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A reconstruction of CCMA commissioners perceptions of dispute resolution in South Africa: A multi-perspective approach

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Dedication

I dedicate this study to my father and to the late Professor Kobus Oosthuizen

Abstract

A reconstruction of CCMA commissioners' perceptions of dispute resolution in South Africa: A multi-perspective approach

This study focuses on the problems in the dispute resolution system in South Africa. The aim of this study is to explore the perceptions of commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA) regarding the capacity of parties to effectively deal with labour conflict and disputes within the legal framework provided by the Labour Relations Act (LRA) (66/95). This includes an investigation into the reasons for the high referral rate of unfair dismissal cases to the CCMA and the influence of the case-overload on the effective functioning of the dispute resolution system.

The functionalist and conflict theoretical perspectives are used to study the structural aspects of the dispute resolution system and to explore structural strain. The interactionist perspective is used in the methodology of this study to reconstruct the perceptions of a group of CCMA commissioners. This study is predominantly of a qualitative nature and was conducted in an exploratory manner through in-depth interviews and e-mail questionnaires. Dunlop's open systems approach allowed for the conceptualisation of the major dispute resolution components of the labour relations system. The analysis of the transformation of conflict formed the basis for understanding the background, the problem statement, the aims and assumptions of this study.

It was found that the guidelines in Schedule eight of the LRA (66/95) have become the norm for dealing with conflict within an enterprise, creating complex and technical processes for dealing with disputes. However, most of the employers and individual employees do not have the knowledge and skills to operate effectively in the system. This has led to a new type of adversarialism in the individual employment relationship, which is based on rights, rules and power. The very technical nature of the internal conflict resolution mechanisms, the incapacity of the parties and the adversarial nature of the labour relationship have resulted in the high referral rate and consequent problems that the CCMA is experiencing.

Opsomming

'n Rekonstruksie van kommissarisse van die KVBA se persepsies van geskilbeslegting in Suid Afrika: 'n Multi-perspektief benadering.

Hierdie studie fokus op die probleme in die geskilbeslegtingsisteem in Suid-Afrika. Die doel van die studie is om ondersoek in te stel na die persepsies van die kommissarisse van die Kommissie vir Versoening, Bemiddeling and Arbitrasie (KVBA) aangaande die kapasiteit van partye om arbeidskonflik en dispute doeltreffend te hanteer binne die raamwerk van die Wet op Arbeidsverhoudinge (WAV) (66/95). Dit sluit in dat daar ook ondersoek ingestel word na die oorsake vir die hoë verwysingskoers van onbillike ontslagsake na die KVBA, en die invloed van die oormatige saaklading op die doeltreffende funksionering van die geskilbeslegtingsisteem.

Die funksionalistiese en konflikperspektiewe word gebruik om die strukturele aspekte van die geskilbeslegtingsisteem te ondersoek, en om strukturele spanning te bestudeer. Die interaksionistiese perspektief word in die metodologie van die studie gebruik om die persepsies van 'n groep KVBA kommissarisse te rekonstrueer. Hierdie studie is primêr van 'n kwalitatiewe aard, en was op 'n eksploratiewe wyse gedoen by wyse van in-diepte onderhoude en e-pos vraelyste. Dunlop se oop-sisteembenadering het die konseptualisering van die hoofkomponente vir geskilbeslegting van die arbeidsverhoudingesisteem moontlik gemaak. Die ontleding van die transformasie van konflik vorm die basis vir die agtergrond, die probleemstelling, die doelwitte en die aannames van die studie.

Daar is gevind dat die riglyne in Skedule agt van die WAV (66/95) die norm geword het vir die hantering van konflik binne 'n onderneming. Die gevolg hiervan is die ontstaan van 'n komplekse en tegniese proses vir die hantering van geskille. Die meeste werkgewers en werknemers het egter nie die kennis of vaardighede om effektief binne die sisteem te opereer nie. Dit het gelei tot 'n nuwe tipe van vyandigheid in die werksplek waar die individuele arbeidsverhouding gebasseer is op regte, reëls en mag. Die baie tegniese aard van die interne geskilbeslegtingsmeganismes, die onvermoë van die partye en die vyandige aard van die arbeidsverhouding het gelei tot die hoë verwysingskoers en die gepaardgaande probleme wat die KVBA ervaar.

Preface

This study reflects some years of research, teaching, and experience of labour dispute resolution, as well as a keen interest in conflict, people, labour relations and the field of industrial sociology.

The idea for the study arose from many years of assisting employer and employee parties to find their way through a minefield of technicalities and administrative difficulties in the dispute resolution system. I believe that the CCMA is the cornerstone of sound labour relations in South Africa and I hope that this research could contribute, albeit in a small way, to finding solutions to the many difficulties that the system is experiencing.

My sincere appreciation is expressed to the following people who made this study possible:

- Dr Herman Linde, my study leader, for his enthusiasm, motivation and the professional manner in which he guided me through the process.
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- My children, especially Christiaan and Hendrich, who had been there throughout this process, sharing my study and my computer and supporting me with coffee, love and understanding.
- God Almighty for His grace, today and every day....

Hanneli Bendeman

Pretoria
November 2003

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CHAPTER 1

BACKGROUND AND PROBLEM STATEMENT

1.1 Introduction

Even though the Labour Relations Act no 66 of 1995 (hereafter referred to as LRA (66/95)) has brought statutory dispute resolution mechanisms and processes within reach of the ordinary worker, it might actually have compounded the problems relating to dispute resolution in the country. The Commission for Conciliation Mediation and Arbitration (CCMA) is overburdened with cases and its effective functioning is questioned (Brand, 2000:82-83; Israelstam, 2003:2).

After having been exposed to the conciliation process as a CCMA commissioner since 1997, the impression was formed that the parties to the dispute resolution process are not equipped to effectively function within the dispute resolution system created by the LRA (66/95). The reason for this appears to be that the parties do not deal with workplace conflict in terms of the guidelines in Schedule eight of the LRA (66/95).

These guidelines, although just guidelines, have evolved into a yardstick used during conciliation and arbitration, against which the actions of the parties are measured to determine substantive and procedural fairness. It is therefore paramount that employers and employees have a proper understanding of the management of conflict through the internal mechanisms in the organisation. If formal disciplinary and grievance procedures exist and are properly used as mechanisms to deal with conflict, more disputes will be resolved internally and fewer cases will be referred to the CCMA. It became apparent that these procedures are often either ignored or simply regarded as a formality for the termination of employment.

1.2 Background to the study

The labour relationship has been characterised by adversarialism since the industrial revolution. Marx ascribed this to the capitalist nature of the labour process that is characterised by de-skilling, fragmentation of tasks, tight control over workers, emphasis on high productivity and the production of surplus for the benefit of the capitalist (Thompson, 1990:155). The inevitable exploitation of the workers under this labour process lies at the heart of the **radical approach** to labour relations. Workplace conflict is always seen as political and the nature of the social and economic system should be changed (Nel, 1997:4).

The **unitary perspective** of labour relations views conflict as a deviation from the norm and dangerous to the system, rather than creative. This perspective denies any notion of inherent, structural conflict due to the nature of the employment relationship (Nel, 1997:3).

The **pluralist perspective** recognises the fact that the workplace is multi-structured and that different groupings are in constant competition for leadership, authority and resources. Although conflict puts the system in a permanent state of dynamic tension it is seen as rational and inevitable. The mutual dependence of the parties – employers and employees – is recognised and the mechanisms and procedures for resolving these conflicts are emphasised (Nel, 1997:3).

The successes of the trade union movement and the formation of worker interest groups in the workplace over the years have resulted in a more pluralistic approach to labour relations. Conflict between employers and employees has been institutionalised in terms of agreements on rules and procedures. The pluralistic nature of modern labour relations has resulted in conflict largely being contained and resolved within a framework of agreed upon rules and procedures (Haralambos, 1982:263).

It was the intention of the new LRA (66/95) to move away from the unitary and radical approach to labour relations and to create a less adversarial labour relations environment with emphasis on co-operation, worker participation and workplace

democracy (Du Toit *et al*, 1999:3). The labour relationship in South Africa, however, is still inherently adversarial in nature due to the fact that the employer and the employee have opposing goals that cannot easily be reconciled.

The new LRA (66/95) has further created a codified set of rights and obligations. The minimum requirement for successful dispute resolution includes employers that are well informed about their obligations and employees that are aware of their rights. The procedures required in dealing with workplace conflict and disputes should be in place. These procedures refer to disciplinary procedures, grievance procedures and a basic contract of employment that set the ground rules for the work relationship.

The realities of the South African labour market are, however, that a large percentage of employees have no, or little schooling and that the largest proportion of employers are in small to medium sized business with practical no skills or training in labour relations and labour law (Landman, 2001:76). It could thus be assumed that most of the parties affected by the above-mentioned rules and regulations are not equipped to deal with and make proper use of this very sophisticated system that has been created (Healy, 2002b:4).

If it is argued that the relationship can be forced to become co-operative by means of legislation, the question should be asked: In what type of society can such co-operation be achieved, and secondly, whether South Africa is such a society.

The system of dispute resolution offered by the LRA (66/95) has evolved from the shortcomings and problems experienced with the old system of labour relations and dispute resolution (Grogan, 1999:1). One of these shortcomings refers to the fact that disputes were mostly settled in the industrial court, which entailed high costs and prolonged legal action. The need for procedures and institutions to effectively deal with disputes in a cheap and expeditious manner was recognised. It was foreseen that disputes should be resolved as quickly and informally as possible with little or no procedural technicalities (Mischke, 1997a:19). The CCMA was established as a statutory dispute resolution body, which could deal with disputes brought by individuals with no costs and no legal expertise or assistance. The

process of conciliation, which is not new to labour relations, was further made compulsory before going to an adjudicative process such as arbitration or labour court, but also before employing power in industrial action such as strikes or lockouts.

Although a system was created where anybody can pursue a labour dispute without any costs involved in bringing the dispute to the CCMA and without the necessity of legal representation, the question should, however, be asked if it is really achieving the objective of expeditiousness. The tendency also developed that most disputes at arbitration require the intervention of lawyers and therefore it should be questioned if the goals of expeditiousness and affordability have been achieved (Healy, 2002a:4).

The fact that even the lowest level or even uneducated employees can now approach the CCMA with no costs involved does not mean that the processes involved are simple. Even the conciliation process was refined to a highly technical process where legal practitioners and labour lawyers have become involved on behalf of employer as well as employee parties. The involvement of legal representatives inevitably brought about formalised and technical arguments and procedures. This was, however, not the intention of the new Act (66/95). The idea was to have only the disputing parties involved in the conciliation process, thereby keeping proceedings informal by virtue of their lack of legal training.

During the process of conciliation it often becomes evident that one of the parties omitted one or more of the quite sophisticated rules or procedures when dealing with the conflict situation that gave rise to the dispute. In the case of employers they are then penalised for this oversight, usually by having to reinstate or pay compensation. One could speculate that this could be one of the reasons why employers have a negative perception of the CCMA, specifically that the CCMA is pro-employee and anti-employer.

The problem from the employee's side could be illustrated by reference to a constructive dismissal. The employee might have resigned or left the workplace under the impression that the CCMA will assist him/her after termination of service

for the wrongs allegedly done by the employer. What he/she is not aware of, is that there are procedural requirements and technicalities to take into account, e.g. that the onus of proof that the employer has made the employment relationship intolerable, lies with the employee.

From the employer's perspective it could be argued that the conciliation process comes too late. By the time a dispute gets to conciliation, a lot of damage has already been done in terms of the employer not following the right procedure and not taking appropriate action - as prescribed by for instance Schedule eight of the LRA (66/95). For employers and employees to utilise the full potential of the labour relations system as created by the LRA (66/95) they are required to know or be aware of a whole array of rules and regulations, do's and don'ts. By the time the external dispute resolution mechanisms of the LRA (66/95), such as conciliation at the CCMA, are used, a lot of irreversible damage to the conflict situation might already have been done.

The fact that a very sophisticated system of dispute resolution had been created forms the background against which this study will be undertaken. The only measures to determine if an employee had been treated fairly or not are procedural and substantive fairness. The guidelines to substantive and procedural fairness are contained in Schedule eight of the LRA (66/95). The technicalities with regard to the requirements for procedural and substantive fairness will be dealt with in Chapter two. Both the process of conflict escalation and dispute resolution will be presented schematically in Chapter two.

The commissioners of the CCMA are the representatives of the state in the process of dispute resolution. These are trained individuals tasked with the function of resolving disputes within the statutory framework created by the LRA (66/95). These commissioners are caught up between the needs and problems of the employer and employee parties to disputes on the one hand, and the inherent problems of the newly created system of dispute resolution on the other hand (Gon, 1997:23 – 26).

1.3 Problem statement

The LRA (66/95) intended that labour disputes should be resolved as quickly and informally as possible with little or no procedural technicalities at the CCMA (Mischke, 1997a:19). Contrary to the intention of the LRA (66/95), a very sophisticated dispute resolution system has been created. Schedule eight of the LRA (66/95) spells out in great detail how various disputes should be dealt with in terms of procedural fairness. Problems arise when employers follow inappropriate procedures to deal with specific disputes. Daphne (2001:10) clearly stated that a thorough knowledge of the CCMA Rules (Republic of South Africa, 2002) is essential for the effective utilisation of the CCMA's dispute resolution processes. He also stated that there are significant challenges facing users of labour legislation when interpreting and applying the requirements and provisions of the LRA (66/95) and that the range and complexity of labour legislation need to be known and understood to be able to effectively use the system of dispute resolution.

It is clear that one of the requirements of successful dispute resolution under the LRA (66/95) is employers and employees who are well informed about their rights and obligations. Another important requirement is that internal procedures for dealing with workplace conflict and disputes should be in place and should be used properly. Even the most competent labour lawyer, consultant or union representative would struggle to achieve success at the CCMA when called upon to represent a party who has conducted their case poorly from its commencement (Healy, 2001:4).

However, as stated earlier, the realities of the South African labour market are that a large percentage of employees have no, or very little schooling and that the largest proportion of employers are in small to medium sized businesses with little skills or training in labour relations and labour law (Theron and Godfrey, 2001:8). The mechanisms in the workplace to deal with conflict are primarily the grievance and disciplinary procedures. These procedures are not effectively used and many small and medium sized employers do not have these procedures in place. Theron and Godfrey (2001:7) acknowledged the difficulties associated with defining small to medium sized businesses and point out that the "number of employees employed" is

often the common criteria in all definitions. Another characteristic is that the person managing the business is usually also the one managing the dispute and the skills and resources to do so are not comparable with those available to larger businesses. The result is that more disputes land up in the CCMA and when they do, one of the parties is usually penalised for not following the proper procedures for internal conflict resolution.

Landman argued that the majority of South African employees and employers are "unsophisticated" with regard to their rights and duties in terms of labour legislation (2001:76). This contrasts with a very sophisticated system of rules and procedures that forms the basis of the dispute resolution process in the LRA (66/95). Brand asserted that most of the role players who have to operate within the system do not have the ability to effectively deal with the system. They are the parties who are feeling the consequences of the unfair dismissal regime and the shortcomings of the CCMA (Brand, 1999:6).

The CCMA commissioners are the representatives of the state tasked with the resolution of these disputes. They are trained and well aware of the technicalities involved in conflict resolution and are caught up on a daily basis in having to deal with the incapacity of employer and employee parties. It was found that the parties to CCMA processes generally display very uneven levels of preparedness and levels of knowledge of the law and this leads to a reduction in the effectiveness of the dispute resolution system and the utilisation of the CCMA resources (Daphne, 2001:9).

This study will explore the ability of employers and employees to function within the dispute resolution processes and mechanisms as provided by the industrial relations system from the perspective of CCMA commissioners. Interest in this specific topic arose from years of experience as a CCMA commissioner where it very often became clear in the conciliation process that a dispute could have been avoided if the parties to the dispute had dealt with the conflict in the appropriate manner. Identifying the extent of their inability and establishing a link between their understanding of conflict dynamics and their utilisation of the internal mechanisms for conflict management will contribute to a better understanding of the problems of

parties to resolve conflict and the consequential high referral rate of disputes to the CCMA.

If the internal mechanisms for conflict resolution are used effectively it could mean that fewer disputes would be referred to a third party for resolution. The fact that so many disputes are referred to the CCMA for conciliation could be an indication that the internal conflict resolution mechanisms are not properly used or fully understood.

1.4 Rationale for the study

The tendency in the past has been to view conflict, from a unitarist perspective, as negative and destructive to the work relationship. The pluralist approach, however, is based on the acceptance and proper management of conflict by means of effective procedures and mechanisms to deal with conflict as soon as it manifests itself in the workplace, and to do so at the lowest level and as speedily as possible (Grossett and Venter, 1998:294). It is indicated in **figure 1.1** that the mechanisms or tools for dealing with conflict in the workplace are the grievance and disciplinary procedures. If these mechanisms are used effectively it could mean that very few disputes would escalate to a level where they are referred to a third party for resolution.

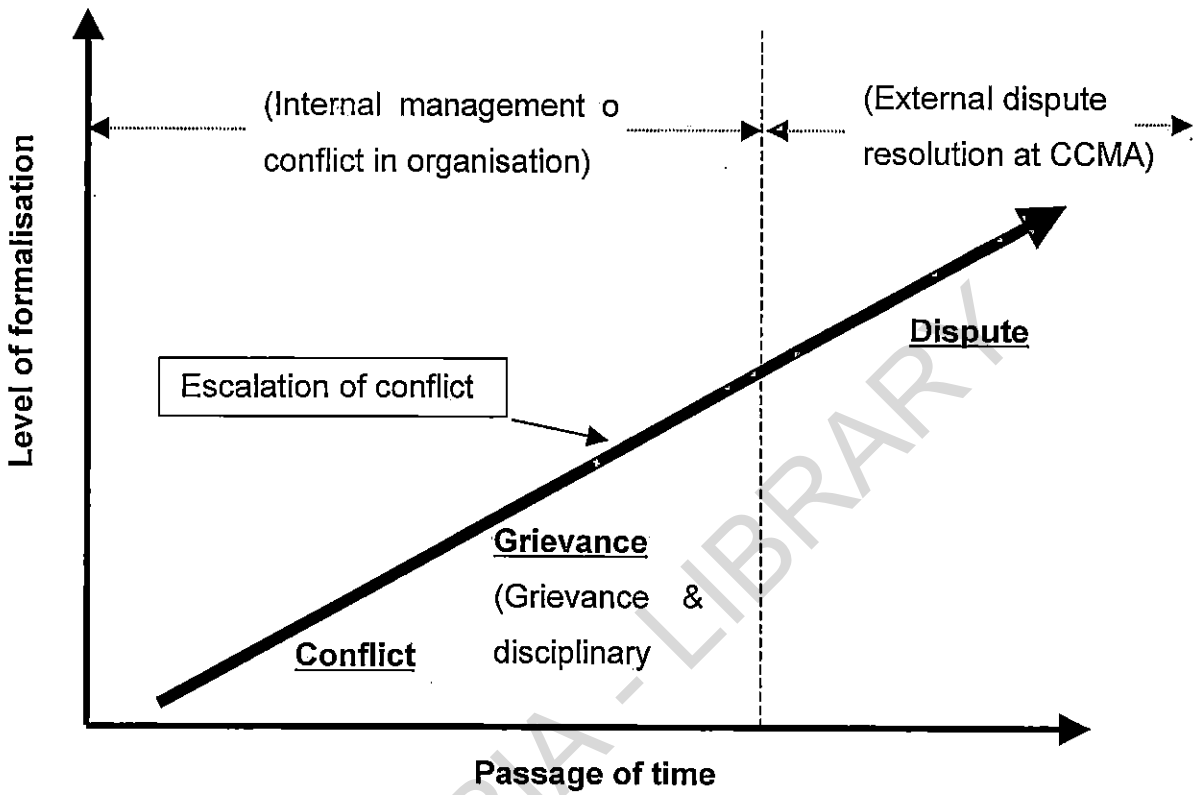
The fact that so many disputes are referred to the CCMA for conciliation could be an indication that the internal conflict resolution mechanisms are not used properly or fully understood in a specific organisation. The dispute resolution system attempts to deal with conflict at a low level before it escalates and becomes highly formalised disputes.

From **figure 1.1** it is clear that when the internal mechanisms for dealing with conflict in the organisation fail, a dispute is declared and referred to external dispute resolution mechanisms such as conciliation at the CCMA or a bargaining council.

Employers and employees still have a tendency to view conflict as negative and destructive – in contrast to the pluralist approach required by the LRA (66/95). They

do not internally deal properly with the conflict and use the CCMA as a statutory grievance procedure (Gon, 1997:24).

Figure 1.1: Internal transformation of conflict over time



Source: Adapted from Mischke, 1997a:10-13

The CCMA commissioners are then exposed to unsophisticated parties, lacking in knowledge and resources, which are looking to them to resolve their problems. With limited resources at the disposal of the CCMA and an enormous caseload, it can be expected that the position of the commissioners is becoming increasingly problematic. The rationale of this study is thus to reconstruct the life experience of commissioners in the dispute resolution system.

1.5 Aims of the study

1.5.1 Primary aim

The main aim of this study is to explore and describe the experiences and perceptions of CCMA commissioners regarding the ability of the parties involved in the dispute resolution process to effectively deal with labour conflict and disputes within the legal framework provided by the LRA (66/95). The reconstruction of the commissioners' reality could facilitate the analysis of the dispute resolution system from a commissioner's perspective.

The question to be asked is whether the lack of capability of the parties in dealing with conflict through the grievance and disciplinary procedures, could be the reason for the high rate of referrals to the CCMA and if this high referral rate is the cause of structural strain on the labour relations system. The **open systems approach** to labour relations holds that the system will adapt to the environment in an effort to maintain stability. The way in which the system attempts to compensate for the structural strain caused by the high referral rate will be explored.

1.5.2 Secondary aims

This aim can be subdivided into the following, more specific aims:

a) To explore the relationship between conflict and disputes and to consider factors influencing the progression of conflict into disputes.

b) To explore the **perceptions** of CCMA commissioners with regard to:
   i) The reasons for the high rate of referrals to the CCMA.
   ii) The nature and appropriateness of the dispute resolution system for small to medium sized employers and individual employees.
   iii) The orientation of employers and employees towards conflict and the use of the internal procedures.
   iv) The ability of the parties to deal with conflict and disputes.
   v) The role of labour lawyers and consultants.
   vi) Problems and needs of the role players.
   vii) To explore the structural strain in the system and ways in which the system of industrial relations copes with and adjusts to the structural strain.
   viii) To explore the effect of the dispute resolution system on the individual labour relationship.

1.6 Research questions

The research questions that this research will attempt to answer, can be derived from the above-mentioned aims. These research questions will also be used to guide the literature study.

Question 1: This question relates to the relationship between conflict and disputes: "What is the relationship between conflict in the workplace and the dispute resolution processes and mechanisms of the LRA (66/95)?" Is there a basic understanding amongst the parties that there is a relationship between internal conflict, the proper management of such conflict and the effective resolution of disputes at the CCMA?

Question 2: "What are the reasons for the high referral rate?"

Question 3: "Is the current system of dispute resolution appropriate for small and medium sized businesses (businesses where the numbers of employees do not warrant the appointment of a labour relations manager) and individual employees?"

Question 4: "Do the parties to a dispute have the ability to deal with conflict and disputes within the legislative framework and what is the role played by labour lawyers and consultants in the dispute resolution process at the CCMA?"

Question 5: "What are the needs and problems of the employers and employees with regard to conflict management?"

Question 6: "How can the problem of high referral rates be addressed?" "How does the system need to change to accommodate this high case load?"

Question 7: "What is the impact of the dispute resolution system on the individual labour relationship?"

1.7 Assumptions

It is assumed that the reconstruction of the life experiences of the CCMA commissioners will allow analysis of the dispute resolution system and will allow the researcher to gain insight into the structural strain that the system of dispute resolution is subjected to. It is also assumed that proper understanding and utilisation of internal conflict handling mechanisms will contribute to a more effective system of dispute resolution. It is further assumed that the commissioners are well trained and in the best position to make a judgement call with regard to the ability of the parties to manage conflict and resolve disputes.

1.8 Basic theoretical statement

Two characteristics of the open system approach to labour relations involve stability and the principle of equilibrium. In an effort to maintain stability the system will adapt to the environment and various ways of reaching the same objective will develop (Tustin and Geldenhuys, 2000:53). The LRA (66/95) created a sophisticated system of dispute resolution in which most of the role players are not capacitated to operate. This gave rise to an excessively high rate of referrals of **individual unfair dismissal** disputes to the CCMA, creating instability in the system. To compensate for this instability, and in particular the incapacity among employers and employees, a new phenomenon emerged in the form of labour consultants and labour lawyers being involved in dispute resolution. This is significant if viewed against the contrary intention of the LRA (66/95) to simplify the process of dispute resolution.

It is against this background that the following assertions are made:

- Dispute resolution in South Africa has fallen prey to a process of technicalisation common to a post-industrial society. However, South Africa has been classified by the International Finance Corporation and the World Bank as an emerging market economy (SEI Investments, 1997:4). The very

technical nature of the labour relations system is thus inappropriate for the labour relationship in South Africa.

- Most of the parties to the labour relationship (small employers and individual employees) do not have the capacity to successfully deal with the labour dispute resolution system in so far as individual labour disputes are concerned.

- The dispute resolution system is based on the acceptance of conflict and the utilisation of mechanisms and processes to deal with the conflict as soon as possible. However, the parties still view conflict as negative and attempt to avoid conflict rather than to deal with it as soon as possible. This belief makes the application of the statutory dispute resolution mechanisms and procedures very difficult.

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

- Labour lawyers and labour consultants have assumed a very important position in the dispute resolution system of South Africa, especially where individual labour disputes are concerned. Their importance in the labour relations system have increased over the past few years despite legislative attempts to keep them out of the processes.

1.9 Outline of the study

In **Chapter one**, the background to the problem statement is discussed and the aims of the study are formulated. The parties to the dispute resolution process are identified, capability of the parties is discussed and the processes of conflict management and dispute resolution are dealt with. This chapter provides the foundation on which the rest of the study is based.

Chapter two deals with the conceptualisation and theoretical framework. It is made clear that the discipline of sociology provides the theoretical framework for conceptualisation of the problem and the aims of the study. The study is grounded in the theories of specifically the structural functionalists such as Comte, Spencer, Durkheim, Parsons and Merton. Reference is made to the conflict theory of Marx to acknowledge the structural elements in society and to use some of his ideas in analysing the current industrial relations system. The interactionist perspective is explained because it forms the basis of the methodology employed in this study.

Modern systems theory is used in **Chapter three** to identify, analyse and evaluate the strategic variables of the industrial relations system. This industrial sociological approach provides a mechanism to indicate where dispute resolution fits into the broad picture of the labour relations system. It is pointed out that if the dispute resolution system malfunctions, it affects the rest of the system. It not only allows for the conceptualisation of the major components of the labour relations system, but also allows for understanding the interconnectedness with other parts of the system. It provides the framework to indicate that there is an interconnectedness between the internal conflict resolution processes in the organisation and the external dispute resolution mechanisms where the CCMA commissioner deals with the dispute.

In **Chapter four** the causes of conflict, the escalation, moderation and aggravation of conflict, the process of formalisation and intensification of conflict and the successful management thereof are dealt with. It is important to understand the difference between conflict, a grievance and a dispute and the internal mechanisms to deal with conflict to be able to understand the predicament that the CCMA commissioner finds himself or herself in when dealing with disputes at the conciliation phase.

The importance of understanding and using the internal conflict resolution mechanisms at the disposal of the employer and employee to deal with conflict is stressed in **Chapter five**. The very technical nature of the guidelines in Schedule eight of the LRA (66/95) is highlighted and the intricacies of substantive and

procedural fairness are dealt with. The commissioners are at the interface where the parties come to realise the mistakes that have been made due to a lack of knowledge and skills.

Chapter six offers a discussion on the external dispute resolution mechanisms and procedures but focuses mainly on the CCMA as the statutory dispute resolution institution established in terms of the LRA (66/95). Many of the problems experienced by the CCMA as a relative new institution of the labour market are discussed. Understanding the institutions for dispute resolution could provide insight into the possible strain that the dispute resolution system is experiencing.

The methodology is spelled out in **Chapter seven**. It is explained that the study is of a qualitative nature and that a more interpretive approach to studying social science is used as opposed to the critical and positivist approaches. The interpretive approach is more concerned with achieving an empathic understanding of feelings and views of commissioners within the dispute resolution system than with testing laws of human behaviour (Neuman, 1997:75). The research is exploratory and descriptive in nature and the CCMA commissioners are the units of analysis. The study focuses on the Gauteng area where purposive and snowball-sampling techniques were used to identify the respondents. The data collection was done through in-depth interviews guided by an interview schedule as well as e-mailed questionnaires with mostly open-ended questions. The rationale for the specific method of data analysis is explained in detail.

Chapter eight deals primarily with the findings and **Chapter nine** with the conclusion and recommendations.

1.10 Conclusion

This study will explore the problems that have been identified in this chapter regarding the system of dispute resolution in South Africa. The aims and the research questions as formulated in paragraphs 1.5 and 1.6 are used to guide the research process. In chapter seven, where the methodology is discussed, reference is made to these aims and research questions and it is shown how the

interview schedule and questionnaire are used to operationalise the aims of the study. The aims are also used in the analysis of the data and serve as a guideline for structuring the findings of this research.

The disciplines of sociology and industrial sociology are rich in theories that provide useful instruments for interpretation and understanding of the world around us. This study is firmly based in the structural functional theories of some of the fathers of sociology such as Compte, Spencer, Durkheim and specifically Parsons and Merton.

The next chapter, Chapter two is devoted to a discussion of these theories in an attempt to create a framework for understanding the problems as identified in Chapter one.

CHAPTER 2

CONCEPTUALISATION AND THEORETICAL APPROACH

2.1 Introduction

Chapter one provides the rationale for the research, focussing on the current problems experienced in the resolution of disputes and the assumed incapacity of the parties to deal with the dispute resolution system. This chapter, and the next one, deals with the theoretical framework pertaining to labour relations and dispute resolution. Chapter two contains the sociological theories and the next chapter will have an industrial sociological approach. It should be emphasised that the focus of this study is not on workplace conflict in the Marxian idiom referring to the conflict between the employer and the worker because of an unequal distribution of resources. It also does not focus on the individual's experience of conflict in the workplace. It focuses, however, on the structure of the labour relations system as provided by the LRA (66/95) and the processes and mechanisms for dispute resolution. The labour relations system will be explored and described through the life experiences of CCMA commissioners. The intention is further not to challenge any existing theory. A multi-perspective approach is used where the most well known sociological theories are implemented to assist in analysing the mechanisms and processes for conflict management and dispute resolution.

2.2 A multi-perspective approach

Within sociology it is possible to identify a broad approach founded on the assumption that our social environment is structured by our actions. (Martindale, 1970:484-487). This approach is referred to as **structuralism** and it makes provision for two varieties of structuralism namely consensus structuralism and conflict structuralism (Cuff and Payne, 1981:22). These two approaches have a common focus in that they both stress the **systematic** nature of society. They both focus on the whole society, the social structure and the relationship of its parts. Functionalism is a mode of analysis in sociology seen as a variation of the

consensus approach of structuralism. The consensus approach (functionalism) stresses the co-operation and harmonious elements in society and the conflict approach stresses the coercive and divisive elements (Cuff and Payne, 1981:11).

The **functionalist perspective** is used in this research to study the function of a social practice (dispute resolution) and institution (CCMA) and to analyse the contribution of that practice or institution to the continuation of society (the dispute resolution system as provided by the LRA (66/95)). To study one institution or practice we need to know how it relates to other parts of the body (other institutions of the labour market).

It should be noted that Demerath and Peterson (1967:517) distinguish structuralism from functionalism. According to them, the structuralists focus on a specific part of the system and the functionalists are primarily interested in the system as a whole. The structuralists are more likely to foresee and acknowledge conflict and more likely to detect change in a system and more likely to accept and focus on change and ideological activism. The functionalists overemphasise unity and equilibrium and are more concerned with internal process than external change and are more conservative in their attitude towards change. The functionalists may be more explanatory and the structuralists are more descriptive (Demerath and Peterson, 1967:158).

The **conflict perspective** is used for analysing and understanding the structure of the system of dispute resolution and not to analyse workplace conflict due to unequal resources. It is also to acknowledge the structural elements in Marx's view of society and to use some of Marx's ideas in analysing the current industrial relations system and dispute resolution practices.

The **symbolic interactionist perspective** is used in the methodology of this study to focus on the empathic understanding of the life experiences of CCMA commissioners. Symbolic interactionism places the accent on attitudes and meanings (Martindale, 1970:339). The commissioners' experiences of being caught up in the dispute resolution system will form the focus of the research. They have to give effect to the aims of the LRA (66/95) and the CCMA on the one hand, and are

confronted with the problems inherent in the system on the other hand. They are confronted with the problems and needs of the parties to the dispute resolution process and the limitations of the CCMA as a relatively new and under-resourced institution of the labour market. Reconstruction of their worlds provides the background for critical analysis of the mechanisms and processes for managing conflict and the resolution of disputes.

The above-mentioned sociological theories are simply different ways of trying to understand the social world (Cuff and Payne, 1981:2). The various sociological perspectives are ultimately distinctive but also very closely linked. None of these theories are, however, superior to the other and none of them can guarantee the 'truth'.

The essence of using a multi-perspective theoretical framework is to identify the structural strain caused by environmental changes. The high rate of individual unfair dismissal disputes, the incapacity of the employer and employee parties, the lack of resources of the CCMA, the existence of private dispute resolution institutions and the problems experienced by the commissioners are only examples of factors that could contribute to structural strain on the system. These theories will be used to explore the ways in which the system copes with structural strain and to explain that if the dispute resolution part of the labour relations system malfunctions, it affects the rest of the industrial relations system.

2.2.1 Structuralism as a sociological perspective to analyse society

Within sociology it is possible to identify a broad approach founded on the assumption that our social environment is structured by our actions. Our values, attitudes, activities and relationships are influenced by the structure of society and the organisation in which we live (Martindale, 1970:484-487). This perspective is referred to as structuralism and as indicated in the previous paragraphs this broad approach makes provision for two varieties of structuralism namely consensus structuralism and conflict structuralism (Cuff and Payne, 1981:22).

Proponents of **consensus structuralism** are those who focus on the aspects holding the system together. These theorists are among others Comte, Spencer,

Durkheim, Parsons, Merton, Smelzer and Davis and Moore. The theorists supporting **conflict structuralism** are among others, Marx, Weber, Lockwood and Goldthrop, Dahrendorf and Frank Parken (Cuff and Payne, 1981:various pages).

The origin of industrial sociology lies in the attempts of the classical theorists to come to terms with the nature of industrialisation and the influence on society. Marx, Weber and Durkheim wrote about the world of work within their broad general theories about society. In their attempts to understand skills, technology, the division of labour and the organisation of work, the development of industrial sociology or the sociology of work has become characterised by fragmentation since it formed part of their broader theories about society (Thompson, 1990:12). The development of industrial sociology and the systems approach has thus been influenced by both conflict and consensus structuralism.

2.2.2 The consensus perspective of structuralism

The consensus perspective focuses on the fact that social life is always organised. The theoretical and empirical analyses are based on the assumption that societies can be seen as persistent, cohesive, stable, integrated wholes, differentiated by their cultural and social structural arrangements. These assumptions have generated a conceptual framework and mode of analysis called **structural functionalism.** As explained in paragraph 2.1 functionalism is a mode of analysis in sociology seen as a variation of the consensus approach of structuralism.

2.3 The functionalist perspective

The functionalist perspective emphasised the way that the parts of a society are structured to maintain its stability (Schaefer and Lamm, 1998:18). As stated above, the discipline of sociology should according to this approach study the relationship of parts of a society to each other and to society as a whole. To study the function of a social practice or institution is to analyse the contribution of that practice or institution to the continuation of society. To study one institution or practice we need to know how it relates to other parts of the body.

Functionalists view society as a system of interconnected parts, which forms a whole. The various parts to this system can only be understood in relation to the other parts (Haralambos, 1982:521-522). Functional analysis turns to an examination of the parts of society to investigate how they contribute to maintaining the system. The question to be asked is whether the CCMA is the most appropriate institution to maintain the system of labour relations. Functionalism also emphasises the importance of **moral consensus** in maintaining order and stability in society. Moral consensus exists when most people in a society share the same values. It is questionable if the employers and employees share the values based on substantive and procedural fairness as required by the LRA (66/99). Order and alliance are regarded as the normal state of society and this stability or equilibrium is grounded in the existence of a moral consensus among members of society.

A common critique of functionalism is that it unduly stresses factors that lead to social cohesion at the expense of those producing division and conflict in a society (Haralambos, 1982:533). In other words the emphasis is not on factors such as class, race and gender. Functionalists write about society as if it has needs and purposes even though these concepts make sense only when applied to individual human beings (Giddens, 2001:16). The dispute resolution institution (CCMA) needs the employer and employee parties to be informed, skilled, equipped, trained and knowledgeable about various labour relations legislation issues in order for the industrial relations system to function effectively. This study will explore the capacity of these role players in the labour relations system.

Two early sociologists who had made specific contributions to this perspective were Comte and Spencer (Cuff and Payne, 1981:23)

2.3.1 Auguste Comte (1798-1857)

Auguste Comte defined the term 'sociology'. He claimed that societies and human understanding of societies had developed through three stages namely the theological, the metaphysical and the scientific stage. During the first two stages human beings came to know their world by means of superstition and reason and logic. The third stage is characterised by the application of scientific methods as

used in the natural sciences to master nature and to come to an understanding of society and sociological phenomena. In this last stage man also came to the conclusion that society can and should be reshaped. The subject matter of sociology for Comte had two branches namely 'statics' and 'dynamics'. Statics refer to the study of whole societies and are aimed at describing how it works or functions as a system made up of various interrelated parts. Dynamics are about discovering the laws explaining how whole societies change over the course of time (Cuff and Payne, 1981:24). His intention was that both branches would be objectively studied by employing the methods of the natural sciences to study social structures in a systematic way that will eventually lead to more rational human interaction (Schaefer, 2001:13).

The concept, "statics", refers to the fact that the labour relations system will be analysed as a whole made up of various interlinked parts. The "dynamics" will be dealt with in so far as the perceptions of the commissioners will be obtained in an attempt to discover how the labour relations system will change over time.

2.3.2 Herbert Spencer (1820-1903)

Herbert Spencer can be seen as the second founder of sociology. He held similar views as Comte but he did not feel compelled to correct, improve or reshape society. He was influenced by Charles Darwin's study *The Origin of Species* (Schaefer, 2001:13) and viewed society as analogous to an organism and a living creature. Societies also go through a process of evolution from very simple structures to highly complex structures - from homogeneity or sameness to differentiation. With this differentiation the parts of the organisation become more and more specialised (Martindale, 1970:66). These notions of Spencer are valuable in so far as this study is based on the assumption that the dispute resolution mechanisms in the labour relations system has, due to specialisation, evolved into highly complex and sophisticated mechanisms and procedures.

He agreed with Comte that society is made up of various parts having to work well together if the society is to remain healthy. The parts of the system that makes societies 'orderly' are the various institutions and processes such as policies, family, economy, government, etc. In the same way it can be argued that some of the parts

that make an industrial relations system an "orderly" system are the institutions and processes for dispute resolution.

Society should also meet the demands of the environment in order to survive. Spencer referred to three vital functions for the survival of society namely regulation, distribution and sustenance. This implies that societies must be governed and controlled, economic goods must be produced and distributed and the population must be maintained. Dispute resolution in this modern day has become highly regulated through legislation. Conflict is inherent in the human relationship and conflict resolution is an emotive issue. The conflict management and dispute resolution processes have become regulated by legislation to the extent that the humane, interpersonal characteristics are being ignored. This is emphasised by Grogan (2000:4) in his discourse on "The death of the reasonable employer" where he argued that the system of dispute resolution is solely based on legislation with no room for interpersonal values such as loyalty, friendship, humaneness, etc. This is also highlighted in the next paragraph.

Comte and Spencer both focussed on structures and their functions and introduced between them broad outlines for the structural-functionalist analysis of society (Van der Zanden, 1979:14).

2.3.3 Emile Durkheim (1858 - 1917)

The concept of societies as 'moral entities' can be ascribed to Durkheim. He argued that all human associations give rise to expectations of patterns of conduct. These patterns could refer to substantive and procedural fairness as defined in the LRA (66/95). These new patterns of conduct give rise to **values**, **perceptions** and **actions.** These in turn give rise to **expectations** and **constraints** on how persons ought to behave. Thus, as persons associate with each other there emerges a collective conscientiousness, which in turn constrains them and obliges them to behave in particular ways (Cuff and Payne, 1981:26). The human association in the context of this study could refer to the association between employers and employees in the workplace when there is conflict and how it is dealt with in the grievance and disciplinary processes. The expectations of behaviour could refer to

the fact that employees not only expect the employer to treat them fairly and to fulfil their part of the psychological contract (Gerber *et al*, 1998:56), but also to behave in accordance with the guidelines as spelled out in the LRA (66/95). They have high expectations in terms of compensation from the CCMA. From the employers' side they are constrained in terms of deciding on their own how to deal with labour conflict and disputes (Grogan, 2000:4).

The fact that there is moral pressure coming from society and the fact that certain activities are not allowed, form the basis of the notion of society as a system, existing over and above us. This notion is further strengthened by the idea that people have to be protected against those who break the rules and that wrongdoers have to pay their debt to society. For groups of people - employers and employees - to live together co-operatively they must have some basic agreement on what their priorities as a group are and how they ought to behave towards each other and arrange their relationship (Cuff and Payne, 1981:26). These arguments are in particular relevant to a study of conflict management and dispute resolution in the South African labour market. It clarifies the motivation of the parties to attempt to resolve disputes effectively.

A further argument of Durkheim was that, for human beings to come together at all to make a contract, they must already have some common agreement on the value of such a contract and some common agreement to be bound by the unwritten rules of a contractual situation (Cuff and Payne, 1981:27). This can be seen as affirmation of the notion that there is a mutual interdependence between employer and employee in the work situation. According to Durkheim this prior arrangement represents a framework of the order that forms the essence of the industrial society.

Durkheim saw social solidarity as an essential property of society. He divided society into two types; those in which solidarity was **mechanical**, or dominated by a collective consciousness, and those in which it was **organic**, or characterised by specialisation, division of labour and interdependence (Martindale, 1970:87). He was concerned with how solidarity is transformed and focussed on the concept of value of law for social analysis. He believed that in primitive societies solidarity is mechanical and people are held together by friendliness, neighbourliness and kinship as if by an external force. This is largely due to the homogeneity of that

specific society. The law of the people is dominated by **repressive** sanctions preventing them from hurting each other. However, when a society becomes more complex and is more heterogeneous, there cannot be the luxury of venting one's rage. A new motive enters the law – the restoration of the system to a workable state and repair to any damage done to injured parties. Law becomes restitutive rather than repressive (Martindale, 1970:88). This reflects on the industrial relations system where employers see the system as punitive on the employer where internal conflict resolution procedures in the workplace have not been followed. Due to the fact that there is a huge discrepancy in individuals' sense and perception of fairness, it has become necessary to regulate the management of conflict in the workplace. This regulation of conflict and dispute resolution under the LRA (66/95) is characterised by what Durkheim referred to as "a restoration of the system to a workable state and to repair any damages done to an injured party" (Martindale, 1970:88). This 'restoration' usually takes place at the CCMA where employers become aware of the fact that they haven't followed certain rules and are then "punished" by having to pay compensation to, or reinstate the employee who has been unfairly dismissed.

Durkheim accepted the systematic nature of society. He argued that as the division of labour increases and new roles are required, there is an increasing differentiation of units in the system (Cuff and Payne, 1981:27). At the same time the uniformity of beliefs and moral norms decrease, but the specific society does not disintegrate. A new form of solidarity and a new moral order develops to supplement the weakening influences of common values. This new form of morality is necessary to prevent society from collapsing and disintegrating. These arguments apply to the fact that high expectations were created among employees with the establishment of the CCMA. Employers had to adjust to the new rules of substantive and procedural fairness created by the LRA (66/95). Labour consultants and labour lawyers are increasingly becoming involved in the dispute resolution process despite attempts by the drafters of the LRA (66/95) to keep them out of the processes. The labour relations system is in a constant process of change in an attempt to adapt to changing environmental factors.

The concept of equilibrium (also see paragraph 3.5.5) is important in the consensus theories. Durkheim was in agreement with Comte and Spencer by viewing society as a stable orderly system which experiences change and adjusts or adapts to changed situations in some way to re-create a new order and a new state of equilibrium (Cuff and Payne, 1981:28). It could be argued that there are various factors placing the system of dispute resolution under strain (as mentioned in paragraph 1.8) and the system will attempt to maintain a state of equilibrium by adapting to these factors.

2.3.4 Talcott Parsons (1798-1857)

Parsons suggested that if any social system is to operate at all, four basic conditions have to be met or four problems have to be solved. He called these conditions or problems 'functional imperatives' or 'functional prerequisites' and they concern not only social organisations but also the needs of the members of a specific society. These four basic problems are: (1) Adaptation to the environment, (2) Goal attainment, (3) Pattern maintenance and (4) Integration. (Grusky and Miller, 1981:98).

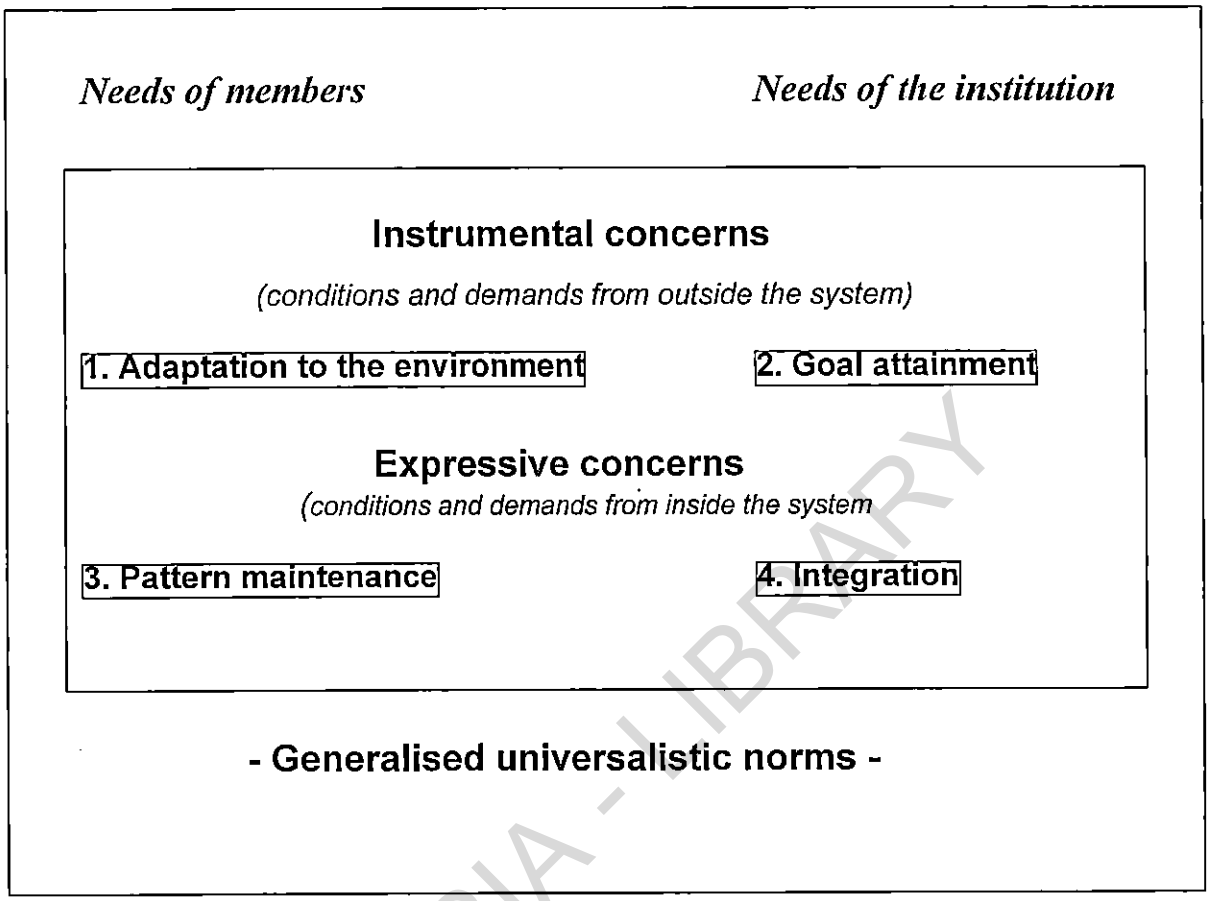
Parsons saw the first two problems as 'instrumental' meaning it involves conditions and demands from outside the system. They require the performance of tasks such as allocating means to achieve the goals of the society. He saw the latter two problems as 'expressive concerns'; meaning that they maintain social values and control emotional development.

Figure 2.1 gives an indication of how these concepts of Parsons can be adapted and used to analyse the dispute resolution processes and institutions in the industrial relations system.

2.3.4.1 Needs of members and institution

For purposes of this study, the **members** referred to in **figure 2.1** are the employers, employees, trade union officials and the commissioners involved in the conciliation process at the CCMA. The needs of the **institution** refer to the needs

Figure 2.1: Functional prerequisites for a system to function



Source: Researcher, 2003

of the CCMA as a dispute resolution institution such as adequate funding, well trained commissioners as well as the fact that the system needs the parties to the conciliation process to be capacitated – to be trained in the guidelines provided in the LRA (66/95).

2.3.4.2 Instrumental concerns

The **instrumental concerns** including the **demands and conditions from outside the system** could refer, for example, to the fact that the CCMA has to function amidst legislative changes creating additional tasks and functions for the CCMA. The labour law field has changed greatly in recent years through the introduction of various new pieces of labour legislation such as the LRA (66/96), the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of

1998 (Basson *et al*, 2000:1). Another example might be the lack of funding for the CCMA.

2.3.4.3 Adaptation

Adaptation refers to the relationship between the system and the environment. The system must have some control over its environment - to meet the needs of the members of the society - in this instance the needs of the employers and employees. The economy is mostly concerned with this function. The mechanisms and processes of the labour relations system must adapt to the needs of the employer and employees in the labour market but it must also sustain economic development.

Adaptation to the environment also includes the regulatory processes or rule making in which the specialised output is a complex of rules that relate the actors to the technological and market environment. Frequent changes pose problems of adaptation to the actors (Dunlop, 1958:30).

This can be made applicable to the manner in which the CCMA is able to adapt to factors such as the high incidence of retrenchment brought about by globalisation and privatisation initiatives that also increased the CCMA's workload. This could include the recent legislative changes to the LRA (66/95), the drafting of the CCMA Rules, appointment of more full and part time commissioners and the dispute prevention initiatives as explained in chapter five. Adaptation means not only passive adjustment to environmental changes, but also the ability to cope with the environment and with uncertainty (Parsons, 1967:493).

2.3.4.4 Goal attainment

Goal attainment refers to the need for a system to set goals to which all activity is directed. Procedures for establishing goals and deciding on priorities between goals are institutionalised in the form of legislation and labour policy. Government not only sets goals through labour policy and labour market programmes, but also allocates resources to achieve them. The establishment of the CCMA for dispute resolution can be seen as a good example.

Dunlop (1958:30) referred to **goal attainment** as the mobilisation of the necessary prerequisites for the attainment of given goals. For purposes of this study goal attainment refers to the goals as spelled out in the LRA (66/95), namely the creation of an expeditious and affordable dispute mechanism. There is a significant body of literature referring to the fact that the CCMA is probably not achieving these goals (Brand, 2000:81; Gon, 1997:24-26 and Le Roux, 1998:61-62).

2.3.4.5 Expressive concerns

Looking at the **expressive concerns**, one should consider the **demands from inside the system**. This might refer to the demands from the commissioners in terms of what their needs are to perform their work effectively, or the demands from the parties for their disputes to be settled fairly and expeditiously. The CCMA is currently investigating the low settlement rate of commissioners and the question to be asked is what are the needs of the commissioners in order to achieve high settlement rates. Demands such as sufficient, well-qualified and skilled staff to deal with the enormous workload created by the excessive referrals of individual unfair dismissal disputes should be considered.

2.3.4.6 Pattern maintenance

The expressive concerns include the efforts to maintain a specific value system and controlling emotional development. **Pattern maintenance** refers to the basic patterns of values institutionalised in the society. The family, religion and the educational system are examples of institutions that perform these functions. Values of a society are rooted in a specific religion, which can be seen as the ultimate justification for the values of a social system. The labour relations system, however, lacks these institutionalised values because of the divergent needs and aims of employees and employers. The new LRA and the constitution set the baseline for these shared values in the labour arena in the post-1994 South Africa.

Pattern maintenance refers to the values of fairness that are well imbedded in all the procedures in the conflict management process. These values are enforced through juristic processes during arbitration and adjudication. This is not in line with

the goals of the LRA (66/95) namely to have a less legalistic process of dealing with disputes. Pattern maintenance could also refer to the fact that the system should allow alternative dispute resolution without changing the general pattern. One of the arguments in this study is that the CCMA does not allow alternative dispute resolution because of the fact that the only values that are maintained are those contained in Schedule eight of the LRA (66/95) pertaining to the Code of Good practices during dismissal. Dunlop (1958:29) called this a tension-management subsystem and it concerns the motivation of the actors and the integrity of the values of the system. Section 135 of the LRA (66/95) gives the commissioners a wide discretion in terms of the resolution of a dispute in conciliation – for instance to allow representation or not – but according to Parsons' model such discretion undermines the values of the system and would not be facilitating pattern maintenance.

2.3.4.7 Integration

Integration refers primarily to the adjustment to conflict. It is concerned with the co-ordination and mutual adjustment of the parts of the social system. The law is the main institution that meets this need. Legal norms standardise and legalise relations between individuals and institutions to reduce the potential for conflict. If conflict does arise, it is settled by the judicial system and therefore does not lead to the disintegration of the system. Successful dispute resolution mechanisms and processes serve to integrate the system.

Dunlop (1958:29) described the integrative subsystem as relating the cultural value patterns to the motivation of individual actors to eliminate undue conflict and other failures of co-ordination. The specialised output of this subsystem is solidarity in the labour community. For purposes of this study it could be argued that the system's survival depends on the extent to which it will be able to integrate alternative dispute resolution, labour lawyers and consultants into the system. In conciliation it is important to do whatever is necessary to resolve the dispute but the general guidelines of the LRA (66/95) Code of Good Practice should be followed.

Parsons (1967:510) also referred to generalised universalistic norms that play a role in the evolution of a society. He identified the development of a general legal

system as an integrated system of universalistic norms applicable to society as a whole. This has happened in the labour relations arena where labour relations have become regulated by a sophisticated system of labour laws. Parsons pointed out that it is, however, possible that a society can develop without the highly normative order and he specifically refers to order based on religion. Religious law tends to inhibit generalisation of legal principle but it also favours what Weber called substantive over formal rationality (Parsons, 1967:511). The standard of legal correctness tends to be the implementation of religious precepts and not procedural propriety and consistency of general principle. The older systems tended to treat justice as a direct implementation of precepts of religious and moral conduct without institutionalising an independent system of societal norms, adapted to the function of social control. The most important focus of such an independent system is the codification of norms not directly moral or religious and the formalisation of procedural rules defining the situation in which judgements are to be made (Parsons, 1967:512). This theory applies to the development of principles of substantive and procedural fairness as contained in Schedule eight of the LRA (66/95), whereby an independent system of norms was developed, where procedural rules define the situation in which judgements are to be made.

Parsons (1967:512) held that to maintain the society and to solve these problems, any society has to have four major structural features. These are the major subsystems in a society namely the economy, politics, kinship (family) and cultural organisations as indicated in **figure 2.2.**

Figure 2.2: Major structural features

Economy	*Politics*	*Kinship*	*Culture*
- Funding	**- Legislation**	**- Employee/employer**	**- Relationship**

Source: Researcher, 2003

The **economy** is responsible for distributing material resources needed by society. However, the effective functioning of the CCMA is hampered by the lack of funds due to the excessive referrals of individual unfair dismissal disputes.

The **political subsystem** focuses on selecting collective goals and motivating members of society to achieve those goals. The LRA (66/95) has set the goals and guidelines for parties in dispute and provided for the mechanisms to achieve the goals of successful dispute resolution.

Kinship institutions serve the function of maintaining the expected and accepted patterns of social interaction and help to control interpersonal tension through the process of socialisation. The relationship between the employer and the employees and the informal structure in the organisation can be discussed in this instance. The relationships that develop in the workplace need to be maintained in order to have peaceful labour relations. If the parties resolve their conflicts internally by proper use of the grievance and disciplinary procedures there need not be many disputes, the CCMA will not be overburdened and the system will function properly and be maintained.

Cultural institutions such as religion and education, and also mass communication institutions serve the function of integrating the various elements of a social system. The role of communication and training is very important in dispute resolution. The employer and employee parties need to be made aware of the requirements of the LRA (66/95) to capacitate themselves to function properly within the labour relations system. If they are well informed and trained in terms of conflict management and dispute resolution, the equilibrium in the system will be maintained (Cuff and Payne, 1981:36).

Parsons agreed with Durkheim that society is essentially a moral entity. Institutions develop which prescribe norms, and with these norms prescribe behaviour patterns and role expectations. This creates the problem of maintaining the system as a whole, preventing the disintegration of the system and keeping it in a state of equilibrium.

Parsons viewed power as necessary for the effective pursuit of collective goals, and this power is possessed by society as a whole. Because the group has shared values there are collective goals in societies and power will be used in furtherance of the collective goals and both sides of the relationship will benefit (Haralambos, 1982:99). But co-operation on a large scale requires organisation and direction, which necessitate positions of command. Some are therefore granted the power to direct others. Power takes the form of authority, which is seen as legitimate because it is seen to further collective goals (Haralambos, 1982:100). According to Grusky and Miller (1981:105) Parsons was also of the view that power depends on four conditions: The first is the institutionalisation of a value system that legitimises the goal of the organisation as well as the way in which the organisation functions. Secondly he referred to the regulation of the organisation's procurement and decision-making processes through adherence to commonly accepted rules in a society. The third condition referred to day-to-day support of the people whose co-operation is needed and the fourth was the command of necessary facilities such as finances.

Criticism has been levelled against Parsons, stating that his views of power in society are naïve (Haralambos, 1982:101). Be that as it may, these elements of power can be used to look at the power and authority that commissioners have in the dispute resolution setting. It can also be used to find out if the employer and employee parties have a set of shared values with regard to substantive and procedural fairness in the workplace.

Parson's theoretical model can be applied not only to whole societies but it is also applicable in the analysis of institutions and even two person role relationships. He provided sociologists with a more detailed set of concepts than had previously been available to help understand the nature of social behaviour from within the consensus approach (Cuff and Payne, 1981:44).

From the above it is clear that Parsons and Merton drew extensively on Durkheim for the formulation of their consensus theory (Giddens, 2001:16). However, the main critique against the functionalist perspective is that it focuses too much on those factors leading to consensus.

2.3.5 Merton (1910-)

Robert K Merton coined the terms "**manifest**" and "**latent**" functions (Berger and Kellner, 1981:12)

It is common practice to identify manifest functions, which are recognised and intended by the individuals involved, but also latent functions, which are the unintended and unrecognised consequences of social behaviour. A good example of such latent functions is the Hawthorn experiments where the intention was to determine the effect of lighting in a factory on productivity. It was discovered that the presence of the researcher and not the lighting had the most effect on improved productivity (Cuff and Payne, 1981:48). Merton contended that the **latent dysfunctions** should also be recognised. Sociologists can be seen to look behind the behaviour and activities of groups of people in society.

The latent dysfunctions of the CCMA and the procedures and processes of dispute resolution will be investigated in this study. For instance, many unions - also referred to as capitalistic unions or unions formed for capital gain – have been formed specifically to make money out of individuals who are uncertain as to how to pursue their disputes in the CCMA. Is this a latent function or latent dysfunction? A window of opportunity for labour consultants and labour lawyers was created by the sophistication of the dispute resolution system that was created by the new LRA (66/95). These could be seen as latent functions of the system of labour relations. The fact that consultants and labour lawyers are kept out of the conciliation process through legislation poses the question whether such representation is seen as a function or a dysfunction.

Merton questioned the notion that if something is "functional" in a particular system then it bestows some sort of positive normative judgement. He criticised Parsons for being too ambitious and not focussing on the process of doing research. He aimed to identify certain 'dos' and 'don'ts' when studying any phenomena in a functionalist framework and referred to this systematic checklist of concepts and procedures as a 'paradigm'. He argued that the concept 'function' should be reserved only for those observed consequences of social events or arrangements

that make for the adaptation or judgement of a given system (Cuff and Payne, 1981:45 and Haralambos, 1982:531).

Many items are not functional to the entire system but only to a part of it. If it is argued that a specific item is functional - or not functional - one should also specify the unit that it impacts on. While some items may be dysfunctional or disruptive on a certain part of a system, some others might have neutral or no consequences. The positive functions should be balanced with the negative functions and only then can one say that the function is positive or negative. This should be kept in mind when criticising an institution such as the CCMA and the involvement of parties other than just the employer and employees and their representatives. The negative aspects should be weighed up against the positive impact that it has on the industrial relations system. Employers might feel that the LRA (66/95) is advantageous to the employees only and argue that the CCMA is detrimental to organisational efficiency and counter-productive. The disadvantages that these employers perceive in terms of their own productive existence should be weighed up against the aims of the LRA (66/95), which is to establish universal principles of equity and fairness.

Merton also argued that it does not make sense to say that a specific activity or practice or institution is indispensable to a specific society because it fulfils a functional prerequisite. There may be other social forms and practices that could equally fulfil them. In other words, there may be functional alternatives or substitutes. This argument could be used to support the notion of alternative dispute resolution (ADR) as well as various non-statutory dispute resolution mechanisms and processes. Functionalism could thus be criticised as seeking to justify the existing institutions in society.

Merton emphasised that both the macro- and the micro level theories should be utilised to study societies. The macro level theories are used to study whole societies whereas the micro theories stress the study of small groups and often use experimental studies in laboratories (Schaefer, 2001:17).

2.3.6 Criticisms of the general assumptions of functionalists

Although the functionalist perspective is widely used and very popular to analyse and understand various sociological institutions and phenomena, it has also been criticised over the years.

Since the mid-1960s there was a shift away from using sociology as dedicated to the preservation of the *status quo* to a more critical left wing questioning of society and its structures. The structural-functionalists were perceived as having had an affinity with a basically conservative position on social change as illustrated by the concept of 'system maintenance' and equilibrium. In defiance of this criticism the structural-functionalists pointed out that the fact that certain social forces maintain the system does not imply that this is what they ought to do. However, the argument that a specific aspect of society was functional was taken to be a normative statement, namely that because it was functional, therefore it was acceptable as it is (Berger and Kellner, 1981:132).

Merton, a functional analyst criticised the following aspects of the functionalist theory:

Functional unity: A common assumption of functionalists is that all parts of the society are functional for the entire system. Merton suggested that there might be certain parts in a society that do not benefit the entire system. It could also be that not all the role players perceive a specific institution or unit of the system to be beneficial to them (Cuff and Payne, 1981:46). Employers have developed a very negative attitude towards the CCMA (Israelstam, 2003:2). There is a perception among many employers that the CCMA is an institution specifically for the employees and that the employers are forced to pay compensation no matter what the circumstances. Some employers question the functional unity of the CCMA.

Function versus dysfunction: There is the general tendency among functionalists to find positive functions for all aspects and parts of the system. Merton also argues that not all parts of a system necessarily fulfil a positive function for all units in a society. Some parts might be negative and other could have no effect on certain

parts of the system at all. Some parts may have dysfunctional or disruptive consequences for certain parts of the system (Cuff and Payne, 1981:46). The question could, for instance, be asked what the impact of the CCMA is on employers. Some might feel that the CCMA is dysfunctional to a free market economy where the principles of supply and demand dominate general perceptions of fairness and equity. This issue will be explored from the perspectives of the commissioners in this study.

Indispensability: Merton further stated that some functionalists incorrectly argue that something is indispensable for the well-being of society because it fulfils a functional prerequisite. There may be other forms and practices that could equally fulfil them. There may be functional alternatives or substitutes (Cuff and Payne, 1981:47). The term "alternative dispute resolution" (ADR) can be used as an example. This term, in the past, referred to methods of dispute resolution that differed from the traditional methods of litigation and adjudication. These principles on which ADR was based was embedded in the functioning of the CCMA, namely to first go through a process of conciliation before arbitration or adjudication. The possibility that there might be functional alternatives or substitutes for the current dispute resolution processes and institutions, should always be recognised.

2.4 The conflict perspective of structuralism

Many writers on industrial relations reject the consensus approach – such as the systems theory (See discussion on the systems approach in Chapter three) - because they cannot associate themselves with consensus theories that assume that there is no long-term fundamental division of interest in society. These writers view conflict as being endemic in capitalist societies and that it manifests in industrial relations situations where the confrontation between capital and labour is most apparent. The question is whether conflict theories can be incorporated within a systems approach (Craig, 1981:7).

The purpose of also discussing the conflict perspective is to acknowledge the structural elements in Marx's view of society and to use some of Marx's ideas in analysing the current industrial relations system and dispute resolution practices.

The conflict theorists regard themselves as critics of society. Marx's work constitutes the main body of conceptual and theoretical work within conflict theory (Cuff and Payne, 1981:36). Mostly focussing on the work of Marx, the conflict theorists saw society as fragmented into groups that compete for social and economic resources. Those who have the most economic and political resources maintain social order. Change is effected through a power struggle between opposing parties. Conflict theorists see the consensus theorists as appeasers of the existing system.

Marx made a number of assumptions about the nature of societies. He contended that the social world is characterised by flux and change rather than stability and the permanence of phenomena. Change is orderly and scientific findings can be made about the order. The key to the pattern of change can be found in the economic order of the society. Society can be viewed as an interrelated system of parts with the economy shaping the other parts. Human beings are shaped, in both attitudes and behaviour, by society's social institutions. Very few people can escape their historical and social circumstances to study their society with detachment and dispassion (Cuff and Payne, 1981:57).

It is further Marx's view that the ideas and consciousness of people shape the social and material world but only if they act on those ideas. They have to realise that the material features of a particular society in a particular historical period must set limits on the extent to which ideas, even when backed by social action, can significantly reshape the nature of society. This notion specifically applies to the fact that the dispute resolution system in South Africa is a very sophisticated system and yet the labour community that has to operate within this system is in many instances unsophisticated. However, it is questionable if the system would have evolved in a natural and gradual way due to the fact that the old system was beneficial to employers – who were in a position of power and would not have been the driving force behind changing the system. The changes to the LRA (66/95) could be seen as the result of pressure by trade unions, representing a collective consciousness. Their specific ideas were conveyed to government through a process of negotiations that started in the old National Manpower Commission (NMC), which resulted in

sufficient pressure on government to effect changes to the industrial relations system and which culminated in the new LRA (66/95).

In his analysis of society, Marx identified three characteristics of society as (i) the exploitation of many by few, (ii) strains and tensions within the system created by the system itself and (iii) certainty of drastic and violent change of the system (Cuff and Payne, 1981:58-59).

In terms of the **first characteristic** it is interesting to note that Marx maintained that the exploitation is not because of the evil nature of mankind, but 'exploitation' is a structural requirement of the whole social system. The capitalistic system structured a whole new bond or relationship between human beings characterised by depersonalisation and exploitation. It could be argued that the new system of industrial relations and dispute resolution has restructured the relationship between employers and employees. It is now guided by universal principles of fairness as spelled out in the LRA (66/95), and it differs from the exploitative nature of the relationship in the previous era of industrial relations under apartheid.

It is specifically the **second characteristic** that can be applied to the analysis and better understanding of dispute resolution within the broader industrial relations system. Marx discussed the contradictions and strains and tensions of the system as created by the system itself. His argument was about capitalists having to lower prices to be competitive and lowering wages to be able to do so. In the process the buying capacity of the workers, who are also consumers, decreases leading to economic downturn and inflation (Cuff and Payne, 1981:63). Marx argued that although workers may despair about low wages and terrible conditions, and although capitalists may genuinely wish to be more humane, neither social category can escape the thinking of the times. They can only perceive their world through the "...distorting prism of the monetary system created by the capitalistic system...." (Cuff and Payne, 1981:58-63). Man is seen as being controlled by outside impersonal forces in the industrial relations system and society. This mode of thinking applies to dispute resolution, as the parties (employers and employees) have no other option to resolve their disputes than those prescribed by the LRA.

The **third characteristic** of a society entails certainty of drastic and violent changes of the system. The third characteristic could also be used to explore alternatives for the current system. Although the changes to the LRA were effected through a process of negotiations, one should not lose sight of the history of industrial relations that was characterised by strikes and labour unrest in the period before the Wiehahn-commission (Finnemore, 1998:29 and Bendix, 1996:92). Marx argued that capitalism was doomed and would disintegrate and a new social system would emerge. Man created the old system and it would also be the actions of man that would bring the old system down. He was of the opinion that "...man makes his own history...." (Cuff and Payne, 1981:64). A new system can only be constructed if the old system is fully understood. He saw himself as such a person that understood the old system. However, it is not enough to only inform people of the analysis of the social order but they also need to know what to do to bring about a new type of society (Cuff and Payne, 1981:64). The conviction that a new society would be a better society should also exist. This would involve developing new ideas and values to underpin the restyled institutions of an alternative type of society. A new ideology would have to develop. An ideology, according to Marx, is simply a set of related ideas and values that reflect the interests of the group. It would reflect the interests of the workers as capitalism only focuses on the interests of the employers. It was the intention of the new dispute resolution process that the interests of the employer and the employee should be addressed and provision should be made for both interests in a competitive market influenced by globalisation.

An analysis of the existing society and a blueprint for change are still not enough to bring about revolution. Not only do people have to know what to fight and what to fight for, but they must also 'fight'. This implies active opposition to the system. He talks about struggle and developing a 'true' and not a false consciousness. If the current dispute resolution processes and mechanisms are criticised as being ineffective, the parties involved need to be aware of the shortcomings of the system, need to know what needs to be changed and also what to do to effect these changes. It is in this regard that a study of this nature could play a role in identifying the problems that these role players experience and explore various ways to address these problems.

2.5 The interactionist perspective

Functionalism and Marxism offer very different perspectives on society but they are both known as macro-theories as they both regard society as a system and both see man's behaviour as shaped by the system (Haralambos, 1982:15). Interactionists, however, focus on the process of interaction in a particular context. Meanings are not fixed but constructed and negotiated in interaction situations (Haralambos, 1982:18).

Marcus and Ducklin (1998:23) include symbolic interactionism in what they refer to as agency theory. This is another term for studying the 'agent' (respondent or person who acts). The agency theory seeks to understand how people make sense of and influence the world around them. The CCMA commissioner is seen as the agent or person who have to function, or act, on a day-to-day basis amidst the disputing parties within a specific setting as provided by the CCMA as the main statutory institution for dispute resolution. These agency theories include the work by Weber, Simmel, Mead and even Parsons and Habermas. Although the macro sociologists (conflict and structural functionalists) have a tendency to do research from a positivistic approach by using questionnaires and structured interviews, and the micro-sociologist prefer using interpretive methods such as unstructured interviews and participant observation, a number of studies have sought to utilise mixed methods of research. There is evidence to suggest that the strategy of mixing methods is becoming more widely used in contemporary sociological research and thereby enriching the quality of the research (Marcus and Ducklin, 1998:52).

Mead provided the basis of symbolic interactionism. He contended that human beings, given a set of circumstances, behave in one way at one time and in a completely different way at some other later time. They can plan their conduct in the light of their expectation as to how things will happen. One can only participate in a game if one is able to asses circumstances, not only in terms of one's own interest but relative to those of others (Cuff and Payne, 1981:90-91). The CCMA commissioners have to adjust to varying circumstances. A big organisation, represented by their industrial relations manager, who is a lawyer specialising in

labour law, can be a party in one CCMA process and immediately after that an illiterate domestic worker can stand alone against her employer. The commissioners find themselves having to do a specific number of cases per day with very little time for conciliation. Yet they are judged on their settlement rate. These are examples of how the commissioners have to survive and make sense of their environment.

Even though symbolic interactionists are also interested in making general statements about the world they are sometimes more concerned with describing the occasion than producing generalisations. This is partly because they mostly use detailed qualitative study methods in particular circumstances to come to conclusions (Cuff and Payne, 1981:99). An important characteristic of the symbolic interactionism is that researchers emphasise the process by which the members of society define their circumstances and respective identities. They make a point of describing the competing and conflicting claims people make about what is real and what is happening and do not seek to arbitrate between the claims or say which is correct or incorrect (Cuff and Payne, 1981:105). The purpose of using the interactionist perspective is not to question the life experiences of commissioners but to attempt to understand their position and to make sense of the dispute resolution system from their perspectives.

Weber is the best known exponent of the view that sociology should not study the movements and reflexes of human bodies, but the actions of the people in terms of their understandings and beliefs (Cuff and Payne, 1981:106-107). One implication of taking the standpoint of the actor is that research should be intensive and accomplished through the acquisition of a detailed and rich acquaintance with the life circumstances and ways of those being studied.

Cuff and Payne (1981:109-110) offers a short summary of the views of Strauss. He views organisations as being constantly ordered by a process of 'negotiated order', whereby the organisations are constantly being arranged, modified, rearranged, sustained, defended and undermined. The members of society are therefore constantly involved in a process of negotiation with one another as they make agreements on how they will conduct themselves.

One of the reasons why this takes place is because **within any group**, there is no firm consensus as to the proper organisation of affairs. Each commissioner has his/her own perceptions about the dispute resolution system. These perceptions are created during their interaction with other commissioners, CCMA management, the dispute resolution system, labour lawyers and consultants, and employer and employee parties. Their life experiences create their own perceptions of the world around them.

Another reason for reorganising or changing an organisation (system) is because there is also no consensus **between groups.** Commissioners can be divided into various groups such as full and part time, level A, level B and senior commissioners, legally trained and non-legally trained commissioners and commissioners working only for the CCMA and those also working for other dispute resolution bodies. These groups might have different perceptions about dispute resolution and the problems of the system.

Strauss also contended that 'even the weak have power' over their formal superiors and if there is no co-operation in the system they could make the situation very difficult for superiors (Cuff and Payne, 1981:109). The 'weak' therefore have an influence over the system and the system has to adapt to the needs of even the weakest parties in the labour relations system, which are the small and medium sized employers and the individual employees. The perceptions of the commissioners with regard to the effectiveness of the dispute resolution system will give an indication of potential strain on the dispute resolution system and possible changes. These changes to accommodate the needs of the 'weak' in society can be seen as the establishment of 'negotiated order'.

People are not all the time engaged in negotiations about their relative positions and they are not openly making deals or writing out agreements. They mostly get involved in a kind of implicit, unspoken, mutual adjustment of action, sharing of feelings, attitude, interests and understanding as though it was a process of bargaining.

The interactionist approach offers the necessary conceptual framework for the design of the methodology in this research.

2.6 Conclusion

Some elements of the three most prominent sociological theories have been isolated to establish a theoretical framework for the analysis of the dispute resolution system. As stated in the beginning of the chapter, the intention is not to challenge any existing theory. A multi-perspective approach is used where the most common sociological theories are applied to assist in analysing the mechanisms and processes for conflict management and dispute resolution.

The **functionalist perspective** is used in this research to study the function of a social practice (dispute resolution) and institution (CCMA) and to analyse the contribution of that practice or institution to the continuation of society (the dispute resolution system as provided by the LRA (66/95). The **conflict perspective** is used to acknowledge the structural elements in Marx's view of society and to use some of Marx's ideas in analysing the current industrial relations system and dispute resolution practices. The **symbolic interactionist perspective** is used in the methodology of this study to focus on the empathic understanding of the life experience of CCMA commissioners. The above-mentioned Sociological theories are simply different ways of trying to understand the social world (Cuff and Payne, 1981:2). It must be emphasised that none of these theories are superior to the other and none of them can guarantee the 'truth'.

The functionalist perspective that holds that every unit in a society/organisation has consequences that contribute to the preservation and survival of a larger system will be utilised in the formation of a framework for the analysis of the labour relations system. Craig's adaptation of Dunlop's open systems approach will be discussed in Chapter three and will form the basis of the framework to analyse the labour relations system in this study.

CHAPTER 3

MODERN SYSTEMS THEORY FOR ANALYSING INDUSTRIAL RELATIONS

3.1 Introduction

Chapter two and three are both theoretical chapters. Chapter two highlights the most common sociological theories to assist in analysing the mechanisms and processes for conflict management and dispute resolution. Chapter three focuses specifically on the systems theory to explore the labour relations system. The **functionalist perspective** is used in this research to study the function of a social practice (dispute resolution) and institution (CCMA) and to analyse the contribution of that practice or institution to the continuation of society (the dispute resolution system as provided by the LRA (66/95)). However, to study one institution or practice we need to know how it relates to other parts of the system. The **systems approach** offers the most comprehensive way of doing this by identifying, analysing, synthesising and evaluating the strategic variables of an industrial relations system. This can include the systematic analysis of socially meaningful actions of the employer and employee parties in the process of managing conflict and resolving disputes within the framework provided by the LRA (66/95). That is the purpose of this chapter. In the final section of this chapter there is a discussion on the characteristics of the modern systems theory. The relationship between the various sociological theories related to structuralism and functionalism on the one hand and the systems approach on the other will be illustrated, thereby fusing Chapters two and three.

3.2 The systems approach

Craig (1981:7) contended that since Dunlop published his seminal work on industrial relations systems in 1958, little progress has been made in refining this systems approach. Dunlop's intention with formulating this theory was to present a general

theory of industrial relations, which explains why particular rules are established and how and why they change in response to changes affecting the system. A framework such as the systems theory allows for the conceptualisation of the major components of the labour relations system so that each component, as well as the interconnection with the other parts of the system, may subsequently be examined in detail. The general intention of the framework is to provide a mechanism to understand and interpret the actions of employers and employees in the workplace where conflict has been institutionalised within the industrial relations system (Tustin & Geldenhuys, 2000:50).

Buckley (1967:7-40) discussed the development of modern systems theory by referring to the **mechanical model**, also referred to as the "mechanistic school of thought", the **organic model**, the **process model** and the model of **Parsons and Homans.** He then went on to formulate a **general systems perspective** of society.

The **mechanical** model refers to the analysis of society making use of the same methods used in natural sciences. Buckley (1967:9) traced the use of mechanical concepts such as those used by Pareto, a trained engineer, to explain social phenomena in the work of Parsons and Homans. The **organic** model is based on the work of Spencer and focuses on the view of a society as an organism with emphasis on the organism's tendency to maintain equilibrium. The **process** model is based on the work of Marx and Engels who viewed society as a complex, multifaceted, fluid interplay of widely varying degrees and intensities of associations and dissociation. **Process** focuses on the actions and interactions of the components of an ongoing system. The **Parsons and Homans models** emphasise the attempts in a system to maintain equilibrium. Buckley's (1967:various pages) analysis of the systems theory also included the consensus and conflict perspectives as highlighted by Cuff and Payne (1981:various pages).

Dunlop (1958:4) agreed that the idea of a social system as a whole is ordinarily regarded as the province of sociology and he relied heavily on the work done by Parsons as discussed in Chapter two. He saw the economic system as a subsystem of the more general total system and applied the systems theory in the same manner to the subsystem of industrial relations in an industrialised society

(Dunlop, 1958:5). He viewed the industrial relations system as a separate and distinctive subsystem worthy of analytical and theoretical subject matter. The study of industrial relations has had very little theoretical content in the past. It has been a type of a crossroad where a number of disciplines meet. His systems theory of industrial relations has provided the theoretical core needed to relate isolated facts, to point to new types of enquiries and to make research more additive and thereby provided the study of industrial relations with a genuine discipline.

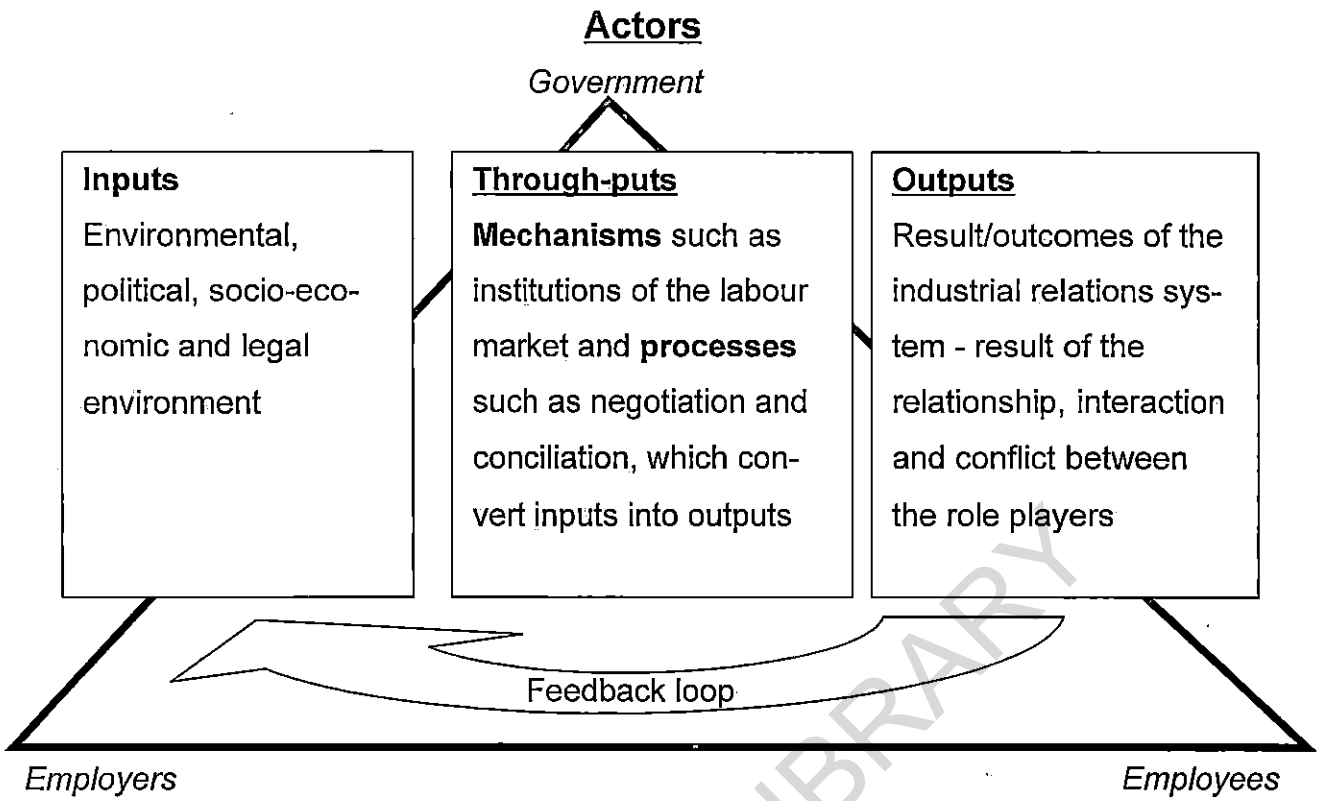
He identified three separate analytical problems in his framework, namely the relation of the industrial relations system to the society as a whole, the relationship to the economic subsystem and the relationship between the inner parts or components of the industrial relations system. Dunlop saw the industrial relations system as a separate and distinctive sub-system of an industrial society. The full range of rule making governing the workplace is central to an industrial relations system (1958:5). The theory was designed to highlight relationships, to focus attention upon critical variables and to formulate propositions for enquiry and testing.

3.3 A framework for the analysis of a labour relations system

Dunlop identified and defined the 'actors' in the industrial relations system, the 'contexts' of a system, the establishment of 'rules' and the ideology of an industrial relations system. Craig has elaborated on the work of Dunlop with regard to the application of the open systems theory to the analysis of labour relations.

The systems approach as presented by Craig (1981:9-20) consists of four basic components (see **figure 3.1**): 1) Inputs, such as goals, values and power from the environmental sub-system, 2) procedures for converting the inputs into outputs (throughputs), 3) the outputs, comprising the financial, social and psychological reward to the employees, and 4) the feedback loop through which the output flows back into the labour relations system. Each of these components will briefly be discussed.

Figure 3.1: The industrial relations system



Source: Adapted from Craig, 1981:9-33

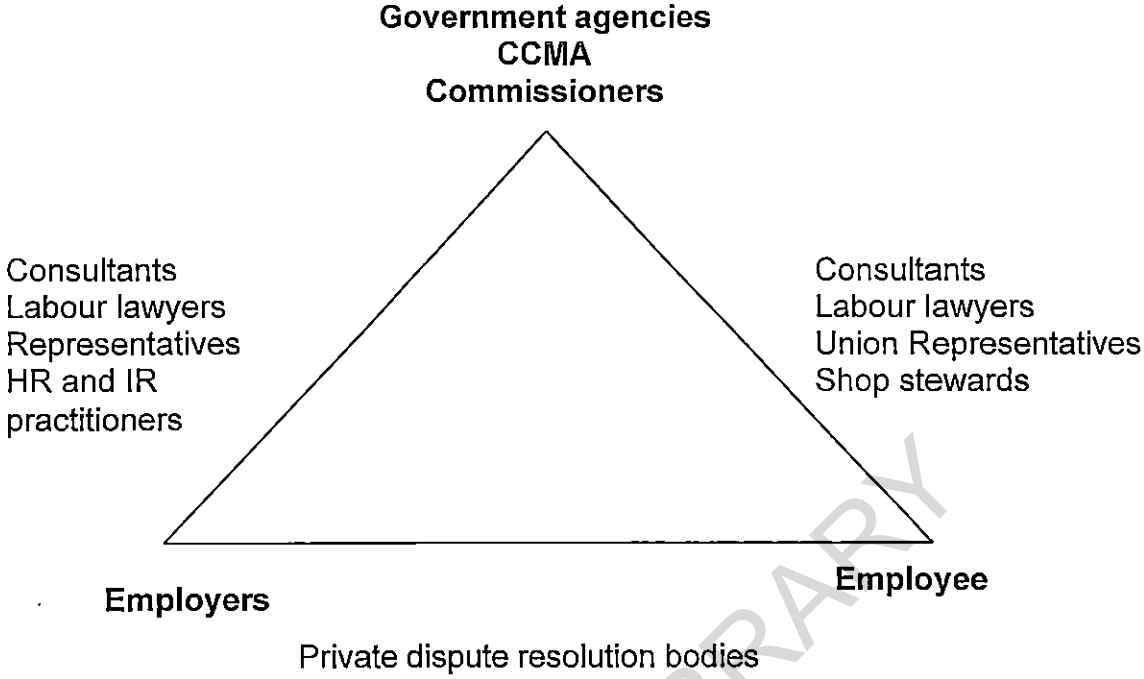
3.3.1 Inputs

The 'inputs' refer to the environmental influences from outside and within the system of labour relations. This part of the theoretical framework is relevant to this study as it identifies the role players in the process of dispute resolution that also forms the units of analysis for data collection. It provides the information with regard to the environment in which dispute resolution takes place and which should be taken into account when exploring the commissioners' perceptions, needs and problems. Dunlop (1958:8) stated that every industrial relations system have three actors, namely the employers, employees and specialised government agencies.

3.3.1.1 The actors

The **actors** in the system are also called the role players in the labour relations system. For the purpose of this study, additional actors need to be identified, as indicated in **figure 3.2**.

Figure 3.2: The role players/actors in the industrial relations system



Source: Adapted from Bendix, 1996:11

The **representatives** of the parties such as trade union representatives (including shop stewards and trade union officials), and representatives from employer organisations also came to play important roles in the labour relations system, specifically with regard to dispute resolution processes.

The CCMA commissioners can, for the purpose of this study be viewed as representatives of the government's dispute resolution institution. Private dispute resolution institutions can also not be left out of the picture as they have a very important input into the system of labour relations. This study also looks at **labour lawyers** and **consultants** as role players in the process of dispute resolution.

A distinction should be made between the inputs from the system itself (within-puts), which are the **goals, values** and **power** of actors in the system, and the flow of effects from the environmental subsystem (inputs).

3.3.1.2 Goals, values and power

The goals, values and power of these role players convert the inputs into outputs. **Goals** refer to the objectives that each of the role players seek to achieve. **Values** refer to the norms or standards that an actor observes in establishing a hierarchy of objectives and the means to obtain these objectives. **Power** refers to the ability of an actor to satisfy his or her goals despite the resistance of others.

Marx argued that, even though labour (the **employees**) is the source of all value, they are exploited because of the employer's drive for surplus in a capitalistic system (Anstey, 1991:19). Therefore, according to Craig (1981:10) organised labour has on the one hand a very pragmatic **goal** of obtaining higher and higher remuneration. On the other hand, they are also guided by egalitarian **values** and norms because of their concern with public welfare as part of their goals. The employees have collective **power** that can be deployed during industrial action such as strikes. Although relevant to the escalation of conflict and the conflict handling mechanisms that will be referred to in this study, collective power falls outside the scope of this study as the focus is on individual unfair dismissal cases.

The **employer** (management) is motivated by the **goal** of obtaining more and more profits, a greater share of the market or more growth in a very competitive global economy. Traditionally the employer had all the **power** because of the fact that he/she owned the means of production and could determine wages and employment. However, legislation changed this quite substantially. The employers' **values** are determined by the variables in the environment that allow business to survive, such as labour policy, legislation and socio-economic trends (Craig, 1981:10). An example is the values of equality and development that are now very relevant in shaping organisational values in South Africa.

Government has the **goals**, among others, of ensuring decent living standards and maintaining industrial peace by assisting employees and employers to resolve disputes. State intervention varies depending on the prevailing socio-political ideology. The most basic form of intervention is the regulation of minimum working conditions. The **values** of the state are derived from the Constitution. The co-

ordination of labour relations in South Africa is incorporated in the Constitution (108/1996) as a fundamental right. Section 23 of the Constitution (108/1996) provides for the right to fair labour practices, freedom of association, collective bargaining and the right to strike. The state is therefore not a full and equal partner in the labour relationship, but rather plays the role of facilitator, regulator and protector (Tustin and Geldenhuys, 2000:103). This is in contrast to the **power** exercised by the state under the Nationalist government when black trade unions were not recognised.

The **private institutions** that have emerged over the past few years since the promulgation of the LRA (66/95) also have the goal of maintaining peace and order in the labour relationship. Their profit motive and need for financial survival in an economy with high unemployment and few job opportunities in the formal economy should, however, not be ignored. The motives of the so-called capitalistic unions and the huge numbers of labour consultants/lawyers should be investigated as well as their role and function within the labour relations system.

The **power** of the above-mentioned parties may vary according to conditions in the environment as well as within the industrial relations system itself. A slack economy will give employers more power, whereas a strong union movement will add to the power of employees. The state's power in South Africa is regulated by a constitution and legislation spelling out the rights and duties of the parties within a free and equitable labour relations system.

3.3.1.3 Environmental influences

The **inputs** from the environment have significant conditioning effects on the labour relations system. According to Craig (1981:11) the physical surroundings in which the employers and employees find themselves and to which they have to adjust, form the **ecological system**. Examples of this might be the fact that the South African economy has a large number of employees in the production sector with a very large portion of workers in the mining industry as well as in agriculture (Barker, 2003:80). The majority of these workers are low skilled and often functionally illiterate.

The product market, labour market, money market and technological innovations form the **economic system**. Factors that play a role here are, firstly, the fact that many employees find themselves in sectors such as the domestic and agricultural sector where the employment relationship has, until recently, not been properly governed by formal employment contracts. Further reasons are the high incidence of unemployment, and the fact that a large portion of the workforce is still functionally illiterate (Barker, 2003:251). These characteristics of the economic system have an impact on the effective functioning of the labour relations system. High economic growth, a well-trained work force, and a technological innovative workplace will certainly have different labour relations outcomes (Craig, 1981:12).

The **legal system** establishes rules and procedures that must be followed by the parties to the labour relationship. The actions of unions and management are directed and contained to ensure stability and co-operation. Labour standards and basic conditions of employment become conditioning inputs into the system of labour relations (Craig, 1981:12). The Constitution and international labour standards and conventions, as embedded in labour law, comprise the legal factors in the system. The assumption of this study is that the legal system regulating conflict management and dispute resolution has become highly sophisticated, whereas the parties (mostly individual employees and small and medium sized employers) having to function within this system, are mostly unsophisticated.

The **political system** had a huge impact on South African labour relations. The fact that black workers were excluded from the previous labour legislation system was one of the reasons that workers had to rely on their collective actions to get recognition in the workplace despite the legal odds that were against them. Political parties, alliances, ideology, socio-economic policy and international relations all play a major role in the labour relations system (Finnemore, 1998:17).

The **socio-economic system** consists of social factors such as demography, urbanisation, housing, transport, health, education and training, media, gender and cultural values (Finnemore, 1998:17). These factors play a role in shaping the labour relations system. They might give rise to needs and expectations, which again fosters conflict.

The above-mentioned factors (sub-systems) have a dynamic impact on the parties to the labour relationship and contain many elements that foster conflict. The divergent **goals** and **values** of management and workers are examples. The apartheid system and serious structural imbalances in the economy such as the unequal distribution of wealth and scarcity of resources to redress such problems add to the conflict. The transformation of workplaces brought about by affirmative action and skills development create new needs, uncertainties and expectations. The establishment of the National Economic Development and Labour Council (NEDLAC) places emphasis on co-operation between government, employers and unions with the expectation that co-ordinated tripartite relations will create stable and less strike prone labour relations (Finnemore, 1998:16).

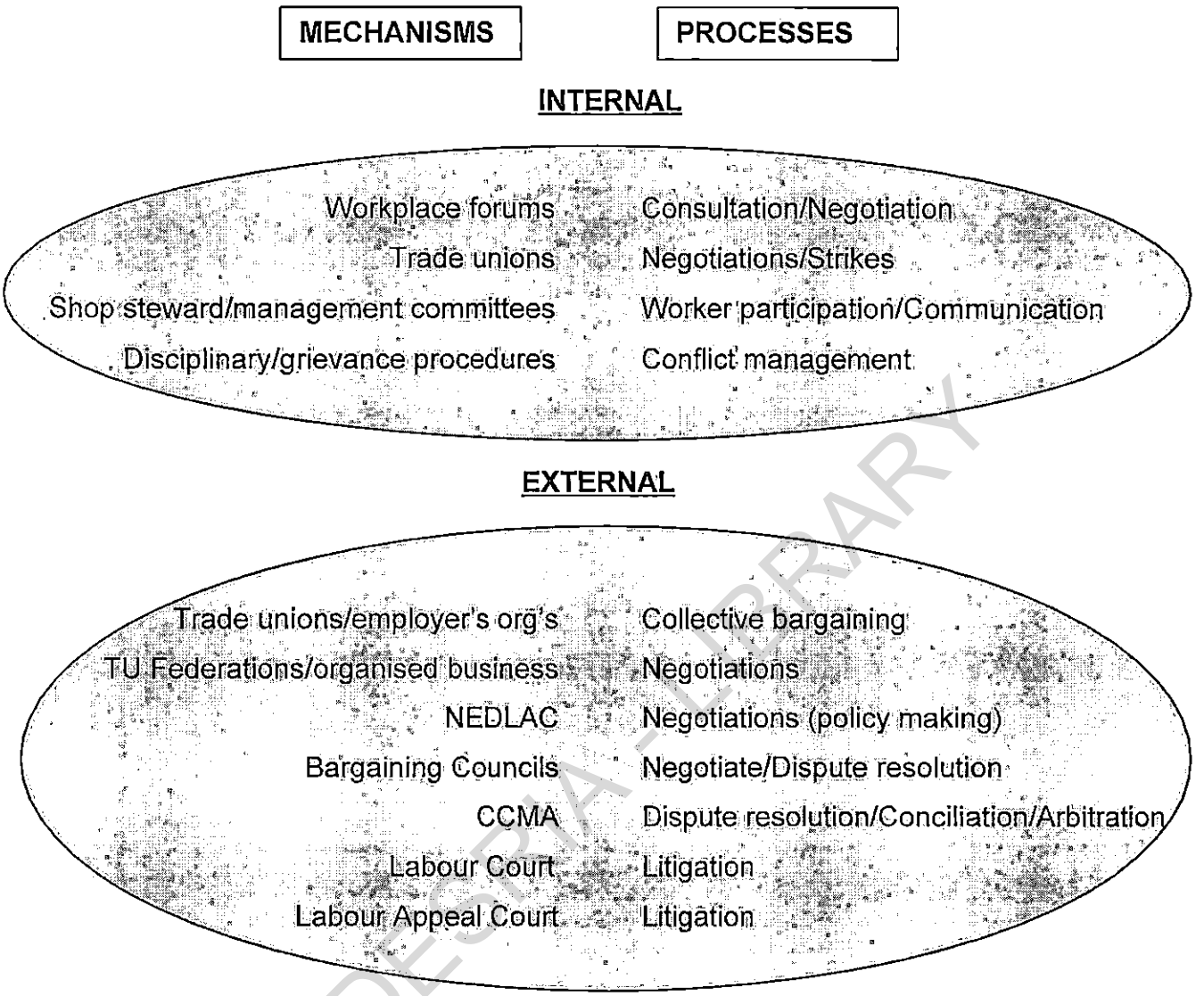
3.3.2 The throughputs

The **throughputs** incorporate those **structures/mechanisms** and **processes** responsible for converting the inputs into outputs. Tustin and Geldenhuys (2000:57) make a distinction between the internal and external mechanisms and processes. **Figure 3.3** is a schematic presentation of the internal and external mechanisms and of the processes converting 'inputs' into 'outputs'.

3.3.2.1 Internal and external mechanisms and procedures

The **internal mechanisms** would refer to those mechanisms created within organisations to regulate the workplace relationships between employers and employees. Workplace forums, trade unions, shop steward committees, and disciplinary and grievance procedures could be mentioned as examples of such internal mechanisms (see **figure 3.3**). The grievance and disciplinary procedures and codes of conduct in an organisation play a vital role in the resolution of conflict at organisational level (Finnemore, 1998:18).

Figure 3.3: Internal and external mechanisms and processes converting 'inputs' into 'outputs'



Source: Adapted from Finnemore, 1998:17 and Tustin and Geldenhuys, 2000:57

This figure does not include all the institutions of the labour market but only those relevant to labour relations and dispute resolution.

The **internal processes** relate to collective bargaining and negotiation, strike action, communication, training, counselling and conflict management. For the purposes of this research the process of internal enquiry and hearings should in particular be emphasised.

External mechanisms for dispute resolution include among others, the CCMA, bargaining councils, the labour court and the labour appeal court. Within these institutions various **procedures** such as negotiation, collective bargaining, conciliation, arbitration, fact finding and adjudication take place.

Finnemore (1998:16), Craig (1981:15) and Tustin and Geldenhuys (2000:128) perceived **the resolution of conflict** as the main function of the throughputs in the industrial relations system. This is the result of the predominantly adversarial nature of the labour relationship. The emphasis is less on co-operation and joint problem solving and more on processes and institutions to resolve and prevent conflict. The fact that the LRA (66/95) does make provision for workplace forums could be an indication of the possibility of moving towards a dispensation where there is an understanding of mutual independence and co-operation. Even though Finnemore, as well as Tustin and Geldenhuys, included other forums such as bargaining councils and workplace forums, as well as processes such as consultation and communication, training and counselling in their framework, the emphasis in both sources is on conflict. Conflict and conflict resolution has become institutionalised in the current system of industrial relations in South Africa.

This study will focus in particular on the internal mechanisms and processes (grievance and disciplinary procedures) on the one hand, and the external mechanisms and processes (CCMA conciliation and arbitration) on the other, and the relationship between the two. It will focus on the individual employer/employee relationship, because individual unfair dismissal disputes comprise by far the majority of the CCMA caseload.

3.3.2.2 The individual and collective nature of the labour relationship

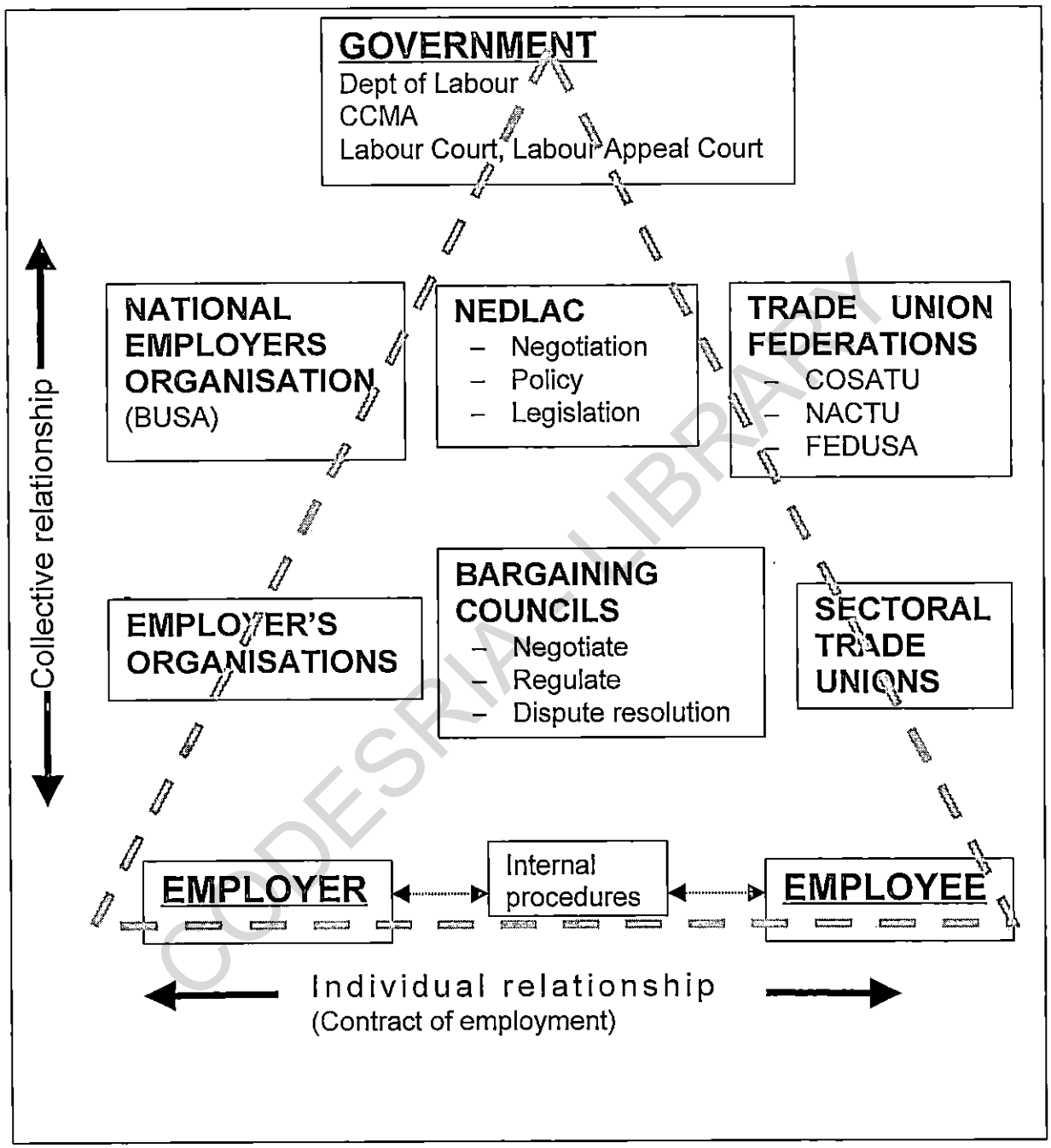
Many of the structures and procedures are only functional with regard to the collective nature of the labour relationship and it is therefore necessary to explain the individual and collective nature of the labour relationship. It is further also important to thoroughly understand how the processes and institutions are related. The various institutions of the labour market will briefly be discussed specifically with the aim to indicate which institutions are responsible for which processes. **Figure**

3.4 has been developed specifically in an attempt to explain the tripartite nature of labour relations. It also illustrates the collective and individual aspects of the relationship and will also assist in understanding the inter-relatedness of the various institutions/mechanisms and processes taking place in such institutions. The institutions will be discussed with regard to their relevance to the three parties involved in the labour relationship and the level at which the various processes are executed (individual or collective level).

The **individual relationship** is regulated by the contract of employment between a single employer and an individual employee (Grogan, 1999:40). The LRA (66/95) ensures the right of freedom of association that allows employees to form **trade unions** to represent them. The employer in turn can form or join an **employers' organisation** for the purpose of collective bargaining with the unions in a specific industry (Bendix, 1996:190). The collective nature of labour relations then becomes evident. The statutory forum for such negotiations is the **bargaining council** where collective agreements are reached with regard to mainly conditions of employment in the specific sector. The results of negotiations in bargaining councils are contained in collective agreements that are published in the Government Gazette and are usually made binding on the whole of the industry. The bargaining council also regulates the industry as it provides for inspectors to ensure that the agreements are applied. Another function of the bargaining council is to resolve disputes in a specific industry (Bendix, 1996:283).

When trade unions form **federations**, very powerful structures are formed and in countering the power of these trade union federations in influencing government policy, employers were obliged to form an **organised business federation,** namely Business Unity South Africa (BUSA), which comprised the former Business South Africa and the Black Business Council. The main trade union federations in South Africa are COSATU (Confederation of Trade Unions of South Africa), NACTU (National Council of Trade Unions) and Fedusa (Federation of Unions of South Africa). These powerful organisations negotiate with each other and the government on issues of policy-making in the National Economic Development and Labour Council (**NEDLAC**). Labour policy that develops in this manner can be described as corporatism.

Figure 3.4: Framework for understanding the institutions/mechanisms and processes of the throughputs within the broad system of labour relations



Source: Adapted from Bendix, 1996:20 and Finnemore, 1998:17

Another important structure is the **Department of Labour,** which is responsible for the execution of labour policy as contained in labour legislation, but also for regulating the labour relationship. Other structures include the **Labour Court** (LC)

and **Labour Appeal Court** (LAC), the Commission for Conciliation Mediation and Arbitration (**CCMA**), **Workplace Forums** (WPF) and shop stewards and management committees. Most of these structures are relevant on the collective, as well as on the individual level of the labour relationship. The other parties such as labour lawyers and consultants also form part of this system but will not be emphasised here.

From the above, it is clear that there are certain institutions designed specifically for certain processes. The CCMA is in principle a dispute resolution body. The bargaining councils, however, also have dispute resolution functions. The main function of trade unions and employers' organisations is to negotiate collectively and reach collective agreements. These organisations, however, also have other functions.

It is important to understand the functions and inter-relatedness of the various structures, since many misunderstandings occur. Anecdotal evidence from years of experience as a CCMA commissioner and lecturer in labour relations and dispute resolution emphasised the extent of such misunderstandings. There are many instances, for example, where disputes are referred to the CCMA even though there is a bargaining council covering that particular employer. The CCMA has implemented a screening process where jurisdiction is determined before a case is scheduled for conciliation in an attempt to overcome this problem. It is also a common problem that employers and employees perceive the Labour Court and Labour Appeal Court as the ultimate dispute resolution bodies after the arbitration process at the CCMA, which is incorrect. It is not always clear in the mind of the individual employee and the small employer that there is a difference between trade unions and trade union federations. NEDLAC is often seen as a dispute resolution body and the CCMA is sometimes perceived as a forum that represents the interests of employees.

3.3.2.3 Principles underlying mechanisms and processes for throughput

Craig (1981:13-15) described the various principles underlying the institutions and processes for converting inputs into outputs. It is mentioned that the labour relations system can be determined unilaterally, bilaterally or on a tri-partite basis.

Labour policy making in South Africa is based on the tri-partite relationship between the state, employers and employees, with the state in its capacity as regulator, policy maker and legislator. The employees have collective power through the trade union movement and the trade union federations. These parties negotiate with organised business federations in an institution created specifically for the purpose of negotiating policy (Nedlac).

The individual labour relationship is a bilateral relationship within an environment of certain mechanisms and processes. Finnemore (1998:18) states that the labour relations system is only as effective as the functioning of its dispute resolution mechanisms and processes in particular. These structures must change with the requirements of the environment and the parties. They must, however, also be reliable and stable. Only those mechanisms, institutions and processes that relate to dispute resolution, will be elaborated on in the next chapters.

3.3.3 Output (outcomes)

According to Tustin and Geldenhuys (2000:224) the mechanisms and procedures for handling conflict in the system have an effect on the organisation on the one hand and on the individual worker on the other hand. Craig (1981:16) contended that the main function of an industrial relation system is the allocation of rewards to employees for their service and improvement in their working conditions. Collective agreements, joint decision-making, negotiation, arbitration and strikes are all used to obtain these favourable outcomes for the workers. According to Finnemore (1998:18) the outcome of arbitration and strike action is usually a win/lose situation, which creates even more tension. In the longer term, however, the process of power testing can lead to a more realistic assessment by the parties of each other's resolve and resources. New procedures might then be designed to reduce the potential for conflict in the workplace in the future. Disputes might then be resolved through these internal processes, without the need to resort to power play and a new win/win relationship develops.

Craig (1981:16) placed a lot of emphasis on the outputs of the labour relations system with regard to what the **employees** have to gain from the system. Tustin

and Geldenhuys (2000:225) argued, however that the output (outcomes) impact on the **organisation** as well as on the **individual worker**. The **organisational** outcomes pertain to profitability, the cost of labour turnover to the company, productivity changes and organisational policies. These are all aspects of the output of the labour relations system of the organisation. The output with regard to the **employees** would include job security, health, interaction on the shop floor, power levels and attitudes.

The output with regard to the dispute resolution system is of specific importance in this study. The output of the dispute resolution system manifests in the problems that this research is investigating such as the low level of internal settlement, with the resultant high referral rate of individual unfair dismissal cases. It is contended that it is the failure of the internal conflict management processes and mechanisms that causes the problems in the external processes and mechanisms. Confirmation of this contention will be sought in this research.

3.3.4 Feedback

This study is based on the assumption that if the internal procedures (grievance and disciplinary procedures) are properly used, then very few disputes will be referred to the external mechanisms such as the CCMA. If the output of the labour relations system is that a high percentage of disputes - specifically unfair dismissal cases - are referred to the CCMA, it means that the internal procedures are not being used properly. Craig (1981:18) also referred to the micro and macro level of dealing with problems in the system. The more aligned the goals, values and power of the actors in the system, the less likely conflict will arise. In the same context it could be said that if the conflict could be resolved internally through proper use of the conflict handling mechanisms, the more positive the output of the system and the feedback into the system.

If the output for the organisation is high litigation costs, excessive time spent at the CCMA, high "penalties" where internal procedures have not been followed, then negative perceptions with regard to the CCMA is fed back into the system.

The feedback into the other sub-systems in the environment can be seen in the various attempts by employers to introduce flexible work practices and reduce employment. Employers are fearful of entering into permanent employment relationships and are making use of labour brokers, short-term contracts and sub-contractors. Labour is no longer seen as an asset but as a liability. The changes to the LRA (2002) specifically addressed the issue of defining sub-contract relationships in an effort to curb these practices that have developed among employers. The increase in the number of labour lawyers and consultants as well as the many trade unions that have emerged create job and income opportunities, but also impacts on legislation (Albertyn, 2002:1723).

The outcomes become inputs into the labour relations system through the feedback loop that the system proposes (Craig, 1981:17). The outputs of the labour relations system affect community attitudes towards labour and management through the feedback into the system.

This study emphasises the importance of the fact that the labour relations system must be beneficial and functional to all the parties in the labour relationship. If specific parts of the system, such as the dispute resolution mechanisms or procedures, are not beneficial to the parties in the system, then a natural process will start to change that specific part. If the one part continues to be dysfunctional, it will have an effect on the parties and the environment, which in turn would then also react to influence that particular part.

3.4 System, change and conflict

South African society has gone through fundamental changes in the past ten years. After many years of conflict that threatened to tear the society apart there was sufficient agreement on a set of values that should characterise our society. These were contained in the Constitution. The Government's approach to labour law was based on regulated flexibility with the aim of ensuring an appropriate balance between promoting employment and protecting those in employment. Labour policy was the result of negotiation and trade-offs between the social partners, and the

post-1994 era was characterised by new labour legislation that changed the system of industrial relations (Pityana, 1999:2-11).

An industrial relations system implies an inner unity and consistency. A significant change in one aspect or facet can lead to changes in other parts of the system, thereby creating new rules and new positions. If the internal mechanisms for dealing with conflict fail, for whatever reason, it can be expected that the external mechanisms for dispute resolution will experience some problems. The system of industrial relations will attempt to correct the imbalance in the system by producing other mechanisms and processes to overcome these problems. The emergence of many bogus trade unions and employer organisations and the labour consultants – many of whom function under the guise of such organisations – are good examples of strategies that develop to overcome problems in the system.

The concept of an industrial relations system is useful as a tool of analysis when a specific system is analysed in its historical context and changes in the system are studied through time. The status of the actors is influenced by the particular point in time when the system was started. The whole complex of rules of the workplace and work community is altered through changes that occur in a national industrial relations system during the course of economic development. The rules relating to industrial relations and settlement of disputes should be examined and related to the industrialising process and to the type of elite directing the transformation to modern industry (Dunlop, 1958:389). An industrial relations system may be thought of as moving through time and responding to changes that affect the constitution of the system. The labour relations system in South Africa has undergone enormous changes since the 1980's when worker rights were first defined by the Wiehahn Commission (Bendix, 1996:91–104). The complex of rules can be expected to change in line with changes to the social, economic and political environment and the resultant changes in the locus and distribution of power in the larger society. Changes may originate with the actors or in the organisations and the task of analysis is to indicate the consequences for the complex of rules. The systems approach provides a means of investigating changes over time in the rules and other features of industrial relations.

Buckley (1967:51) identified tension as ever present in a system. Stress and strain manifest under conditions of felt blockage or constraints and is ever present throughout a system. This tension assumes different forms such as frustrations, enthusiasm, aggression, normative deviations, crowd or quasi-group processes, conflict and competition or upheaval and destruction. In stress situations energy is mobilised and a state of tension is produced. In exploring the frustrations, enthusiasm, processes and perceptions of the commissioners, an attempt will be made to better understand the specific strain that the system is experiencing.

Marx, as a structuralist, argued that the capitalist system produces the tensions and conflicts that threaten to tear the system apart. He stated that 'man makes his own history' and that it is thus not just a matter of analysing the existing society and creating a blueprint for the new system, namely knowing what to fight for, but people must also 'fight'. Marx wanted to discover the principles of change for society. He studied those groups who wanted to change the old system and those who want to maintain the old system (Cuff and Payne, 1981:67). Dahrendorf studied the nature of conflict in post-capitalist society. He argued that Marx's analysis of capitalist society was correct but that there have been highly significant changes. He stated that in post-capitalist societies conflicts have become institutionalised. Conflict is no longer bitter and potentially disruptive because interests are pursued according to the rules of the game. These rules require the use of established machinery for dealing with conflicts created by competing interest groups (Cuff and Payne, 1981:86). The establishment of the CCMA signified the institutionalisation of conflict in the labour relations system. The problems experienced by the parties in their dealings with this institution has lead to necessary changes which have been effected through legislative changes and the drafting and redrafting of the CCMA Rules (Albertyn, 2002:1715). Modern systems analysis suggests that a system with high adaptive potential requires some optimum level of both stability and flexibility. A central feature of the complex adaptive system is its capacity to persist or develop by changing its own structure, sometimes in fundamental ways (Buckley, 1967:206). The role played by labour consultants will be explored in this regard.

The system strives to maintain stability and is constantly in the process of balancing the needs and power of different actors. The institutionalisation of conflict is an

example. The system generates complex institutions and organisations to deal with these forces, which aim to rectify the imbalance causing the tension in the system (Buckley, 1967:129). Many institutional structures are not to be seen as inevitable consequences of the operation of a social system as such, but of the particular selective and perpetuating mechanisms that have characterised its operation. Expenditure of energy is required to maintain any open system's steady state. Discrepancies or exigencies of one kind or another lead to continual re-mapping and reorganisation. This means that any given social structure must at some stage fail to define, specify, or provide adequately for some exigencies or unstructured events.

In an open system the normal operation of its institutions constantly generate a variety of inputs and strains thereby contributing to a continuous process of structure elaboration and reorganisation (Buckley, 1967:130). It is for this reason that alternative dispute resolution processes and mechanisms will be explored. Institutional structures create and recreate themselves in an ongoing developmental process. Buckley (1967:151) argued that social order or stability is to be explained as the result of a cumulative process characterised by dissensus and role strain stemming from the difficulty of fulfilling role demands. If most of the role players – small to medium sized employers and individual employees as well as trade union representatives – do not have the capability in terms of knowledge and skills to successfully operate in the dispute resolution system, then one can assume that they will experience difficulty in complying with the demands of the system. The system can therefore be expected to adjust to these strains, which is an issue that will be explored in this study.

Conflict is inherent in any system of industrial relations. The CCMA as a conflict resolution institution within the broader framework of the industrial relations system has been plagued by problems and difficulties since its inception. Some of the problems investigated by the Gauteng branch of the South African Society of Labour Lawyers relate to the competence and capacity of commissioners, administration, workload and budget. Other concerns that were raised dealt with the high rate of referral of individual unfair dismissal cases, low settlement rate and problems with

regard to legal representation (Gostner, 1997:24-27). These are examples of the problems that cause structural strain.

This study uses the systems approach to explore the perceptions of some of the actors in this system – the commissioners – regarding the problems experienced with dispute resolution, in an attempt to understand the positions of the other role players – employers, employees and union representatives. It also seeks to explore the role of the labour consultants and labour lawyers in an attempt to foresee in what direction the labour relations system will change.

The test of the systems theory is ultimately in its use or usefulness (Dunlop, 1958:28) and this theory has been very useful to give effect to the aims of this study.

3.5 Characteristics of modern systems theory and relationship with the structural functionalism

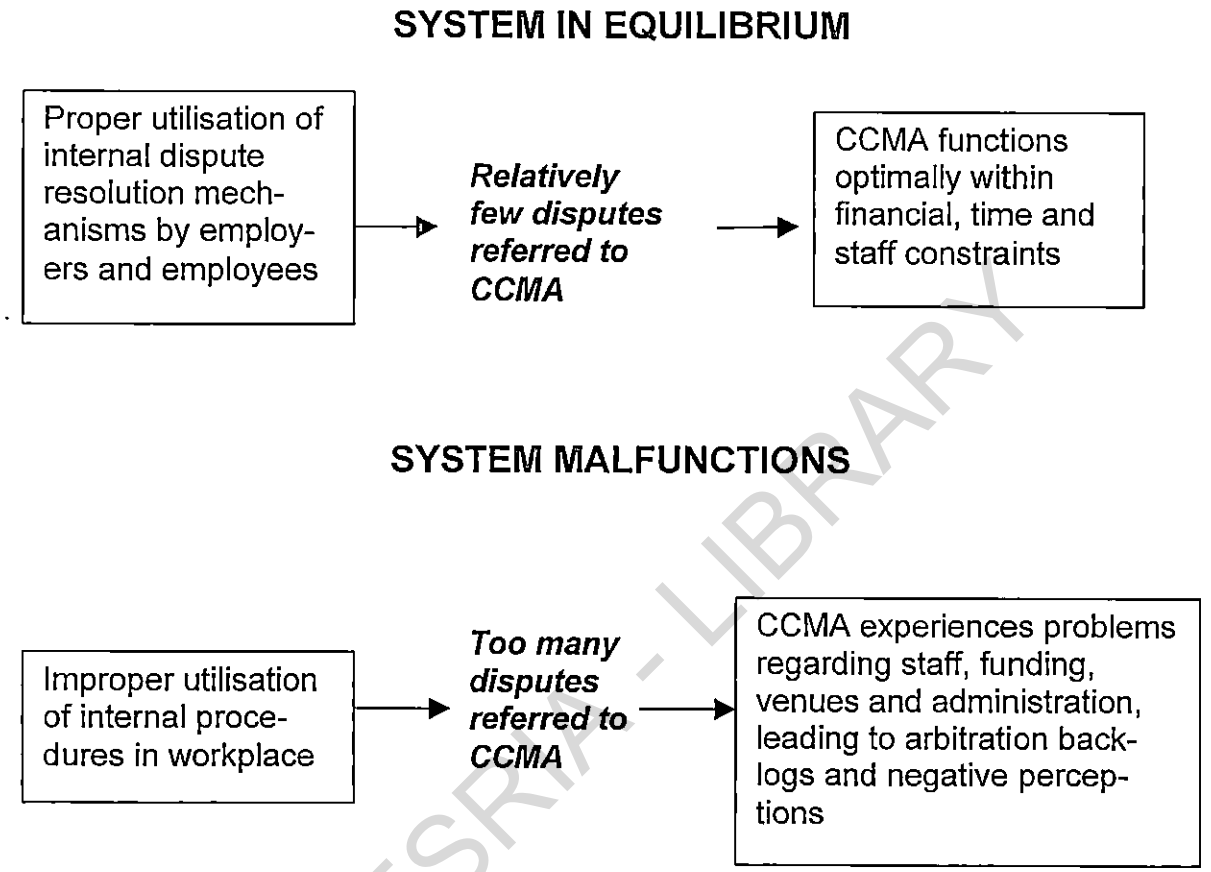
As stated above, the **systems approach** offers a most comprehensive way of identifying, analysing, synthesising and evaluating the strategic variables of an industrial relations system. The systems approach is in essence an example of the functionalist perspective and it is characterised by the fact that there is integration between the parts of the system, maintenance of the system as a whole, functional prerequisites, order and equilibrium. It is necessary to highlight some of these general characteristics of modern systems theory, and to relate them to structural functionalism.

3.5.1 Integration between parts

Any system requires a minimum amount of integration between its parts (Haralambos, 1982:523 and Buckley, 1967:41). This would mean that dispute resolution can only be understood and analysed in relation to the other processes and mechanisms that make up the whole of the labour relations system (**figure 3.5**). Internal conflict resolution procedures in the organisation namely the grievance and disciplinary procedures could be used as an example. The mere existence of these

procedures does not guarantee a fair system of industrial relations. It should be seen in the context of the broader framework of dispute resolution.

Figure 3.5: Integration of parts



Source: Researcher: 2003

The function of the disciplinary and grievance procedure in an organisation is to deal with conflict at an early stage. This is also the case with negotiations and worker participation. If these internal processes are not successful, conflict will escalate. A point is then reached where power needs to be employed to resolve the conflict; namely either industrial action or a dispute is declared and referred to an outside institution for resolution.

This is a good example of the inter-relatedness of the parts of the industrial relations system. An analysis of the parts of a system leads to an explanation of how they contribute to the integration and maintenance of the system (Haralambos, 1982:523).

3.5.2 Maintenance of the system as a whole

The maintenance of the system as a whole is important. If a specific institution or process is not contributing to the successful functioning of the system, then such a process or mechanism will become redundant or will be replaced by another which is more beneficial for the system (Haralambos, 1982:529).

According to Parsons if there is a disturbance in one part of the system then the system will correct itself to restore the equilibrium in the system. This study is based on the assumption that the labour relations system is very complex in a society that does not have the capacity to deal with such sophisticated labour legislation. The labour relations system of South Africa has seen a number of old institutions and processes being replaced by new ones, to better serve the needs of the parties to the system, namely the employers and employees. A good example of this is the National Manpower Commission (NMC) that was replaced by the National Economic Development and Labour Council (NEDLAC), the old industrial court being replaced by the new Labour Court and the old conciliation boards replaced by a whole new institution to deal with various dispute resolution processes, the Commission for Conciliation Mediation and Arbitration (CCMA) (Grogan, 1999:1-2). In the light of the problems experienced at the CCMA the question could be asked whether there is a need for additional or other forms of dispute resolution and alternative dispute resolution institutions.

An example could be the utilisation of non-government organisations (NGO's) and community centres for interventions in disputes between domestic workers and employers before a dismissal, or before a dispute is referred to the CCMA (Rugunanan, 1999:128).

When considering the maintenance of the system of labour relations, mention should be made of the functional prerequisites for such maintenance.

3.5.3 Functional prerequisites

According to Marion J. Levy (Haralambos, 1982:522) a society - in this study the labour relations system - has basic needs that must be met if it is to continue existing. As discussed in Chapter two, these basic needs refer to **functional prerequisites,** which should be determined by identifying those factors that would lead to the breakdown or termination of the labour relations system (Haralambos, 1982:522). **Parsons** argued that any social system has four main components (Grusky and Miller, 1981:109) or basic functional prerequisites: (1) adaptation (2) goal attainment (3) integration and (4) pattern maintenance. Society must give effect to these functional requirements in order to survive. These functional requirements will again be referred to in Chapter eight when discussing the findings of this study.

This study contends that the processes and mechanisms for **conflict management** and effective **dispute resolution** processes and institutions are such functional prerequisites for the labour relations system in South Africa. It could be argued that it was precisely the adversarial nature of labour relations, the high incidence of strikes and violent labour action, and the backlog of industrial court cases that necessitated the drafting of a totally new piece of labour legislation (Finnemore, 1998:40). The establishment of the CCMA embedded this need for the survival of the industrial relations system by providing the means to properly deal with conflict and disputes in a controlled manner.

3.5.4 Order

Durkheim emphasised the need for order in a society. He was a functionalist concerned with functional analysis seeking to understand the functions of the individual parts of the system (Haralambos, 1982:525). He began with the question as to how individuals are integrated to form a society and how order is maintained. Durkheim saw the answer in consensus. A collective conscience consisting of common beliefs and sentiments could integrate individuals into an orderly society. Parsons had also been deeply concerned with the concept of order. He linked this concept of order with the interrelatedness of the various parts in society. He

therefore defined *interdependence* as order in the relationship between the components that enter a system (Buckley, 1967:24).

The various pieces of labour legislation could be seen as the mechanisms to create this consensus regarding what is fair in the workplace. Labour legislation could also be seen as instrumental in maintaining order in the workplace and in the industrial relations system as a whole. However, it is to be questioned if such a collective conscience exists in the South African workplace. Workers are becoming more and more aware of their rights and employers are forced to focus more and more on productivity and other measures to survive in a highly competitive world economy. Mutual obligation, as suggested by Durkheim (Haralambos, 1982:525), is not yet the guiding force in South African labour relations, and the labour relationship is still very adversarial in nature.

In the same manner that Durkheim saw the function of religion as keeping order in the society, labour legislation could be seen as the force that spells out the principles of fairness and responsibility and therefore, keeps order in the labour relationship. It is intended to make orderly labour relations possible by expressing, maintaining and reinforcing the sentiments or values, which should form the collective conscience.

Parsons also questioned whether social order is possible. He observed that society is characterised by co-operation and mutual advantage rather than mutual hostility and destruction. This can, however, not be said of the labour relationship that is characterised by divergent values and the belief by parties that their divergent aspirations cannot be met simultaneously (Anstey, 1991:4).

3.5.5 Equilibrium

A society in **equilibrium** is a society in which there is no conflict. Where everybody knows what is expected, and every role that is expected is met. The key process for attaining this theoretical state of equilibrium is socialisation and social control. Role players are socialised into the expectations attached to a specific role. This process

is backed up by positive sanctions ("rewards") and negative sanctions ("penalties") of role performances that do not meet these expectations.

Socialisation is therefore an extremely important process, for those who use this consensus perspective, to analyse the nature and process of social behaviour. It is a process through which individuals learn what is expected of them in various situations and the process through which they become committed to the societal value system. For the purpose of this study it could be argued that employers and employees should learn – or be taught – how to behave when they deal with workplace conflict and dispute resolution, namely according to the acceptable norms as created by the LRA (66/95).

Another contention of Parsons is that norms can be in conflict in different parts of the social system and yet, not upset the equilibrium of society. He referred to the fact that industrialisation requires the best person to be employed for a specific job. This sentiment can generate conflict of expectations between familial roles and expected ways of behaving in the economy, for instance where a woman is appointed in a more senior position than a man is. The education system serves as a bridge between the potentially conflicting relationship and expectations encountered in the family and the economic system. It can be seen as helping to maintain the equilibrium of society by giving members of society an opportunity to learn how to adjust and cope with conflicting expectations in socially approved ways. In the same way it could be argued that the parties to conflict and disputes in the workplace need time, knowledge and skills to adjust to the new system of dispute resolution. Similarly, labour lawyers and labour consultants play a bridging role in preparing employers and employees to effectively function within this dispute resolution system.

3.6 Conclusion

The labour relationship is adversarial in essence due to the fact that the employer and employee have divergent goals. The history of South Africa is such that parties still have a long way to go before they reach the point where employer and

employee are united through the common goal of productivity, as Parsons' view of Western society has it (Haralambos, 1982:525). In a Western society, members of a particular workforce will share the goal of efficient production in their factory, a goal that stems from the general value of economic productivity. A common goal provides an incentive for co-operation. When values are institutionalised and behaviour structured in terms of them, the result is a stable system. A state of equilibrium is therefore attained as the various parts of the system are in balance. It could take a lengthy time period for both parties to reach a point where their behaviour in the workplace is regulated by a generally accepted set of norms based on the principles of fairness as spelled out in the LRA (66/95). It would take some employers at least one costly visit to the CCMA to prompt them to change behaviour and get their house in order.

Some employers are beginning to react to the perceived unlucky deal that they get from the CCMA in conciliation. By not attending conciliation proceedings they are forcing the system - which was designed to be less legalistic - back to a judicial process by having arbitration as the only remaining option to resolve the dispute. They are making sure that the game is played on a field where they have always had the upper hand, namely by involving lawyers and advocates, which only big employers can afford.

The drafters of the new LRA (66/95) saw the need for proper dispute resolution mechanisms as one of the prerequisites for the maintenance of a successful labour relations system. They emphasised the fact that instead of preventing disputes from occurring, conflict should be managed, and on order to do so, latent conflict should be manifested to enable conflict resolution (see Chapter four).

This chapter elaborated on the systems theory to analyse the labour relationship from a sociological perspective. The various institutions, mechanisms and processes for dealing with the labour relationship were identified. The collective, as well as the individual levels of the relationship were outlined and the various manifestations of the role players namely the state, employers and employees were discussed. Not only were the effect of the environment on the system discussed, but also the impact of the output of the system on the environment.

The next chapters will be dedicated to a detailed discussion of the internal and external mechanisms and procedures within the dispute resolution system in an attempt to establish a link between the internal management of conflict and the external handling of disputes. The statutory framework provided by the LRA (66/95) will be used to indicate how simple the process of dispute resolution has been made and yet, how extremely complicated it could be for an employer and employee to make sense of and be able to use the dispute resolution system.

The phenomenon of conflict is examined more closely in Chapter four. Understanding the dynamics of conflict is of vital importance to be able to see how the dispute resolution system has been designed to cater for the management of conflict and dealing with disputes. The relationship between conflict, grievances and disputes needs to be spelled out to enable the understanding of the relationship between the internal and the external processes and mechanisms.

CHAPTER 4

UNDERSTANDING CONFLICT IN THE WORKPLACE

4.1 Introduction

> "We should never lose sight of the fact that the disputes which are to be resolved are manifestations of a conflict-power relationship between parties. At some point in time, that conflict-power relationship is unbalanced by some cause or trigger, and the conflict-power is transformed through a grievance phase into a formal dispute that has to be resolved in some way or another...There is a path from conflict to a dispute, and we should never lose sight of that path, nor where we stand on that path" (Mischke, 1997a:14-15)

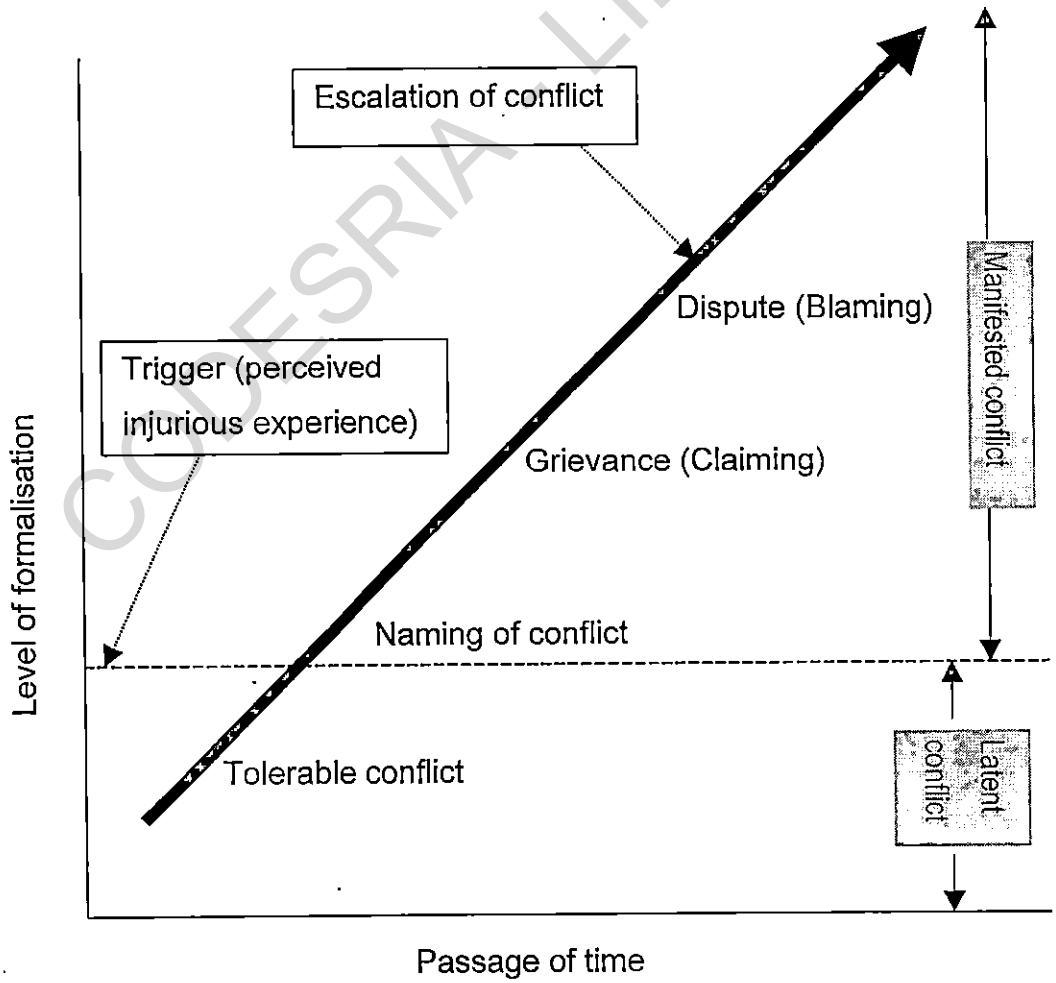
The focus of this study is on the dispute resolution system and the problems commissioners experience. The previous two chapters elaborated on the theory, structure and functions of the dispute resolution system. It was pointed out that the CCMA – as a statutory dispute resolution institution – has a specific place and function within the system of labour relations. A few questions need to be asked at this point: Where does a dispute come from? What is the difference between conflict and a dispute? Where does it originate and why does the CCMA have to deal with disputes outside of the organisation? Why are the parties in the workplace unable to resolve their conflict effectively? What is the cause of the high referral rate of disputes to the CCMA?

The analysis of the transformation of conflict will further elucidate the background, the problem statement and the aims of this study. The background as contained in Chapter one explained that by the time a dispute is referred to the CCMA, much irreversible damage has been done by not following the correct internal procedures. The problem statement highlighted the fact that poor internal procedures - or not following any internal procedures - allow conflict to escalate and transform from 'conflict' to a 'dispute' that has to be referred to an institution outside the

organisation for resolution. One of the aims of this study is to establish the abilities of the parties to successfully deal with internal conflict in the organisation.

Any study about dispute resolution hinges on the proper and thorough understanding of the concept of conflict. In a discussion on conflict in the workplace it is important to define and identity the differences between the concepts conflict, grievance and dispute. The difference between these concepts is that a grievance is a more formal and better-defined form of conflict. A dispute refers to a grievance that has not been resolved and that has reached a more formal stage, to the extent that it must be referred to an outside institution or person for resolution (Mischke, 1997a:11). **Figure 4.1** indicates that conflict, which is inherent in the relationship, is usually in a latent phase and one, or both of the parties, might not be aware of the conflict. It usually takes an incident (trigger) to transform the conflict from the latent phase into a manifested state.

Figure 4.1: The transformation of conflict



Source: Adapted from Mischke, 1997a:10-13

It is only once the conflict has manifested that the parties can deal with it through the internal communication mechanisms and procedures such as the grievance or disciplinary procedures. The conflict is then also 'named' by, for instance, by referring to a specific issue or incident. During this process the one party 'claims' something from the other party – states what is required for resolution of the conflict, such as reinstatement. The other party (often the employer) is 'blamed' for the dispute. Mischke (1997a:10-13) referred to this process as the transformation of conflict and identifies a number of factors that relate to the intensity of the grievance or dispute and those factors that relate to the manner in which conflict transforms and is formalised into a dispute. **Figure 4.1** will be discussed in detail and the process of transformation of conflict will be explained by means of a case study in section 4.4.

Before addressing the escalation and formalisation of conflict, the term conflict should be defined and understood.

4.2 Defining conflict

Nel *et al* (1998:4) stated that conflict is central to labour relations and that the simultaneous existence of mutual and conflicting interests constitutes the basic problem in labour relations. The parties are required to balance conflict with co-operation.

Deery *et al* (1997:103) contended that industrial conflict could only be understood by examining all its manifestations and behaviour. Strikes and work stoppages are more spectacular manifestations of conflict but the total range of behaviour and attitudes of employers as well as employees, should be explored and considered as forms of conflict that should be dealt with.

Likert and Likert (1976:7-8) defined conflict as "the active striving for one's own preferred outcome which, if attained, precludes the attainment by others of their own preferred outcome, thereby producing hostility." They also differentiate between two

kinds of conflict namely *substantive* conflict, which is rooted in the substance of the task and *affective* conflict, which is defined as "conflict derived from the emotional, affective aspects of the interpersonal relations". The challenge is seen in handling the substantive conflict successfully "even in situations where the presence of affective conflict makes the task more difficult" (Likert and Likert, 1976:8).

Israelstam (2002:6) attributed the high rate of referrals of disputes to the CCMA to unprofessional management and the fact that managers often do not know and understand labour laws and lack the skills and ability to implement discipline in an unemotive and fair manner. The current system of dispute resolution not only requires strict adherence to the guidelines in Schedule eight of the LRA (66/95) but also requires the parties to distance themselves emotionally from the conflict and the dispute. This view is in contrast to Likert and Likert's definition. Furthermore, years of experience as a commissioner have convinced me that conflict and disputes are highly emotive issues for both the employer and the employee. This should be recognised by those involved in disputes and dispute resolution. Managing conflict and dealing with disputes are not just merely following a set of rules and guidelines as prescribed by Schedule eight of the LRA (66/95) in a fair and unemotional manner. Numerous changes in the workplace, however, need to take place before that point is reached, if ever.

Pienaar and Spoelstra (1991:178-206) did not attempt to define conflict as such but they clearly stated that "Conflict is a prerequisite for negotiation". They defined *dysfunctional conflict* as "...any confrontation or interaction ... that harms the negotiation process or hinders the achievement of the goals of both parties..." (Pienaar and Spoelstra, 1991:180).

Anstey's (1991:4) definition of conflict includes aspirations that cannot be achieved simultaneously, perceived divergence in values (latent conflict), the use of power (manifest conflict) to deal with the conflict and protection of self-interests. Anstey defined social conflict as follows:

Conflict exists in a relationship when parties believe that their aspirations cannot be met simultaneously, or perceive a divergence in their values, needs or interests (latent conflict)

and

purposefully employ their power in an effort to defeat, neutralise or eliminate each other to protect or further their interests in the interaction (manifest conflict.).

Anstey's definition of conflict will be used to identify the key elements of conflict and where necessary reference will be made to the work of other authors in this regard.

4.3 The elements of conflict

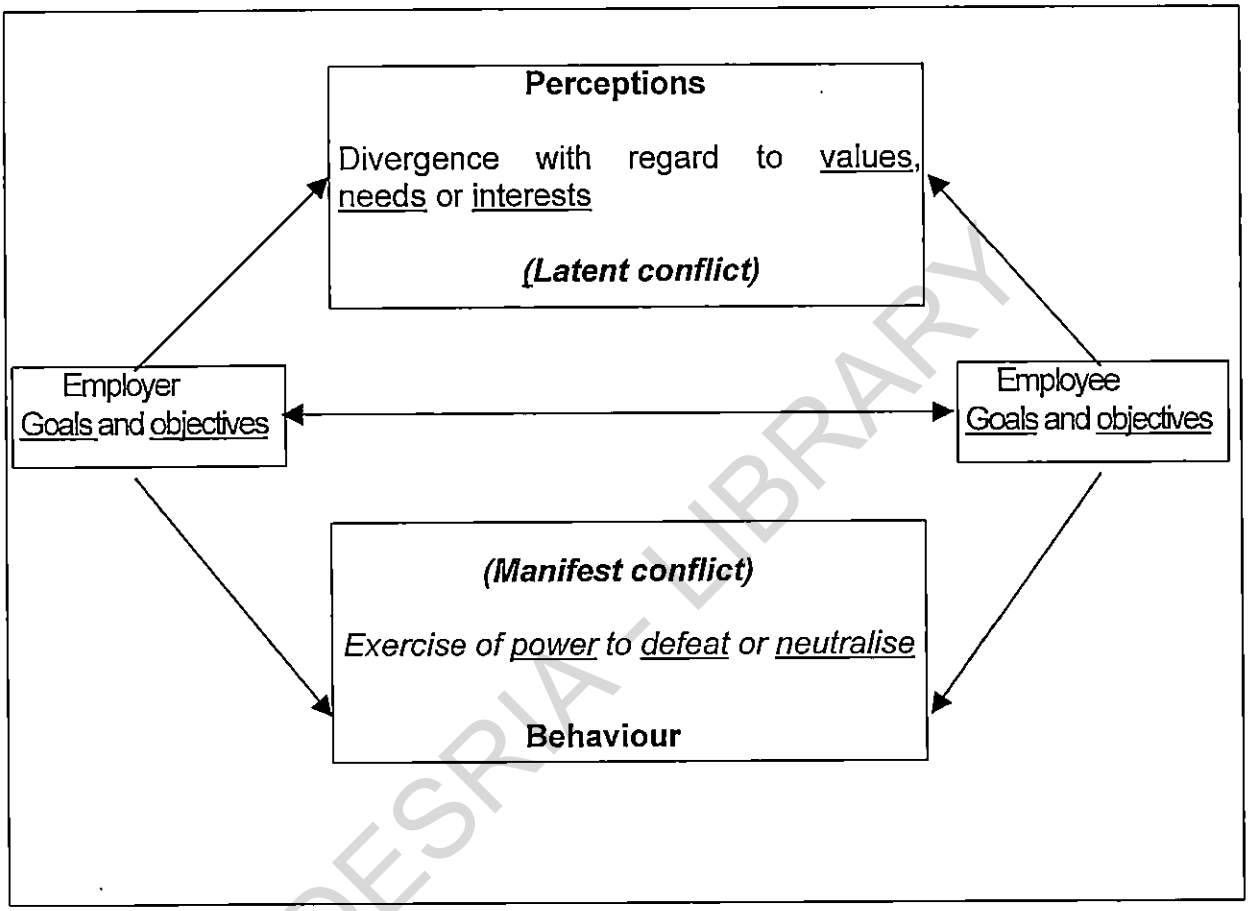
In analysing conflict in workplace context, it is important to understand the various elements of conflict but also to understand what the effect of the workplace and the parties to the relationship are on the dynamics of conflict. **Figure 4.2** contains the elements of conflict as defined by Anstey (1991:4) and indicates that there is a relationship between the employer and the employee. Their perceptions of a divergence between their own and the other party's values, needs and interests create fertile soil for the existence of latent conflict. **Figure 4.2** further explains that when these parties employ their respective power in order to defeat or neutralise the other party to protect or further their own interests, then the conflict manifests in the behaviour of the parties.

- *Conflict only arises in a relationship*

This means that the parties have to be in relative proximity to each other for a clash of beliefs or perceptions to develop. This applies to any relationship, be it a personal relationship, professional relationship or political relationship. Marx analysed the social world by looking at people's relationships in the economic order, or the world of work. He identified the economic power that employers had over their employees and also the conflict that arose due to the exploitative nature of the labour relationship (Cuff and Payne, 1981:59).

With the increased emphasis on worker rights and continued regulation of the workplace, the goals of the employer (profit motive) and the goals of the employees (higher wages, job security) seem to be drifting further apart with an increased potential for workplace conflict.

Figure 4.2: The elements of conflict



Source: Researcher, 2003

- *Conflict is not always visible (latent conflict)*

Latent conflict refers to conflict that is dormant or concealed. It might seem as if there is no conflict but usually the conflict is there. It is only due to circumstances that it has not manifested. This latent conflict is due to the perceptions of the parties regarding the divergence in their values and needs (Anstey, 1991:4). Nel *et al* (1998:147) described latent conflict as "...simply potential for conflict". He also identified another phase, "awareness of conflict" where the parties realise there is conflict but nothing is being done about it.

❋ *Perceptions about the same interests*

Conflict only arises when parties have different perceptions about the same thing. This means that there is a perceived clash of aspirations and their perspectives intersect at some point (Tustin and Geldenhuys, 2000:110). Nel *et al* (1998:147) referred to this as "the experience of conflict" where there is an intense sense of something that is going to happen. Emotions are building up and any one of the parties might consider creating an incident of confrontation.

❋ *Manifestation of conflict*

When conflict reaches a point beyond what is perceived as tolerable conflict, it becomes manifest conflict. This is visible conflict where a specific issue can usually be **named** and the aggrieved party usually **claims** something from the other party, who is to be **blamed** for the conflict. It is sometimes easier to deal with manifest than latent conflict. This process of naming, claiming and blaming is according to Mischke (1997a:7) a prerequisite for dealing with manifest conflict.

❋ *Mechanisms to deal with conflict*

Once the conflict has become visible (manifest conflict) certain mechanisms and procedures must be available to deal with conflict in a simple and expeditious manner. Conflict between employers and employees has been institutionalised in terms of an agreed upon set of rules and procedures (Haralambos, 1982:263). Disciplinary penalties ought to be applied progressively; namely that a lighter sanction should be applied in the case of a first offence and graver sanctions should be reserved for repetition of transgressions (Grogan, 1999:96). If these mechanisms and processes are used, and they are used effectively, it would mean that the conflict can be resolved and the relationship can continue. Conflict at this stage becomes a grievance because the parties can define their problem and claim what would resolve the grievance. At this stage the parties might start considering using their power to protect their interests (Mischke, 1997a:13).

The meaning of the 'grievance phase' should also be discussed. The grievance refers to a specific stage of conflict formalisation. The meaning of this phase of conflict for the employee is that it is an opportunity to formally communicate to the employer, through recognised internal mechanisms, the existence of a problem (conflict) that needs to be addressed. Finnemore (1998:195) referred to the grievance procedure as 'the opposite' of the disciplinary procedure.

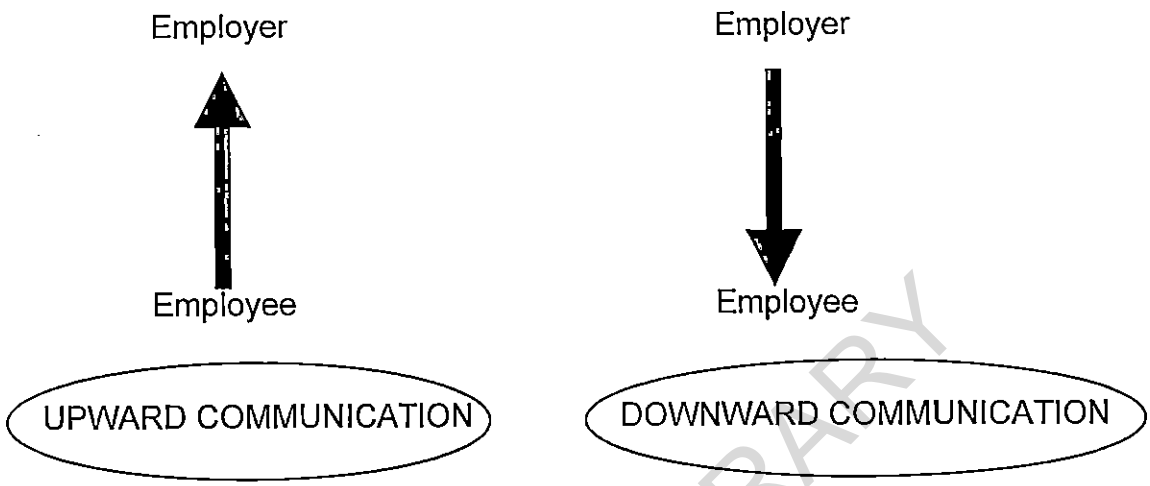
The meaning of this grievance phase for the employer is the same, namely that the opportunity to communicate to the employee, in a recognised formal manner, the existence of a problem (conflict) that needs to be addressed. In the workplace context, however, the mechanisms for dealing with this stage of conflict are different. The employer will use the disciplinary procedure and the employee would use the grievance procedure to communicate the existence of the problem. It is indicated in **figure 4.3** that grievance and disciplinary procedures serve the same purpose at the grievance stage of conflict, namely to communicate to the other party the existence of conflict to be dealt with through specific formalised procedures.

Nel (1997:79) referred to 'downward communication' and 'upward communication' and also to 'two-way' and 'one-way ' communication but fails to include or specify the grievance and disciplinary procedures in his discussion of 'methods of formal communication'.

- *The formalisation of conflict*

If the conflict cannot be resolved through the available internal mechanisms and processes, it must be referred to a third party, usually outside of the organisation. In order to be referred to an outside institution such as the CCMA, private dispute resolution bodies or bargaining councils, there are a number of prerequisites that have to be met. The dispute must be formulated properly according to the LRA (66/95) and referred in the manner and according to procedures spelled out in legislation. These procedures usually take time and Mischke (1997a:13) made it clear that conflict becomes more formalised as time goes by and if conflict is left unresolved.

Figure 4.3: Grievance and disciplinary procedures as methods of upward and downward communication in the workplace



Source: Researcher, 2003

- *The effect of time*

As conflict is transformed into a grievance and then into a dispute, the degree of formalisation of the issues increases. A grievance is more formal than a mere complaint or a grudge. By the time the conflict becomes a dispute, it has been intensified by aggravating factors (Mischke, 1997a:13). Aggravating factors, according to Anstey (1991:43) refer to the fact that there are various intervening variables which serve to aggravate (or moderate) the actions of the parties involved. In the absence of proper conflict regulation mechanisms, or if these mechanisms are insufficient to countervail the influence of aggravators, conflict can be expected to grow in intensity and size (Anstey, 1991:51).

- *The use of power*

Power plays a pivotal role in transforming latent conflict into manifest conflict. Power may be defined as "...the capacity to bring about desired outcomes, or to change the position or stance of another party" (Anstey, 1991:114). The modern view of power is that it is not a possession, but something that can only be

exercised (Mischke, 1997a:5). The grievance and disciplinary procedures have been institutionalised in organisations to effectively deal with conflict at a specific point in the process of escalation. It can only be used effectively after the proper manifestation of conflict. Implicit in these procedures should be a specific authority and legitimacy to ensure the effective use and application of these procedures. Buckley (1967:176) linked the concepts of power, authority and legitimacy to the concept of 'control'. He referred to Robert Bierstedt's definition of 'power' as a 'latent force', 'force' as 'manifest power' and 'authority as' institutionalised power'. This is seen by Buckley (1967:176) as an attempt to equate authority and power by way of institutionalisation.

Mischke (1997a:5) contended that the notion of a dynamic power relationship between employer and employee has been well established. However, he stated that power is not a consequence of the relationship but amounts to the very nature of that relationship. He furthermore viewed power as not only transforming latent conflict into manifest conflict, but saw conflict itself as rooted in an ever changing power relationship. It can be deducted that power is conflict and conflict is power (Mischke, 1997a:5).

4.4 Analysis of the transformation of conflict

Some of the elements of conflict that were mentioned above are relevant to the process of transformation of conflict. In the above section the concepts of naming, claiming and blaming have been used and reference was made to the effect of time on conflict. The difference between a grievance and a dispute was also explained. These concepts will now be discussed in an analysis of the transformation of conflict.

Mischke (1997a:7) made it very clear that conflict cannot be eradicated but that it needs to be managed instead. The well-known and institutionalised procedures for the management of conflict are primarily the grievance and disciplinary procedures.

From **figures 4.1** and **4.2** it is clear that conflict is inherent but latent in all relationships even if the conflict has not manifested and that a trigger factor is

usually needed to transform conflict from being latent to manifest in the workplace. It was pointed out that if conflict is not dealt with properly at an early stage that it then escalates and becomes more formalised over time due to the fact that specific procedures and mechanisms should then be used to deal with the conflict in an appropriate manner. The grievance and disciplinary procedures are such mechanisms available to deal with the conflict.

The grievance procedure can be viewed as an instrument that employees can utilise to bring their grievances to the attention of the employer. In the same manner the disciplinary procedure can be seen as a mechanism for use by management to bring their "grievances" to the attention of the employee. The use of the grievance and disciplinary procedures is an indication that the conflict has reached a more formalised level and that it should be dealt with in a more formalised manner.

At this point the naming, blaming and claiming become relevant since the wronged party, usually the employee, must be specific about the nature of the grievance. **Naming** the dispute refers to identifying the dispute in terms of the LRA (66/95). It is not only fair to the employer to be specific about what the grievance is all about, but it is also a prerequisite for the proper referral of the dispute to the CCMA. It is usually the company that is blamed for the dispute even though the unfairness might have been due to the **actions** of a human resources manager or a supervisor within that company. The **claim** is usually against the company and the new LRA (66/95) is also in certain instances - specifically with regard to unfair dismissal - prescriptive with regard to what can be claimed for substantive or procedural unfairness.

The more formalised the conflict, the more careful it should be dealt with as the damages to the parties increase. If the conflict is detected in a latent phase it can be dealt with through proper communication, motivation, and sensitivity training (Gerber *et al*, 1998:331). Once it has reached the grievance phase it usually involves company time and money to resolve the grievance since management is involved in the procedure and inquiries. Both the disciplinary hearing and the grievance enquiry have certain prerequisites in terms of procedures that must be followed. They involve a lot of paper work with regard to notices that must be sent out timeously, minutes that must be typed and records that must be kept (Nel,

1997:212-237). When a dispute is referred to an outside institution such as the CCMA, it becomes highly formalised in that a specific form must be used, information must be provided, certain time limits must be followed, etc. The process of dispute resolution then also becomes costly since offering to pay compensation at the conciliation phase might be the only way of solution preventing the dispute from going to arbitration. The impression is then that the employer is being punished (Israelstam, 2002:6).

The escalation of conflict can best be explained by way of a case study.

Case study: Escalation of conflict

A salesperson had been very valuable to the organisation for five years and she received numerous awards for best salesperson. She made good money and was generally too focused and too busy to complain. She worked under three sales managers in her term of employment and generally got on well with them. However, with the last sales manager she experienced problems.

She also reached a stage in her life where the travelling involved in selling lost its appeal and she wanted more job security. With the appointment of yet another sales manager from outside the organisation she enquired why she had never been promoted to the position of sales manager. She consulted the company policy - which was a well hidden document in this organisation - and found out that they had a policy of internal promotion.

She was advised by the human resource officer to use the grievance procedure to air her dissatisfaction. The company, however, ignored her grievance since the new sales manager had already been appointed. At this point the employee referred the dispute against the company to the CCMA. The employer was accused of being guilty of an unfair labour practice relating to the promotion, demotion or training of an employee under Schedule seven, item 2(1)(b) of the LRA (66/95) (this was before its amendment in 2002). This term 'unfair' implies failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended. The employee wanted to be promoted according to the company procedure.

This dispute was resolved during conciliation at the CCMA due to the fact that the company agreed to restructure the sales department to create a managerial position for her. The fact that restructuring was possible in this instance was fortunate but the resolution of this dispute was nevertheless costly to the company.

Analysis of the case study

Latent conflict:

The conflict of interest was inherent in the relationship. The employer did not think of promoting the employee since her sales figures were so good. It was not in the company's best interest to promote her to a managerial position. She wasn't aware of the possible conflict of interests while the circumstances (she liked the travelling and she was still young) suited her. The fact that the company did not recruit or promote according to company procedure could be seen as an aggravating factor.

Trigger factor:

The trigger factor in this case study could have been the personality clash between the employee and the last sales manager, which gave rise to dissatisfaction with certain aspects of the work, such as the travelling and the age difference between herself and the rest of the sales team. Another trigger factor was the discovery of the company policy with regard to internal promotions, which was not followed in her case. She was able to 'name' the conflict when the circumstances that she could normally deal with changed. Something that she did not previously perceive as bad or injurious was transformed into a 'perceived injurious experience' (PIE) (Mischke, 1997a:7).

Manifestation of the conflict:

From the company's perspective this conflict manifested when the employee enquired about the position of sales manager as well as the company policy with regard to promotion. The human resources officer immediately realised that a

mistake had been made and he informed the employee to lodge a formal grievance. This conflict also manifested in her sales figures dropping and her general attitude towards her employer becoming increasingly negative.

The grievance phase:

The purpose of a grievance procedure (Nel et al, 1998:113) is to handle official work related complaints formally. It acts as a safety valve to reduce tension and could be seen as a moderator of conflict (Anstey, 1991:14). The lodging of the grievance entailed that an appropriate form must be used and that the company had to follow specific procedures to deal with the conflict. The fact that the company did not use this opportunity to resolve the grievance meant that the conflict escalated and formalised even further.

Dispute:

In order to have the dispute resolved, the employee had to follow the next step, which was to refer the dispute outside the company to (in this instance) the CCMA. The dispute was referred and the CCMA had 30 days to deal with the dispute. Receipt of the CCMA referral form (Form 7.11) by the employer, confirmed the fact that a dispute was in the hands of the CCMA. From that point in time, the employer had no option but spend time and money on dealing with this dispute. Among others, they obtained the services of a labour lawyer to assist them in assessing their position. The human resources manager as well as the human resources official had to prepare documentation for the case and had to take time off from the office to attend the conciliation.

The formalisation of the conflict:

A grievance is more formal than a mere grudge or complaint, and a dispute is more formalised than a grievance. By the time the conflict becomes a dispute, it has been shaped by a number of factors, which will determine the nature of the dispute and consequently, the nature of the remedy that is sought to resolve that dispute. The

factors that play a role in the formalisation aspects of the transformation process include the following:

- *The parties to the dispute: Both the employer and the employee involved other parties in the conflict. The employee sought advice from a labour lawyer and discussed the incident with colleagues in an attempt to accuse the company of previous unfair conduct, which would strengthen her case. The human resources department also involved their labour lawyer and the industrial relations division was consulted.*

- *The fact that the employer did not follow the internal grievance procedure properly lead to the presentation of the employer as being not only unfair in the appointment of the new sales manager but also in their way of dealing with their employees. The employee was persuaded by a family member - who was a labour consultant - to refer the dispute to the CCMA. The employee demanded a promotion at that point and not a mere explanation.*

- *Choice of mechanisms: The way in which a grievance is dealt with internally will have an impact on the way in which a dispute is formulated and referred.*

  Influence of others: An employee may be unwilling to formalise a matter into a grievance or a dispute, but may be persuaded by others to do so, for instance by a co-worker or shop steward. In this instance, the human resource officer told the employee to use the grievance procedure, whereas a family member persuaded her to refer the dispute to the CCMA.

- *The remedy sought: What a party wants will affect the manner in which the party formulates the terms of the dispute. The employee in the case study clearly did not trust that the grievance will be resolved by the internal procedures and had no alternative but to refer the dispute to the CCMA.*

This case study was used to illustrate the practical application of the scheme provided by Mischke (1997a:10-13). The mechanisms in the workplace to deal with conflict are primarily the grievance and disciplinary procedures and it is clear that if they are not properly used, the conflict will continue to escalate. There are various reasons why they might not be properly used. Small and medium sized employers often do not have these procedures in place. Employees are often scared of being victimised because they will be seen as troublemakers if they use the grievance procedure. Disciplining an employee is usually an unpleasant task and employers are reluctant to follow proper disciplinary procedures. The result is that more disputes land up in the CCMA and when they do, one of the parties is usually penalised for not following the proper procedures for internal conflict resolution.

Nel *et al* (1998:147) added two additional phases of conflict. The "aftermath of the conflict" refers to the negative or hostile feelings between parties after conflict has manifested and even resolved. These feelings could give rise to another conflict episode if not managed correctly. "Conflict aftercare" is the term used by Nel *et al* (1998:147) to refer to those efforts aimed at preventing a recurrence of conflict situations.

4.5 Dimensions of conflict

4.5.1 The legitimacy of conflict

Himes (Anstey, 1991:5) pointed out that all societies struggle with tensions between conflict and co-operation in an ongoing way. Over time, however, certain norms develop with regard to what can be perceived as acceptable levels of conflict and what cannot be tolerated. A society then sets rules to contain and define these acceptable levels of conflict. The South African society and workplace have been fraught with conflict. The drafters of the new LRA (66/95) have also foreseen that conflict must be dealt with. Mischke (1997b:101) stated that the success of the LRA (66/95) lies in the ways in which the employers and employees will conduct their industrial action in terms of the new rules that have been established. The LRA (66/95) contains a large number of references to dispute resolution in some form or another. Even though the intention was to make labour relations less adversarial, the drafters were under no illusion that dispute resolution procedures will still be

needed. The issue of acceptable conflict behaviour is thus raised, and the question of whose standards will be applied to define legitimate or acceptable conflict.

4.5.2 Functional or dysfunctional conflict

Simmel (Ritzer, 1996:210) did some early work on the functions of social conflict. Coser expanded on this work by arguing that conflict might serve to solidify a loosely structured group. He developed a set of propositions regarding the functions of conflict, which is regarded as a work of major significance even in recent times (Anstey, 1991:6). He argued that no group can be entirely harmonious for then it would be devoid of process and structure. Conflict is by no means only disruptive, and conflict as well as co-operation have social functions.

4.5.3 Destructive and productive conflict

Conflict is usually perceived as 'bad' or dysfunctional because it is seen as an indication that something is wrong and needs to be fixed or that conflict has largely destructive consequences (Lewicki *et al*, 1994:6). Conflict becomes destructive when processes of conflict escalation result in mutual attacks and efforts to destroy each other, misjudgements and misperceptions and situational entrapment in which conflict becomes magnified. Productive conflict on the other hand is characterised by the arousal of a problem-solving motivation, triggers creativity and innovation, stimulates new ways of interacting and promotes inter-party relations in terms of trust, sensitivity and understanding (Anstey, 1991:5). The issue should not be about the functionality or dysfunctionality of conflict, but about how it is handled. Mischke (1997a:15) stated that conflict is to be managed and that there is a path from conflict to a dispute that should be understood in order to effectively deal with conflict.

4.5.4 Causes of conflict

Anstey (1991:13) referred to various sources of conflict such as differing goals, structural imbalances (class conflict), threat to important values, scarce resources, communication/information issues, ambiguity and co-ordination.

Nel *et al* (1998:147) specified the causes of conflict between management and labour, and added to the list given by Anstey above by including different value systems and ideologies, the quasi-political nature of trade unions, disrespectful treatment of group representatives, uncertainties about responsibilities and roles, personality differences, job dissatisfaction and low levels of trust.

Tustin and Geldenhuys (2000:107) made a distinction between three main causes of conflict namely distributive causes, structural causes and human relations causes. These three categories will be used to discuss the causes of conflict.

4.5.4.1 Distributive causes

Anstey (1991:15) saw differing goals as the most obvious source of conflict especially where there is an interdependence in the relationship between parties and a scarce resource for which they are competing. This means that neither party can achieve their goals without the other party. For instance, management seeks to reduce the cost of production and workers seek to maximise returns for their labour (wages). The scarce resource factor obliges a conflicting engagement between parties, as their needs cannot be met elsewhere. Tustin and Geldenhuys (2000:107) referred to the allocation or distribution of rewards for the performance of work. The initial stimulus for the conflict may not necessarily emerge from within the organisation but from market forces such as in the case of retrenchments, which are common causes for disputes referred to the CCMA.

Pienaar and Spoelstra (1991:9) described distributive negotiation in a situation where there are differing goals and scarce resources as negotiations where one party attempts to 'win' for itself, regardless of what happens to the other party. There is an attempt to seek control over the other's finances, resources or associations. The actions will be directed at the other party rather than at problem solving, and will be offensive rather than defensive and manipulation can occur. The better alternative is 'integrative negotiation' where the parties attempt to reach a win-win outcome to the conflict.

4.5.4.2 Structural causes

Tustin and Geldenhuys (2000:108) referred to structural causes of conflict as the problems that emerge from the interactions brought about by the formal structures of the organisation. These are usually the result of failure to structure the organisation properly in times of change. Legislative changes are forcing organisations to change. The organisations are so busy adhering to the legal requirements that organisational change and well-structured change management are neglected. Employees have to operate in uncertain circumstances, which leaves them de-motivated and less productive than they would have been, had the appropriate structural aspects been dealt with. Mischke (1997b:15) referred to structural matters such as 'who has the right to control what and whom'? What resources are to be applied and what processes should be used in which circumstances? An example is the question of who should deal with the disciplinary hearing. A case study could be mentioned where the top management delegated their role in the disciplinary and grievance processes to junior levels of management. Where the employees objected to this arrangement it was merely pointed out that top management is allowed to do that in terms of the grievance and/or disciplinary procedure. However, these have in many instances not been negotiated with the employees or the unions. This attitude did not help to address the conflict.

Authority is also part of the structural causes of conflict. Where authority is resented it could lead to conflict. Some managers could be more autocratic than others could. On the other hand, too much reliance on participation may also stimulate conflict as participation encourages the promotion of differences (Tustin and Geldenhuys, 2000:108).

Status inconsistencies might also develop, where employees experience the difference between themselves and management, with managers having more flexibility and far higher remuneration. This could lead to conflict.

Unclear lines of responsibilities are also a cause of conflict. Instead of dealing with the issues of conflict the responsibility to deal with conflict is passed from one

person to the next. To deal with conflict is in essence an unpleasant job. Managers not only do not deal with it timeously but also pass it on to other levels of management. This allows the conflict to escalate over time.

4.5.4.3 Human relations causes

Diversity in skills and abilities, differences in value systems and a combination of personalities in an organisation hold potential for conflict. Physical separation and language differences can create communication barriers and lead to conflict. Other human resources causes include role incompatibility, environmental stress and intra-personal conflict such as frustration that occurs when a person's drive is blocked by either an overt or covert barrier (Tustin and Geldenhuys, 2000:111).

This conflict is often the result of a communication breakdown. According to Anstey (1991:40) companies are generally reluctant to share information with trade unions. The lack of shared legitimate information then gives rise to power struggles and contributes to high levels of mistrust in relationships. This also reduces the parties' capacity to understand each other's circumstances and power realities. Instead of differences being sorted out on the basis of common data they are fought out on the basis of guesswork, assumptions and incorrect information.

4.6 Conclusion

This chapter emphasised that there are a few prerequisites needed for the successful handling of conflict. The first prerequisites is that conflict should be accepted as something inherent in any relationship and that conflict is not necessary negative and destructive. The second prerequisite is that there should be proper mechanisms and procedures to deal with conflict at the various stages. The third prerequisite is that these procedures should be used properly by well-informed individuals. The fourth prerequisite is that conflict should be dealt with at the earliest stage possible.

The problem statement of this study (Chapter one) highlights the large number of individual unfair dismissal disputes that are referred to the CCMA. The drafters of

the new Labour Relations Act (66/95) were well aware of the fact that, although there is a move away from the adversarial labour relationship, that dispute resolution procedures will be needed to deal with the conflict that are inherent in the labour relationship. Conflict cannot be allowed to drag on and must be resolved as quickly as possible. The parties should either be in a position to resolve the conflict themselves or be assisted by a third party intervening. If the conflict can be properly resolved within the organisation then it would not reach the point of a formal dispute to be dealt with at the CCMA.

In the next chapter (Chapter five) the mechanisms to deal properly with conflict within the organisation, namely the grievance and disciplinary procedures, will be discussed in detail. Chapter six will be allocated to a discussion of the external mechanisms for dispute resolution such as the CCMA, and the problems experienced by the system.

CHAPTER 5

INTERNAL CONFLICT RESOLUTION MECHANISMS (GRIEVANCE AND DISCIPLINARY PROCEDURES)

5.1 Introduction

The main problem investigated in this study, as stated in Chapter one, is the high rate of disputes referred to the CCMA. Chapter two deals with the conceptualisation and theoretical approach to investigating this topic. Chapter three uses modern systems theory of industrial relations to put dispute resolution in perspective and explains how the labour relations system provides the framework for the settlement of disputes. Chapter four analyses conflict within an organisation and shows how it escalates to become disputes. Chapter five will now be focusing on the internal dispute resolution mechanisms within the organisation as a method of dealing with conflict. The function and purpose of the disciplinary and grievance procedures will be discussed. The requirements of Schedule eight of the LRA (66/95) will then be discussed and it will be indicated how problems in the internal procedures result in to punitive measures during CCMA proceedings.

5.2 Procedural and substantive fairness

In Chapter one it was mentioned that individual unfair dismissal cases form 70% of the cases referred to the CCMA. The development of the unfair dismissal concept needs to be discussed to enable a better understanding of the internal and external conflict resolution mechanisms.

Le Roux and Van Niekerk (1994:1) held that the rapid transition from the common-law regulation of termination of employment, to a jurisprudence of unfair dismissal is perhaps the most remarkable feature of South African labour law reform. The emerging jurisprudence, because of the development of the law of unfair dismissal, revolutionised policies and procedures on termination of service in the workplace.

Disciplinary codes and procedures were introduced into workplaces that were previously regulated by dismissal at managerial whim. These codes and procedures reflected the new norms that emerged from the courts. The old industrial court established the basic proposition that a fair dismissal has both substantive and procedural elements. These two principles have formed the basis for the development of sophisticated and complex jurisprudence (Le Roux and Van Niekerk, 1994:3).

Basson *et al* (2000:121) provided a summary by explaining that substantive fairness relates to the reason for the dismissal and emphasised that the employer must ensure that the reason for the dismissal is both valid and fair. Procedural fairness deals with the manner in which an employee is dismissed, which will be specific to the type of dismissal.

5.2.1 Procedural fairness

According to Van Niekerk and Le Roux (1997:51) one of the most important changes introduced by the LRA (66/95) relates to **procedural fairness** in dismissal cases as contained in Schedule eight of the LRA (66/95), the "Code of Good Practice: Dismissal" (hereafter referred to as the Code). Although the Code deals mainly with the procedures to be followed before a dismissal, it is based on the principles of fairness, which is required in all disciplinary and grievance procedures.

According to section 188(2) of the LRA (66/95) fairness should be determined by taking the Code into account. This Code, according to Du Toit *et al* (1999:378) is intentionally general and it expressly sanctions departures from its norms in appropriate circumstances. Its intention was only to provide a set of guidelines and not to impose a duty on the employer to follow it. However, in terms of the LRA (66/96) the employer has to prove that the procedures followed before the dismissal was fair. This onus of proof on the employer is a strong motivation to rigorously apply the Code in any disciplinary action. The CCMA proceedings at the conciliation and arbitration phase have also given the Code more weight, since the guidelines in the Code not only form the basis for "reality testing" during the conciliation phase but are also used in arbitration deliberations.

Commissioners do not appear to use much discretion when deciding whether an employer has followed fair procedure. Theron and Godfrey (2001:42), for instance, found that commissioners do not in general treat small and medium sized employers differently from large organisations with regard to procedures, even though one would expect the size of an enterprise to be a factor when making awards regarding procedures.

The one problem in this regard is that, on the one hand, commissioners are expected to be flexible when applying the guidelines of the Code, but on the other hand, the arbitration award is expected to withstand the scrutiny of the Labour Court when the commissioner is taken on review (Du Toit *et al*, 1999:378). Le Roux (1998:63) also highlights the fact that the new constitutional dispensation entitles a citizen to a decision in accordance with the law – unless they voluntarily elect arbitration. Since CCMA arbitration is not a voluntary process, when the employer is summonsed to appear at arbitration, he or she may expect that the law will be applied correctly.

5.2.2 Substantive fairness

Substantive fairness is directly related to the actions and transgressions described in the company's disciplinary code. Substantive fairness refers to the reasons for the disciplinary action, for instance dismissal. Substantive fairness refers to the reasons for dismissal and these reasons are clearly spelled out in the Code as being misconduct, incapacity due to poor work performance, incapacity arising from ill health or injury, operational requirements and dismissal of striking workers (see also Le Roux and Van Niekerk, 1994:3). The latter reason, however, has always been contentious. The criteria for determining substantive fairness in each of these cases are spelled out and the procedures – which are different for each of these categories – are explained in detail (Du Toit *et al*, 1999:377).

According to Nel *et al* (1998:126) three principles apply when considering substantive fairness. The employer has to comply with common-law principles in the absence of any rules or agreement with the workers. It should be established if the employee was aware of the consequences of his or her action. It should also be established that the employee was aware of the rules and regulations. The

employer's circumstances such as losses due to repeated theft or disobedience by workers should also be taken into consideration.

Other grounds for dismissal are dealt with in Convention 158 and Recommendation 166 of the International Labour Organisation. These instruments explicitly provide that it will be unfair to dismiss employees for certain specific reasons, for instance because they belong to a trade union or take part in its activities, or when the dismissal is due to any form of discrimination.

5.2.3 Relevance of substantive and procedural fairness for the internal mechanisms and procedures

Although the Code deals mainly with dismissals, the termination of the employment relationship should be seen as the result of unresolved conflict as explained in Chapter four. Finnemore (1998:205) also describes it as the ultimate sanction to be imposed in the range of penalties for misconduct. When a dismissal is disputed, the third party will have to take into consideration the fairness of the dismissal and this fairness, as explained above, is based on substantive and procedural fairness.

Any conflict situation that leads to dismissal has the potential to become a dispute. The fact that the bulk of the caseload at the CCMA is unfair dismissal disputes, is confirmation of this contention. If the conflict is handled according to the internal disciplinary procedures and also by taking the Code into consideration with regard to both the substance and the procedure, it could be expected that fewer disputes would be referred to the CCMA. The concept of fairness should be reflected in all aspects of the internal conflict mechanisms, even though the Code only deals with fairness of dismissals. These internal mechanisms are considered in greater detail in the rest of this chapter.

5.3 Internal mechanisms

In the previous chapter (section 4.3) it was pointed out that the grievance phase of conflict forms a very important part of the process of conflict resolution and it was emphasised that a grievance and a dispute should not be isolated from one another,

but should be seen as inter-linked. A commissioner at the CCMA or a mediator is confronted with a formal dispute and the actual cause of the dispute - the grievance or trigger - could be totally overlooked. The procedures and skills needed to resolve a grievance are different from the procedures and skills to deal with a dispute.

The mechanisms within the organisation to deal with **conflict** are the grievance and disciplinary procedures and the mechanisms to deal with **disputes** are the conciliation and arbitration processes at the CCMA, bargaining councils or private dispute resolution institutions.

The **grievance procedure** can be referred to as an instrument in the hands of the employees to inform management if there is a problem that needs to be addressed and it allows management to respond to the grievance in an appropriate manner (see, for instance, the case study in section 4.4). This grievance procedure should be contained in a document, which should be handed to the employee on his or her appointment in the organisation, and he or she usually signs that he or she has received a copy.

The **disciplinary procedure,** on the other hand, is a mechanism in the hands of the employer to inform the employee that there is a problem with regard to his or her conduct. It is also fair to not only inform the employee that there is a problem but also to allow him or her to address the problem. The Code enjoins employers to adopt disciplinary rules that establish the standard of conduct required of their employees. Disciplinary rules are intended to create certainty and consistency in the application of discipline. The Code endorses a corrective or progressive approach to discipline (Du Toit *et al*, 1999:378-380). This entails that efforts should be made to correct the employee's behaviour through a system of graduated disciplinary measures such as counselling and warnings.

In Chapter four (**figure 4.3**) it was explained that a grievance amounts to upward communication from the employee to management, whereas discipline is downward communication, from management to the employee. Finnemore (1998:195) described the grievance procedure as the opposite of the disciplinary procedure. In the grievance procedure, the employee is dissatisfied with something that the

employer has done and in the disciplinary procedure, the employer is dissatisfied with something that the employee has done.

Underpinning these two internal procedures is a sophisticated network of jurisprudence. As mentioned in Chapter one, most of the cases referred to the CCMA deal with individual unfair dismissals. The development of the law of individual unfair dismissal by the South African industrial court introduced new policies on the termination of employment. Disciplinary codes and procedures and retrenchment procedures were introduced in workplaces previously regulated by "dismissal at managerial whim" (Le Roux and Van Niekerk, 1994:3). The internal mechanisms and procedures have to be guided by the principles established by the courts and the guidelines contained in the LRA (66/95), both as regards procedural and substantive fairness.

5.4 Grievance procedures

One of the aims of the LRA (66/95) is to simplify the dispute resolution process and to enable resolution at the lowest possible level. If a grievance procedure runs its course without any agreement being reached, a dispute arises. Gerber *et al* (1998:354) described the grievance procedure as the most important institutional system that can be used to support an organisation's labour relationship. If a grievance procedure does not exist in an organisation, then managers will not be aware of dissatisfaction or problems among the employees. If no grievances are brought to the attention of management, it does not mean that there are no grievances. It only means that the dissatisfactions are not mentioned or "manifested" (see section 4.4) and this could result in other non-productive behaviour such as absenteeism, high labour turnover and even industrial sabotage.

An effective grievance procedure is part of an organisation's total communications system. Both management and the employee should be made aware of the functionality of having a grievance procedure. Although management should be concerned with the prevention of grievances, they should not act in such a way that they negate the usefulness and relevance of the grievance procedure. The effort of preventing grievances should not be the only focus because then the grievance

procedure is perceived by management to be the result of failed preventative measures (Net *et al,* 1998:108-109). Employees might also have negative perceptions with regard to grievance procedures because of fear of being intimidated or victimised. The negative perceptions of both management and employees should be changed before the grievance procedure will be used to its full potential.

5.4.1 Defining a grievance

The definition of a grievance, according to Mischke (1997a:10) is a partly formalised expression of individual or collective conflict - usually dissatisfaction in respect of workplace related matters. Nel *et al* (1998:109) defined a grievance as an individual or group's official complaint or enquiry about a work-related situation. It is also seen as a perceived or an alleged breach of the conditions of the employment contract and/or the so-called "psychological contract". The psychological contract refers to the unwritten agreement between the employer and employee about the expectations they have of each other within the work situation. Finnemore (1998:195) defined a grievance as any dissatisfaction or feeling of injustice, which has been experienced by a worker or group of workers and has been brought to the attention of the employer. Such grievances could include low or unequal wages, working conditions, unfair treatment by a supervisor, discrimination, the terms and interpretation of a collective agreement, managerial policies and customs and practices in the work place (Mischke, 1997b:11).

Nel *et al* (1998:109) made a distinction between workers' problems and grievances. This is in line with the discussion in Chapter four (see section 4.4) about the escalation and formalisation of conflict and the distinction between conflict and grievances. A worker problem exists when symptoms indicate that something is wrong. These symptoms are not always easy to identify and can include things such as late coming, impatience and aggression, informal and/or sporadic go-slows, accidents, absenteeism, and poor performance. If these worker problems are not managed or dealt with properly, it could have negative effects on the labour relationship, and might lead to a grievance and eventually a dispute. Management should realise that it is important to channel workers' complaints by means of the

grievance procedure before they accumulate to such an extent that they manifest in these types of problems in the workplace (Nel and Van Rooyen, 1994:273).

5.4.2 Breach of the contract of employment

As stated above, Nel *et al* (1998:109) defined a grievance as a perceived or alleged breach of the conditions of the employment contract and/or the psychological contract. The **employment contract** is a bilateral agreement between the employer and employee. As soon as a person has offered his or her services to an employer in exchange for remuneration, and the employer has accepted the offer, a contractual relationship arises. This contract forms the basis of any employment relationship (Nel *et al*, 1998:109) and determines the nature and content of that relationship. The **psychological contract** is an unwritten agreement about the expectations the employer and employee have of each other in the work relationship. The employee has certain expectations of what he or she ought to receive, what he or she has to give, and how he or she is to be treated, whereas management also expects certain behaviour and performance from the employee. When the employee perceives that the employer is not fulfilling its side of the contract, then dissatisfaction arises.

Nel and Van Rooyen (1994:274) contended that there is an interdependence between the employer and the employee and this gives the employee the right to expect that the employer has an obligation to ensure that action is taken to deal with a grievance. The removal of the grievance involves the removal or adjustment of the perceived violations of rights in terms of the employment or psychological contract in an orderly, fair and equitable manner. The extent to which the adjustment is fair and equitable determines the maintenance of the interdependent relationship between the employer and employee.

5.4.3 Principles underlying a fair grievance procedure

Bendix (1996:350) highlighted the fact that there are no prescriptive steps that have to be adhered to at all costs in the establishment of the grievance procedure. However, he identified the general rules that have to be adhered to.

These rules allow the employee to bring his or her grievance to the attention of management, albeit in stages. The employee must be allowed representation, and management - at various levels - should consider the grievance and make a genuine attempt to address the cause. The process follows various stages – it might progress up the organisational hierarchy and time limits should be established for each step. It is important to stress the fact that the grievance will not be resolved before the employee indicates that it has been resolved. If the grievance remains unresolved, the employee has the right to refer the dispute to the CCMA or a bargaining council. Line management should deal with grievances, but the human resources function in the enterprise could be involved in an advisory capacity.

It is important to note that these are general guidelines that must be adapted for the circumstances of the specific organisation to which it will be applied. Consultation with a trade union or with employee representatives on these rules will enhance their legitimacy and acceptance in the workplace.

5.4.4 Steps in a fair grievance procedure

The following steps could be included in a grievance procedure:

The **first step** is usually to verbally bring the problem to the attention of the direct supervisor. The supervisor must investigate the matter and deal with it. If resolved at this stage, the fact that it has been resolved should be put in writing and sent through to the human resources department (Nel *et al*, 1998:115).

If not resolved the employee should put the grievance in writing - with or without the assistance of a representative - for the direct supervisor to submit to the next level of management. This would be seen as the **second step** in the grievance procedure. The next level of supervision should then investigate the matter as well as the concerns raised by the employee, specifically with regard to the fact that he or she was not satisfied with the solution given by the first line supervisor. Nel *et al* (1998:115) suggested a period of 24 hours to deal with the first level of the

grievance and another 24 hours to deal with the next level. However, in the current highly pressurised workplaces, these short time periods might be too ambitious.

The **third step** entails the written complaint together with the comments of the first line supervisor and the next level of management to be forwarded to the next level of management. This could be the head of the department. At this level the manager is obliged to make recommendations and put his or her findings in writing.

At the **fourth step**, a representative body such as a workers' committee - could be involved in the investigation. It could also be a formal, independent and impartial grievance committee. The shop steward or representatives from the trade union can form part of the investigative team. The human resources manager or a representative from the human resources department will also become involved at this stage if not involved already. Nel *et al* (1998:116) suggested that a ruling and written report to the interested parties must be made within three working days.

At the **fifth stage** the meetings will begin to take the form of negotiations involving senior members of management. The possibility of a dispute being declared is good at this stage and it is in everybody's best interest to attempt to resolve the grievance. This stage of the grievance procedure can also make provision for the involvement of a mediator or facilitator. If not resolved after this stage, then the dispute resolution process might be set in motion. The dispute might be referred to an outside body such as the CCMA for formal conciliation and a further adjudicative process.

The process as spelled out in these paragraphs will depend on the situation within the organisation and the number of levels of authority.

It is advisable to involve the employees - it could be through a union - in negotiating a grievance procedure, so that it can be seen to be legitimate in the eyes of the employees.

5.4.5 Prerequisites for effectiveness of the grievance procedure

The question could be asked as to why, if the grievance procedure exists as a mechanism to resolve conflict - are disputes still being declared and referred to the CCMA? Nel *et al* (1998:113) stated that the existence of a grievance procedure does not guarantee success in solving the grievance. Not only must all the parties involved be satisfied with a specific procedure, but managerial objectivity and protection against victimisation should also be guaranteed. Conflict must always be resolved at the lowest level possible. To achieve this, the grievance procedure should be simple and effective and easy to implement. Nel *et al* (1998:113) identified the prerequisites below for effectiveness.

- **Knowledge**

According to Bendix (1996:352) it is vital that the employees must know that a grievance procedure exists in the organisation. The employees must be initiated into the use of these procedures. This means that employees and shop stewards must be trained in the use of the grievance procedures. Sometimes the grievance procedure is handed to an employee on appointment with the instruction to take note of the content and sign for the receipt of the document. Employees seldom pay attention to this document, as it is irrelevant at the onset of the employment relationship - since no conflict exists at this point. Tustin and Geldenhuys (2000:135) explained that workers need information about various aspects of the organisation to be able to make informed decisions and to shape realistic and legitimate expectations and perceptions.

- **Training**

The training with regard to the effective use of the grievance procedure could be given during the induction process. Gerber *et al* (1998:129) stated that the induction programme of an organisation should include a general orientation with regard to labour relations aspects such as employee rights and responsibilities, trade unions, grievance procedures and disciplinary codes, communication channels and termination of services. It is also advisable that the induction session should be

supplemented with written documentation, containing essential information such as the organisational policy, procedural guides, telephone numbers and an organisational chart. It is good practice to let the employee sign for the receipt of such documentation. The reason being that in the event of a dispute, the employer can be safe against allegations that the employee was not aware of the existence of the grievance procedure. Such training should focus on the functional and positive aspects of the grievance procedure. Role-play and industrial theatre could be used to acquaint the employees with the proper use of the grievance procedure and bring home the positive aspects of timeous and effective conflict resolution mechanisms and procedures.

The employee should not only be trained to formulate the grievance as concisely as possible but should also be able to state clearly what would be an acceptable solution to the grievance (Bendix, 1996:352). This is confirmation of the ideas mentioned in Chapter four with regard to the process of naming, claiming and blaming (see section 4.3). Employees should be trained in the skill of concisely stating their grievances. If the grievance is stated clearly, it will be easier for management to quickly respond to the grievance in the most appropriate manner.

Employee representatives are bound to become involved in grievances and they too should receive training. They should be taught how to listen effectively, sift through the facts, investigate the case properly and represent the employee effectively (Bendix, 1996:352). Poor presentation is highlighted as one of the problems during CCMA proceedings (Healy, 2001:4). Healy stated that even the most competent lawyer or consultant would struggle to present a case at the CCMA if the case has been conducted poorly from its commencement. This refers to the procedures followed in the grievance or disciplinary process. The problem often lies in limited knowledge of relevant legislation and little insight into the requirements for fair procedures. This type of problem can be addressed through appropriate training in the organisation.

- **No victimisation**

An employee will not use the grievance procedure unless he or she is fully convinced that he or she will not be victimised or intimidated for having started a

grievance procedure against his or her employer. In many instances employees are afraid of the grievance procedure because they perceive conflict as negative and see it as a destructive process. In such cases, worker problems and conflict will remain latent (see section 4.2 of Chapter four, eventually escalating to even bigger problems.

According to Nel *et al* (1998:113) the main purpose of a grievance procedure is to handle official work related complaints formally, without those complaining having to fear victimisation or discrimination. Although this is one of the main prerequisites of the grievance procedure it is not necessarily the perception of the employees that it is the case. If an employee has used the grievance procedure and he or she is then somehow victimised, will he or she have the conviction and knowledge of his or her rights to take the grievance further? Will the employer see the employee as simply standing on his or her rights or will the employee be seen as a trouble- maker?

- **Formulating the grievance properly**

Employees must be taught to state their grievance clearly, to be clear about what they would see as the resolution of the grievance and also against whom the complaint is. Tustin and Geldenhuys (2000:137) stressed the fact that sound interactive skills are a prerequisite for effective influence in the workplace. The process of naming, claiming and blaming as set out in the previous chapter (see section 4.4) facilitates the proper formulation of the grievance. Trained and well-informed employees will also not have unrealistic expectations and are less likely to abuse the grievance procedure. The abuse of the grievance procedure is, however, not the biggest problem. The fact that employees might be afraid to use the procedure for fear of victimisation and intimidation is a bigger problem for organisations to overcome.

5.4.6 Value of effective grievance handling

Tustin and Geldenhuys (2000:122) made the statement that an increase in the number of grievances is always an indication of potential conflict. In terms of this study, the statement is erroneous because it is assumed in this study that latent

conflict is inherent in the employment relationship. Once a grievance has been filed it is not an indication of potential conflict but an already, well manifested form of conflict in a complaint/grievance phase. The detailed explanation of the escalation of conflict in Chapter four (section 4.4) makes it clear that a workplace can have a huge conflict potential but no conflict has manifested.

It is thus questioned if the number of grievances in an organisation is a good indication of conflict in the workplace. There might be huge conflict potential and latent conflict, which are not manifested in grievances, but in high absenteeism, low productivity, a high rate of accidents and high labour turnover. If an organisation has a work force that is well trained in terms of their rights and duties and well aware of the benefits of using the grievance procedure, then the number of grievances can be seen as an indication of escalation of conflict. It is contended that it is not the high number of grievances but the high number of *unresolved* grievances and therefore, high referral rate of individual unfair dismissal cases that should be seen as an indication of a poor employment relationship.

Detailed records of grievances of employees should be kept so that the resolution of grievances and an increase in the number of grievances could quickly be ascertained and managed appropriately. In the event of the grievance not being resolved, a dispute could be referred and management has to have evidence that the proper mechanisms were in place and that proper procedures have been followed. The employees and management should be trained to see the grievance procedure, as well as the disciplinary procedures, as useful mechanisms to deal with conflict and not something to be avoided at all costs.

Nel *et al* (1998:275) listed seven aspects with regard to the value of grievance handling:

- it is a safety valve that will release tension and dissipate the latent aggression inherent in all workplaces
- it allows the raising and settlement of grievances for a worker without fear of retribution or victimisation

- it makes for a more open and honest relationship between workers and management
- it allows management to remove legitimate causes of dissatisfaction or conflict
- it allows the removal of small conflict sources that makes small problems escalate into major unrest
- it facilitates the development of positive worker morale
- it assists in promoting goal achievement by a business.

The above can only be achieved if the grievance procedure is perceived positively and used appropriately. A formal grievance procedure allows a grievance to be resolved as it moves upward through the organisation. The procedure should include various levels of management to become involved in order to make it a transparent and effective conflict resolution mechanism (Nel *et al*, 1998:274). Bendix (1996:353) concluded that a grievance procedure will not be effective if the employers (managers and supervisor) as well as the employees (individuals but also shop stewards) are not trained for the handling of grievances. A sincere desire on both sides to resolve conflict internally will contribute to the successful use of the grievance procedure and less referrals of disputes to the CCMA.

5.5 Disciplinary procedures

It was explained in section 5.2 that the jurisprudence in labour law that emerged in the 1980's revolutionised policies and procedures on termination of service in the workplace, and that disciplinary codes and procedures were introduced into workplaces that were previously regulated by dismissal at managerial whim.

The disciplinary procedure is the formal process adopted whenever an employee breaks the rules of the organisation or commits any act, which might seem like a breach of the contract of employment or the psychological contract. The use of a specific disciplinary procedure ensures that all employees are treated fairly and are not disciplined at the whim of a supervisor. The core principle of the disciplinary procedure is contained in the *audi alteram partem* rule, which means that the employee must be granted the opportunity to state his or her case. The purpose of this procedure is - unlike common belief - not to punish, but to correct the behaviour

of the employee (Bendix, 1996:353). The fact that the disciplinary procedure is guided by the Code is indicative of the very important relationship between internal and external dispute resolution mechanisms.

5.5.1 Establishment of a disciplinary procedure - general rules

Not all disciplinary procedures are the same because they should be tailor-made for a specific organisation, which might have specific needs. According to Bendix (1996:353) there are, however, a few basic rules that must be applied in the establishment of a disciplinary procedure:

- Comprehensive and complete

According to Bendix (1996:353) a disciplinary code should list all types of transgressions, which may occur in this specific type of business, and should clearly spell out the disciplinary measures to be applied in each case. The purpose of this would be to ensure that **company rules** have been established.

- Clear and accessible

The procedure to be followed in disciplinary actions should be known to employees and it should be stated in simple terms and easy-to-understand language. The employee should not only sign for receiving a copy of the code at the commencement of employment, but the content thereof should also be addressed during induction.

- Based on principles of natural justice

The principles of natural justice would include a thorough investigation after a transgression and allowing the employee to be informed of the reasons for the disciplinary action against him or her. The employee must be allowed to put his or her side of the story and call witnesses and also to be represented at the hearing. All circumstances should be taken into consideration and there should be conformity and consistency in the disciplinary measures.

Another rule that might be added is that the disciplinary procedure should have legitimacy. Finnemore (1998:203) contended that the internal disciplinary procedures form an important base from which the legitimacy of an organisation's discipline arises. It is therefore important to involve not only line management, but also employee representatives in the process of setting up these rules. Where there is a recognised trade union, they should be involved to ensure that the content is seen to be fair and equitable. It should be incorporated in the conditions of employment and employees should be familiarised with it during the induction period.

5.5.2 Impact of the Code of Good Practice on disciplinary procedures (Substantive and procedural fairness)

As discussed in par 5.2.1, the law on dismissals was codified, and is reflected in the Code of Good Practice: Dismissals, in Schedule eight of the LRA (66/95). The emphasis is not on what constitutes unfairness, but on guidelines of what is considered to be fair. Grogan (1999:378) also emphasised that the Code was intentionally general and created the presumption that the guidelines of the Code should as far as possible be followed, rather than to impose a duty on the employer to so.

It should be noted that although the Code was only intended to provide a set of guidelines to employers, they also serve as a guideline for commissioners in the process of reaching a decision at arbitration. These guidelines are taken into consideration in the process of deciding whether or not a dismissal was procedurally and substantively fair. Nupen and Cheadle (2001:121-122) argued that these guidelines, which were laid down in the Code, were consequently elevated to become some sort of secondary legislation or "soft law". It can therefore be deducted that these guidelines in the Code are now playing a vital role in the determination of the fairness of the conduct of the employer during internal discipline. The Code should therefore be incorporated as far as possible into internal procedures, unless there are very good reasons for deviating from the Code.

5.5.3 The internal disciplinary code

As already emphasised, the Code practically requires every employer to draw up procedures that would apply the principles of fairness in the workplace. This is usually done in an internal **disciplinary code** that spells out the norms of conduct for all employees (Bendix, 1996:353). The desirability of consistency in disciplinary penalties and employees' need to have some certainty about the consequences of breaking **the rules of an organisation**, make the existence of such a disciplinary code very important. The internal code could have several elements, for instance the rules that apply in the workplace, what constitutes a transgression of the rules, penalties/sanctions that will apply when the rules are broken, and the procedures to be followed in such a case.

5.5.3.1 Rules of conduct

The establishment of a set of **rules** applicable to all employees should precede the drawing up of the disciplinary procedure. The rules established in a particular organisation will depend on the nature of the organisation. Smaller organisations may require fewer rules, whereas larger organisations may have to cater for every eventuality (Grogan, 1999:379). The rules should apply consistently to all employees.

5.5.3.2 Transgressions - breaking the rules

Transgressions are usually divided into transgressions that are less serious, to serious transgressions, to those that may result in summary dismissal. The categorisation of offences requires detailed consideration and consultation with all levels of management and also negotiation with a majority, recognised union if it is present in the organisation (Bendix, 1996:355). For instance, the breach of the rule stipulating that an employee may not sleep on duty will be a major offence in the security industry, but only a minor offence in an administrative job.

5.5.3.3 Penalties and sanctions

Once the transgressions have been classified, the penalties for the transgressions should be decided on. A transgression that is not serious could result in a verbal warning for a first offence, a written warning for a second offence, a final warning and then a dismissal (Bendix, 1996:355). Finnemore (1998:205) warned that dismissal should be seen as the ultimate sanction and it should not be lightly imposed but should be exercised with great discretion and fairness by an employer. It is not appropriate to dismiss an employee for a first offence, except if the misconduct is of such a serious nature that a continued employment relationship is made intolerable. Examples of such serious misconduct are gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination.

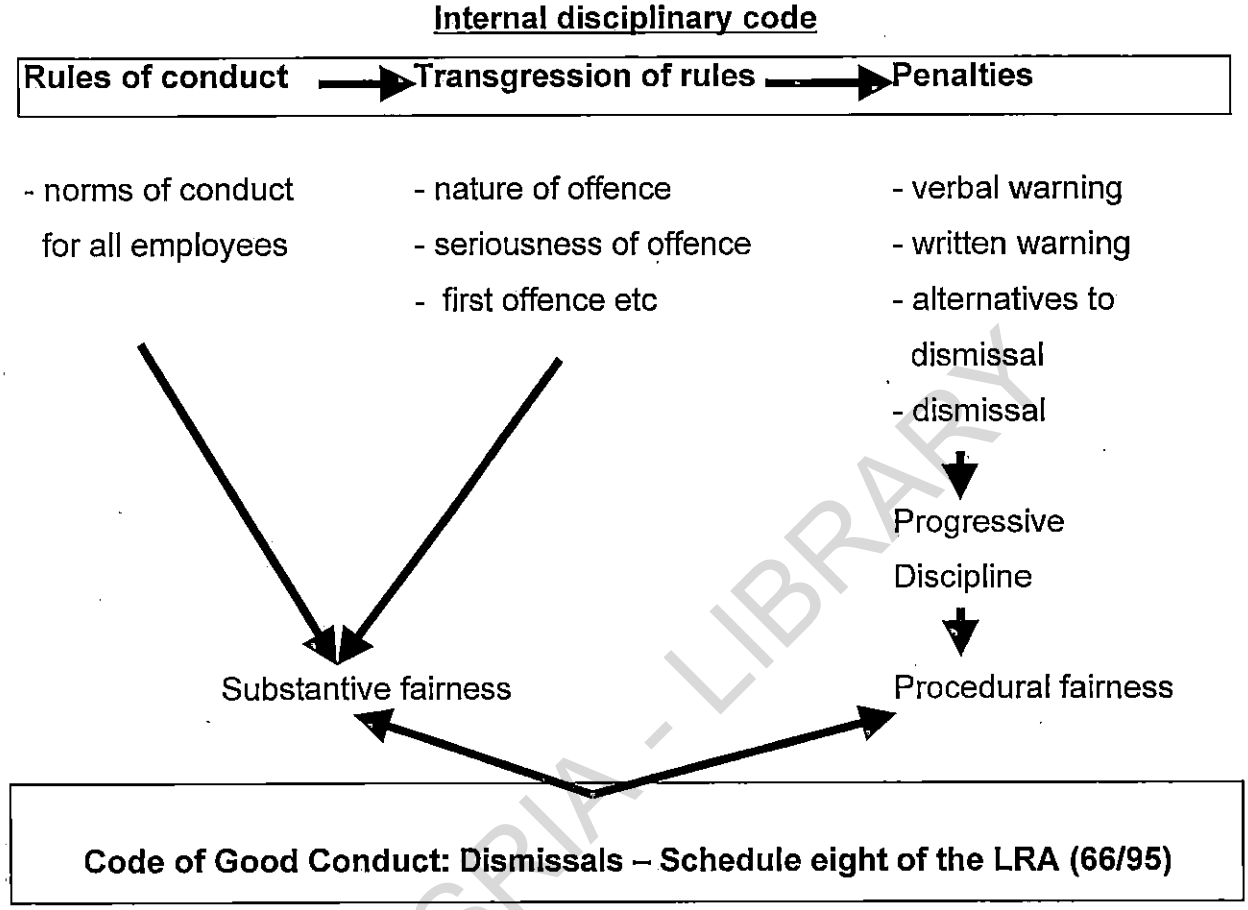
Figure 5.1 shows the various components of a disciplinary code, which sets out the rules or norms of conduct for employees. In the disciplinary code the rules applying in the workplace should firstly be indicated. The nature and seriousness of transgressions or misconduct should be specified. The penalty or sanction for each type of transgression should also be clearly stated. The rules and the transgression of the rules are based on substantive fairness. The penalties that pertain to the specific transgression of the rules can only be imposed after the laid-down procedures have been followed, in order for the penalty to be seen to be fair. The whole process is based on the requirements for fairness as prescribed in the LRA (66/95) Code.

5.5.4 The principle of progressive disciplining

Grogan (1999:91) mentions that the function of disciplining is to ensure that employees contribute effectively and efficiently to the goals of the organisation. In the old master and servant relationship the emphasis was on the use of criminal sanctions to compel employees to perform.

The purpose of discipline is generally regarded as corrective rather than punitive in the modern labour relationship. The Code can be regarded as a national disciplinary code, which endorses the concept of corrective or progressive discipline.

Figure 5.1: Relationship between the internal disciplinary code, the rules of conduct, the transgression of the rules and the penalties or sanctions



Source: Researcher, 2003

It is regarded as a means for employees to know and understand what standards are required of them. The Code seeks to correct behaviour by a system of graduated disciplinary measures that might start with counselling and informal warnings. Thereafter, more serious sanctions might be applied, such as formal, written warnings, and in the final instance, dismissals.

5.5.5 Status of the disciplinary code

Disciplinary codes usually allow relatively informal procedures (such as verbal warnings) before the imposition of penalties such as formal or final warnings. Item 3(3) of the Code specifically provides that formal procedures do not have to be

invoked every time a rule is broken and informal advice and correction are the best and most effective ways for an employer to deal with minor violations of workplace discipline. Formal warnings are sanctions that can have serious consequences for employees (Grogan, 1999:100).

This intention of the Code - to provide for relative informal procedures to be followed before formal sanctions are applied - should be questioned. According to Theron and Godfrey (2001:41) it seems as if there is no recognition in arbitration proceedings for all these informal efforts by an employer to correct the behaviour of an employee, usually because there is no evidence that there was counselling and informal discussions. It could be that employees do not take these informal discussions seriously and do not see them as part of the procedures in the process of progressive disciplining. Although the Code is only intended as a guideline for fair employment practices it is also used as the yardstick for determining fairness in arbitration awards. In this context it can be concluded that the Code has become more than has been intended.

The use of the Code as a yardstick in arbitration deliberations has also changed the employment relationship from a human relationship, where principles of loyalty, common decency and dedication prevails in a relationship regulated by rules and standards. The decision to retrench, for example, can have relatively little regard for the loyal and dedicated worker, because the main principle that should be applied is the LIFO principle (last in first out) or some other objective criteria. These so-called objective criteria would be fair, although they are often very difficult to prove in a court of law. The 'good' employer also does not get recognition for having tolerated individual problems and for being understanding and supportive of the personal goals and problems of employees. His or her status as a good employer is solely based on how well he or she has applied the rules as set out in the Code.

5.5.6 Different procedures for different types of disputes

The Code of Good Conduct in the LRA (66/95) makes it clear that a different procedure should be followed for different types of disputes. The emphasis in a disciplinary enquiry for **misconduct** would be on establishing if a rule had been

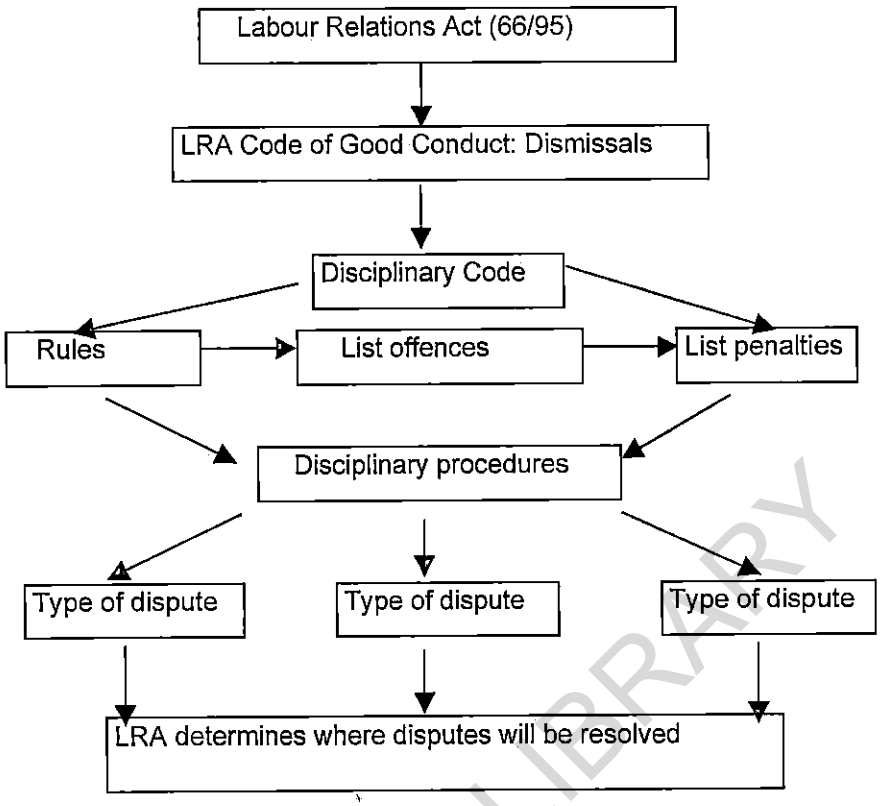
contravened and if the employee knew, or could have been expected to know, of the rule. In a disciplinary enquiry for incapacity due to **poor work performance** there would be an emphasis on training, instruction, consultation, counselling and enough time to achieve the relevant standards of performance. The enquiry in cases of incapacity due to **ill health of injury** should focus on the extend of the illness or injury, the time of absenteeism required, alternative positions available to accommodate the employee and various other measures short of dismissal. The procedure for dismissal based on **operational requirements** will emphasise consultation and negotiation processes, trying to find alternative employment and the LIFO (last-in-first-out) principle.

In **figure 5.2** it is indicated that the internal procedures in the workplace are derived from what is prescribed in Schedule eight of the LRA (66/95). The reason why the Code of Good Conduct deals only with dismissals is because dismissal can be seen as the **ultimate sanction** for misconduct in the workplace and also the most severe form of manifest conflict. It could therefore be argued that the test for a successful system of dispute resolution is the ability to reinstate or re-employ workers who have been dismissed unfairly. The internal disciplinary code is the instrument in the workplace establishing the rules, defining the various types of misconduct and providing clarity on the sanctions to be imposed. The disciplinary procedure to be followed depends on the type of conflict dealt with. **Figure 5.2** also explains the process of discipline.

Parties should be aware of these different procedures so that they know what to expect when they seek resolution of a dispute in the external institutions for dispute resolution as determined by the LRA (66/95).

The intention of the above explanation is by no means an attempt to spell out in detail and in textbook form the steps to be taken in cases of grievances or disputes. It focuses on the functionality and the relevance of these mechanisms in the conflict handling and dispute resolution framework provided by the statute.

Figure 5.2: Disciplinary code, penalties and procedures



Source: Based on Schedule eight of LRA (66/95)

5.6 Problems relating to the implementation of grievance and disciplinary procedures

In the above paragraphs the role, function and importance of the grievance and disciplinary procedures were addressed. The question was asked why are disputes still being referred to the CCMA if organisations have internal conflict resolution mechanisms and they are used effectively.

5.6.1 Numerous small employers

Brand (2000:81) stated that it is mainly the small, unskilled and under-resourced employers who are the most frequent employer parties at the CCMA. It is not only their lack of skill, sophistication and financial means to utilise private alternatives that contribute to this, but also because they are so numerous. In 2000 there were 302 000 companies employing fewer than 20 employees, 63 000 with fewer than 50

workers and 11 500 with fewer than 200. This constitutes 3,5m people and a substantial portion of the country's total workforce. Theron and Godfrey (2001:41) also found that the majority of small employers acted unfairly in their handling of the conflict that resulted in dismissals. According to Brand (2000:81) it was found that in 63% of arbitration cases in the retail industry, where a dismissal was found to be unfair, small employers did not even attend the arbitration proceedings. There is also concern that the legislation with regard to dismissals has had a negative impact on small and emerging employers. One of the reasons for this could be that small employers are being penalised at the CCMA for their lack of internal mechanisms and therefore lack of proper procedures. They see these internal mechanisms as a burden for which they are ill prepared and lacking the time and finances to adequately prepare them for effective functioning under the rules implied by the LRA (66/95). The result is that these employers try to avoid permanent employment contracts and focus on attempts to use fewer employees by outsourcing (Theron and Godfrey, 2001:6). The statement is also made that big employers have the knowledge, skills and resources to keep themselves out of the CCMA and are thus not greatly exposed to the shortcomings of the CCMA. This point is debatable.

5.6.2 The technical nature of the dispute resolution system

Nupen and Cheadle (2001:115) referred to the Code as an example of 'soft law' in our labour relations system. This form of 'soft law' is an area of law that has been under-utilised and if more attention had been given to it, it would have had a positive effect on labour relations. It could have promoted more constructive relationships in the workplace and a greater degree of certainty on how to deal with issues that arise in the workplace.

However, the Code has become the parameter against which the actions of the employer are tested in arbitration proceedings when there is an unfair dismissal case. Nupen and Cheadle (2001:115) emphasised the fact that the Code is only a guideline for good practice but pointed out that the employer should be able to give good reasons why the guidelines have not been followed. This Code has introduced an awareness and respect for procedure but has not achieved much in terms of preventing disputes. They were also of the opinion that there is not only a

lack of knowledge of the law, but the law is overwritten and complex. The 'soft law' option would imply that the rules in the organisation with regard to misconduct and discipline should be stated in a positive way and not based on the criminal law model where the focus is on breach of a rule and sanctions. Other negative terms used in the Code include; charges, defend, guilty, aggravating and mitigating circumstances. This demonstrates that much of the focus on rule making is in a criminal law or criminal law procedure context.

5.7 Conclusion

There are many problems with regard to the existence and use of grievance and disciplinary procedures in organisations. Many of the disputes at the conciliation phase at the CCMA could be traced back to the mistakes made during the disciplinary and grievance procedures by either the employer or the employee. At the conciliation phase it might sometimes be necessary to instruct parties to go back to the internal procedures in the company because a dispute has been referred without going through the proper internal mechanisms.

Employees and employers are also afraid to use the grievance and disciplinary procedures since it is seen as conflict generating and not as it is intended namely as conflict resolution mechanisms. The effective functioning of the internal procedure is dependent on a proper understanding of the nature and function of conflict and conflict management. The mechanisms for conflict management should be understood for what they are, namely a way of dealing with conflict and not as negative measures to ultimately lead to the termination of the employment relationship. Deale (2001b:34) suggested that the high rate of referrals to the CCMA is an indication of the fact that employers and employees are relying heavily on the CCMA to resolve their problems rather than addressing these problems internally. This makes labour disputes much more expensive, especially for employers, than would otherwise have been the case. Deale has estimated that a singly unfair dismissal case that has been referred to the CCMA can cost the employer R 10 000,00 if the dispute runs the full course of dispute resolution through the CCMA. Deale (2001a:35) suggested that one of the alternatives to incurring these costs would be to review the internal dispute resolution procedures

in the company and to ensure that the resolution of conflict at that level is regarded as an important priority.

Hyman (1981:129) contended that the internal procedures are multi-functional. They serve as a safety valve against the spread of disputes in the workplace. It reduces adversarialism, and discourages paternalistic management practices. It is further a recognition of the rights of the employees – or unions – and it is also the first step by which, in the event of failure to settle at the workshop level, conciliatory forces outside the work place can be brought to bear to resolve the situation. The internal mechanisms must therefore in some way or another, be influenced by the outside mechanisms and procedures, not only in practical terms but also in law. The impact of the Code of Good Practice on the internal disciplinary and grievance procedures was thus emphasised in this chapter.

The chapter focussed on the background and requirements that internal mechanisms have to comply with in order to be relevant in the bigger scheme of the labour relations system. It dealt with the internal mechanisms and procedures to manage conflict - from the conflict phase, through the grievance phase to the point were a dispute is referred to an outside body. The next chapter will be devoted to a better understanding of the **external mechanisms and processes** for dealing with disputes and to stress the point that both the internal and external mechanisms form an integrated whole to maintain the system of industrial relations.

CHAPTER 6

EXTERNAL CONFLICT RESOLUTION MECHANISMS AND PROCESSES

6.1 Introduction

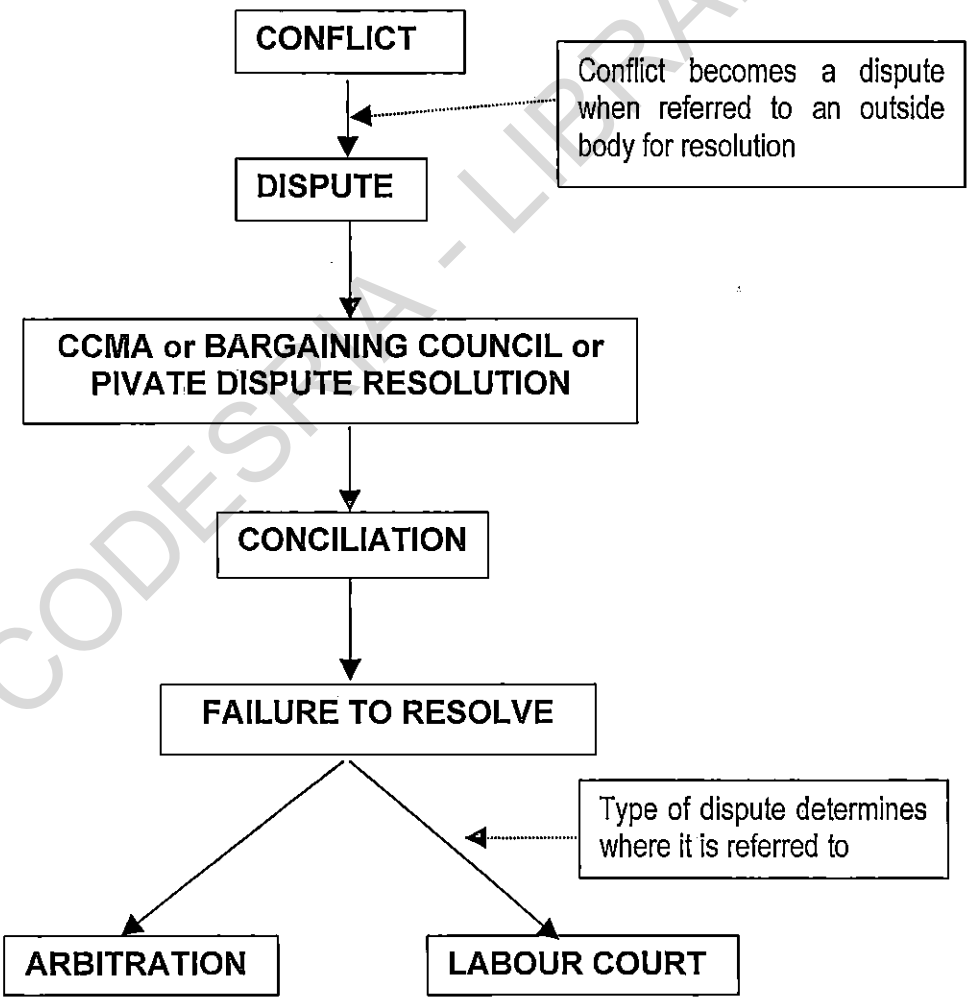
The main problem identified in this study is the high referral rate of disputes to the CCMA and the assumption that the parties dealing with disputes are not sophisticated enough to deal with the system of conflict resolution effectively. The internal mechanisms to deal with conflict in the workplace, namely the grievance and disciplinary procedures, were discussed in detail in Chapter five. The point was made that it would take a paradigm shift in the workplace to have effective resolution of conflict. The parties should move away from viewing conflict as negative and should recognise the value of resolving conflict as soon as possible. The grievance and disciplinary procedures should thus be seen as mechanisms for managing conflict effectively and not as something to be avoided at all cost. The contention is that if internal mechanisms and processes are understood and used effectively, there will be less cases of conflict escalating to become a dispute and referred outside of the organisation for resolution.

In this chapter, these external conflict resolution mechanisms and processes are discussed. The CCMA as the most important statutory institution for external dispute resolution will be discussed. The role and functions of the CCMA will be dealt with and the problems of the CCMA will be highlighted. Reference will be made to other institutions of the labour market that play a role in the dispute resolution process. This is done in an attempt to indicate that the various parts of the system each has its own function and contributes to the maintenance of equilibrium in the labour relations system. Other means of resolving disputes, besides those provided for in the LRA (66/95) will be explored. The issue of alternative dispute resolution will be investigated and brief reference will be made to dispute resolution in other countries.

6.2 External dispute resolution processes

The ultimate aim of dispute settlement procedures according to Bendix (1996: 481) remains the continuation of negotiations towards a settlement and if that is not possible, the final imposition of a settlement by another party, bringing about the restoration of industrial peace. The LRA (66/95) makes provision for mainly two processes for dispute resolution, namely conciliation and arbitration (Grossett and Venter, 1998:403). These processes, together with litigation can be regarded as the main forms of dispute settlement. **Figure 6.1** gives a simplified scheme of the dispute settlement procedures.

Figure 6.1: Dispute settlement procedures



Source: Adapted from Grossett and Venter, 1998:402

Taking into account that a dispute develops when the conflict has escalated to a level where the internal mechanisms have been exhausted and the conflict remains unresolved – see section 4.4), it was indicated that a dispute is referred to either a statutory dispute resolution institution such as the CCMA or to a bargaining council or to a private dispute resolution body. The first process to be attempted in the process of dispute resolution is conciliation. If this process fails, and there is no agreement between the parties on how to resolve the dispute, it is referred to a final process where a third party will make the decision, be it arbitration or Labour Court adjudication. The type of dispute in general determines where a dispute should be referred to after failed conciliation.

6.2.1 Conciliation

Grossett and Venter (1998:404) defined conciliation as the act of procuring goodwill or inducing a friendly feeling. This process entails the involvement of a third party and the third party may or may not be present during the conciliation process. If the third party is present he/she will take no active part in the process although he/she may act as chairperson during meetings. Directly translated from Latin it means "to bring together". Section 135(1) of the LRA (66/95) provides for the appointment of a CCMA commissioner, who must attempt to resolve the dispute through conciliation and has the discretion to decide on the appropriate method to resolve the dispute. A range of consensus-building processes is offered but none of them are defined. The terms 'conciliation' and 'mediation' are sometimes used interchangeably. However, it appears that the term conciliation is used as an umbrella term to include a range of processes designed to bring about consensus and leaves the ultimate decision making for the parties and not the conciliator (Du Toit *et al*, 1999:302).

6.2.2 Mediation

The term mediation is derived from the Latin word "mediare" which means, "to occupy the middle position". In mediation the middle party seems to be playing a participatory role as opposed to the passive role of the conciliator (Grossett and Venter, 1998:404). The act of mediation entails that the mediator attempts by all

means to bring about a settlement. The mediator advises both sides, acts as an intermediary and suggests possible solutions. A mediator acts only in an advisory and conciliatory capacity and has no decision-making powers and cannot impose a settlement on any of the parties. Tustin and Geldenhuys (2000:134) stressed the fact that the effective mediator is a stabilising influence, helps the parties achieve their goals with a minimum of friction, and helps them avoid a breakdown of discussion, which might result in a strike, or the case being referred to arbitration.

Anstey (1991:259-260) warned against the assumption that if a settlement is not reached, the mediation was not successful. The range of objectives and criteria for an effective intervention include the achievement of sufficient movement to allow independent bargaining to continue, the clearer definition of the issues at stake, a broadened search for alternatives, improved communications and a clearer understanding of the power realities in a relationship.

Anstey (1991:273) further emphasised the fact that the mediator uses his/her influence at every point in the mediation and also that their mediator status gives them a great deal of power to do so.

Although the two concepts, conciliation and arbitration, are defined as being inherently different, they are often used interchangeably, referring to the first process in the dispute resolution process.

6.2.3 Arbitration

Arbitration is another form of third party intervention. The third party can be an individual arbitrator, a board of arbitrators or an arbitration court, not acting as a court of law. In the CCMA context the third party is usually a CCMA commissioner but in private dispute resolution it can take any of the other forms. The arbitrator is empowered to take a decision to resolve a dispute. Grossett and Venter (1998:405) defined arbitration as; "... a formal process in which the parties to a dispute jointly ask a neutral third party to hear their respective cases and then to make an award, which they undertake in advance to accept as final and binding upon them". In statutory arbitration under the CCMA, however, a commissioner is appointed and

the parties do not have a choice as to whom that person is. Whatever decision the arbitrator imposes, becomes legally binding on the parties. Where litigation usually provides for a right of appeal, arbitration is intended to dispose of the dispute finally. The arbitrator's award is final and binding and there is no appeal on the merits. Arbitration under the LRA (66/95) is thus not consensual; it is in essence adjudication without a right of appeal. The CCMA may arbitrate in a manner that it considers appropriate, subject only to the duty to arbitrate fairly, quickly and to deal with the substantial merits of the dispute with the minimum of legal formalities. The LRA (66/95) does not require pleadings, and arbitration may thus be relatively informal. Parties may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner (Du Toit *et al,* 1999:309-310).

The LRA (66/95) places a premium on speed and fairness. Many criticisms have been levelled against the CCMA such as, that the arbitration proceeding has become time consuming and costly because it has assumed a very judicial form, similar to litigation in courts. This could be because of the involvement of labour lawyers in the arbitration process for certain types of disputes.

For various reasons, the conciliation and arbitration processes have been separated. One reason is that labour lawyers are not allowed to represent parties in conciliation whereas they are allowed to represent in arbitration. The arbitration is usually scheduled on another day than the conciliation to allow the parties to get legal presentation and properly prepare their cases. Du Toit *et al* (1999:311) anticipated a 'fast-track' arbitration where the disputing parties would have to come prepared for the arbitration in the event of failure of the conciliation. The arbitration can then proceed immediately with the same or another commissioner. The problem with using the same commissioner for both processes is that the conciliator may have become privy to confidential information in a side-meeting with one party, which may compromise his or her capacity to arbitrate even-handedly. The so-called con-arb process has developed and was included in the dispute resolution system with the 2002 amendments to the LRA (66/95) and the drafting of the new CCMA Rules. The Amendment Act (Act 12 of 2002) now makes it possible for conciliation and arbitration to take place on the same day but only for disputes concerning

probation. In private processes any dispute can be referred for a con-arb. The CCMA Rules require that the parties must be given fourteen days' notice of such a con-arb and if there is an objection to this specific process the objecting party should inform the CCMA and the other party at least seven days before the date of the con-arb. Section 136(3) allows the commissioner to be both conciliator and arbitrator but it also gives parties the right to object to this (AMSSA, 2002:4).

Another new initiative of the Amendment Act is the introduction of the pre-dismissal arbitration. The problem in the past has been that employers had to go through a complicated internal disciplinary hearing in the organisation before a dismissal. If the dispute is not settled in conciliation, a similar process had to be entered into in the arbitration, which seemed in many instances to be a duplication of procedures of opening statements, evidence in chief, cross-questioning etc. Section 188A of the LRA (66/95), as amended, now provides that an employer may, with the consent of an employee, request an accredited agency, a bargaining council or the CCMA to conduct a pre-dismissal arbitration about the conduct or capacity of an employee.

The arbitrator conducts the pre-dismissal arbitration in the same manner as the post-dismissal arbitration and the award is final and binding, and has the same status as a CCMA award. The advantage of this system is the elimination of costly and time consuming disciplinary enquiries and appeals, training and paying chairpersons, and cutting the costs involved in attending appeal hearings and CCMA processes. The disadvantages of this process are the fixed fee of R 3000,00 per day for the arbitrator, the waiting period for the CCMA to arrange the event and the travelling to the CCMA's premises for the process. AMSSA (2002:2) anticipated that some employers might be reluctant to use the process because they are at present able to exploit the delays inherent in post-dismissal arbitration to their advantage. Only time will tell if the advantages of the section 188A arbitration will outweigh its disadvantages.

6.2.4 Other processes

Section 135 of the LRA (66/95) states that the commissioner must determine the process to attempt to resolve the dispute. These processes may include, but are

not limited to, mediation, fact-finding or advisory arbitration awards, which is in effect a recommendation to the parties.

Brand and Steadman (1997:81) discussed the process of **facilitation**. Although it is also a consensus seeking process, there are usually more than just two parties involved in the dispute, the issues are usually less distributive and more structural and relationship in nature, the focus is on re-structuring organisations and relationships, and it deals with complex issues that do not necessarily arise from a dispute but may be initiated in order to manage conflict and prevent disputes. A process such as **"relationship building by objectives"** (RBO) is most appropriate for use in exceptionally stressed relationships between employers and employees (AMSSA, 2002:7). The **arb-con** process (arbitration-then-conciliation) allows parties to go through the arbitration process first. The commissioner makes the final and binding award, seal it in an envelope and lock it away for safekeeping. The parties then enter into conciliation, knowing that a third party has already decided the outcome. This motivates them to reach a settlement between themselves rather than going the win-loose route of the arbitration award. This kind of a procedure is only an option in private dispute resolution as the CCMA requires a certificate of outcome indicating that the dispute has been through a conciliation process before scheduling an arbitration hearing.

It should be stressed at this point that the intention of this study is not to identify and discuss all the processes available for dispute resolution and it is recognised that there are several very important and widely used processes. The reason for dealing mainly with conciliation and arbitration is because the emphasis of the study is on individual unfair dismissal disputes and these are the most obvious and most frequently used processes for resolving disputes of this nature.

6.3 Dispute resolution institutions in South Africa

Dispute resolution has been embedded in industrial relations in South Africa since the Industrial Relations Act of 1924. The institutions charged with dispute resolution, however, lacked legitimacy, amongst others due to the influence of apartheid on the labour relations system. Procedures were complex and core

issues were sometimes lost in legal technicalities (Hobo, 1999:5). The primary institutions for dispute resolution under the Industrial Conciliation Act No 28 of 1956 (old LRA (28/56)), namely the industrial councils, conciliation boards and the Industrial Court, had proved over time, to not be up to their task. Brand (2000:77) refers to figures from the Department of Labour indicating that conciliation boards had a settlement rate averaging 30% and industrial councils a rate of less than 30%. The Independent Mediation Services of South Africa (IMSSA) had a settlement rate of 70%. This low settlement rate did not contribute to reducing adversarialism in labour relations, and in fact might have had the opposite effect. The cumbersome procedure for settling disputes also lead to a high incidence of strikes and lock-outs (Du Toit *et al*, 1999:25). The poor record of dispute settlement in the conciliation boards and the industrial councils added to the high number of cases landing on the door of the poorly resourced and inadequately staffed Industrial Court, with the result that the Court had built up an enormous backlog of cases. Disputes often got bogged down in legal technicalities and delays, and in some instances it took three years for cases to be resolved (Brand, 2000: 77).

One of the objectives of the labour reform of the 1990's was the establishment of credible institutions that have the support of business, labour and government (Nupen and Cheadle, 2001:117). The LRA (66/95) encapsulates the new government's aims to reconstruct and democratise the economy and society in the labour relations arena. It therefore introduced new institutions with the intention of giving employers and workers an opportunity to break with the intense adversarialism that characterised labour relations in the past (Du Toit *et al*, 1999:3). There was also a need to bring the statute in line with Chapter three of the Constitution, which includes 'labour relations rights'. This new labour relations system created by the LRA (66/95) was in line with the fundamental rights and protections granted by the Constitution. Among these fundamental rights were the right to fair labour practices. The new dispute resolution institutions aim to provide a proactive and expeditious dispute resolution system available to all workers (Robertson, 1995:67).

The LRA (66/95) brought about an intensive reform of the statutory dispute resolution system. The new system centres on the Commission for Conciliation

Mediation and Arbitration (CCMA), a national Labour Court and a Labour Appeal Court. The CCMA, as the primary dispute resolution institution and the focus of this study, will be elaborated on in detail. The other institutions will be touched on in so far as they have a bearing on the effective functioning of the CCMA and contribute to the better understanding of the problem statement as discussed in Chapter one. The issues pertaining to dispute resolution in bargaining councils will not be dealt with here in any detail, as it is another problem area on its own.

6.3.1 Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA was established as an independent statutory body funded by public money with a head office in Johannesburg and a provincial office in each of the nine provinces. Gon (1997:23) emphasised the importance of the promotion of effective dispute resolution as one of the four primary objectives of the LRA (66/95). Ray Zondo, the Chairperson of the CCMA Governing body at the end of 1996, stated that the CCMA formed the pillar of the new dispute resolution dispensation that have been ushered in by the LRA (CCMA, 1996:4). Moyane (2002:10) submitted that the LRA (66/95), the Basic Conditions of Employment Act, No 75 of 1997 and the Employment Equity Act, No. 55 of 1998 form the pillars upon which economic and social justice will prevail and that workers will have their dignity restored. Workers' rights are being protected by institutions such as the CCMA whose legitimacy workers can recognise because it is representative of the three role players namely government, employers and employees.

The task of designing and establishing the CCMA started in October 1995 with the support of a project funded under an agreement between the South African and Swiss Governments and administrated by the International Labour Organisation (ILO). The knowledge gained (by representatives of the social partners and Charles Nupen, Special Advisor to the ILO Swiss project) from the way in which the Australian Industrial Relations Commission and its registry operated, served as a model for the design and establishment of the CCMA. Although funded by the state, the CCMA is independent (Moyane, 2002:2). The National Economic Development and Labour Council (NEDLAC) appointed the partners to the Governing Body, which had its first meeting on 1 March 1996 (Hobo, 1999:29). The CCMA was established

as a juristic person, independent of the State, political parties, trade unions, or employers' organisations. The fact that big employer organisations and trade unions played a major role in the process where the establishment of the CCMA was negotiated, enhanced its legitimacy in the eyes of the users (Moyane, 2002:2).

The main objective of the CCMA is to provide an effective simple, expeditious and cost effective dispute resolution service to the labour relations community. It was foreseen that the CCMA should also play a role in dispute prevention. It was intended that as many disputes as possible should be resolved through conciliation, resulting in a minority of disputes going to arbitration or the Labour Court. Another objective of the CCMA is to assist in the transformation of South African labour relations by promoting expeditious and simple, high quality dispute resolution and to promote effective strategies for dispute prevention (Hobo, 1999:28).

The CCMA is controlled by a tripartite governing body, which is the supreme policy making body of the CCMA. It consists of a Chairperson and nine other members nominated by NEDLAC and appointed by the Minister of Labour. The members comprise three representatives each of the State, organised business and organised labour. The director of the CCMA is an ex-officio governing body member. The CCMA comprises of a complement of commissioners and registry staff. At the head office there is a team of three National Senior Commissioners and the CCMA Director. The registry headed by a National Registrar provides support to the Commission through the work of six departments namely: Case Management, Information Services, Administration Services, Human Resources Management, Information Technology and Financial Services. At each Provincial Office there is a Convening Senior Commissioner with a team of full-time commissioners supported by an additional complement of part-time commissioners.

The CCMA has compulsory and discretionary functions. The **compulsory** functions include conciliation and arbitration of disputes, facilitation of the process leading to the establishment of workplace forums, compiling and publishing statistics about its activities and considering applications for accreditation of bargaining councils and private agencies. The **discretionary** functions include the conducting of ballots for unions and employer organisations and giving training and advice on the

establishment of collective bargaining structures, workplace restructuring, consultation processes, termination of employment, employment equity programmes and dispute prevention. In addition, it may conduct research and offer advice and training relating to any of the primary objectives of the LRA (66/95) (Hobo, 1999:35).

6.3.2 Difficulties faced by the CCMA

Since its inception the CCMA had been plagued by problems. Some of these problems will be referred to briefly in the following paragraphs.

Finances were a problem from the start due to case overload, with up to 120 000 cases per year being referred to the CCMA (Deale, 2001a:34). The CCMA receives funds from Government through the Department of Labour. In addition, donations were received from the ILO and the Royal Danish Embassy in Pretoria, which were specifically donated for purposes of training commissioners, registrars and case management officers in the beginning. The funds received from the Department of Labour were, and are not enough to keep the CCMA going. The excessive caseload could not have been foreseen and there were various attempts to deal with this high caseload. One of these attempts was that more and more part-time commissioners were used. This, however, proved to be costly and in an attempt to avoid exceeding its budget, it was decided not to use any part time commissioners for a few months in 2003 (Petros, 2003:3). This decision increased the work-load of the full time commissioner dramatically. The CCMA therefore have too few commissioners having to resolve too many disputes. The consequences often show in the quality of the processes and arbitration awards produced (Moyane, 2002:5).

According to the study done by Hobo (1999:36) the **perceptions** of trade unions such as NEHAWU and NUMSA were in the beginning very positive towards the CCMA, but the employers felt that the CCMA commissioners favoured the employees. Theron and Godfrey (2001:4) also found that the dispute resolution system is seen to benefit employees to a greater extent than employers. As a result employers seem increasingly reluctant to employ workers and rather engage the services of contractors or labour brokers (Barker, 2003: 166).

Towards the end of 1996 the **settlement rate** for cases was over 80% (Gon, 1997:23). This success rate was achieved because the CCMA had sufficient capacity to devote sufficient time to cases. By July 1997 the settlement rate at the conciliation stage had dropped to approximately 70%. The CCMA itself also reported a decrease in settlement rates, for instance from 81% for the 2000/2001 period to 68% for the 2001/2002 period (CCMA, 2001: 4 and 2002:6). Although some commentators questioned the settlement rates quoted by the CCMA, it is still a major improvement on the 30% settlement rate of the old conciliation boards (Moyane, 2002:3). According to the CCMA web page (www.ccma.org.za/Stats.asp) the settlement rate reached a low point of 47% in Gauteng for the period 1 April – 31 October 2003 and 62% on a national basis for the 2003/2004 financial year.

It seems as if the high referral rate created a **capacity crisis.** It became clear that the CCMA does not have the capacity to deal with the increase in the number of cases referred (from 60 007 cases in 1997 to 110 639 cases in 2002 (CCMA, 1997: 11and 2002:6). The CCMA web page also indicates that the total number of cases for the six months period 1 April 2003 to 31 October 2003 was already 76 948 (www.ccma.org.za/Stats.asp).

Gon (1997: 24) argued that the CCMA has become a statutory employee grievance procedure as it is empowered to remedy an almost infinite range of employee dissatisfaction. The State, however, does not have the financial resources available to fund such a wide-ranging service to the employed portion of society. The lack of sufficient financial resources already became evident early in the life of the CCMA. In recognition of the problems of the CCMA, COSATU commissioned research to ascertain the **competence of union organisers** or the ability of shop stewards and factory managers to resolve internal problems without resorting to the CCMA in every dispute.

The uncertainty with regard to the **jurisdiction** of the CCMA also lead to many cases being referred to the CCMA whereas they should have been referred to bargaining councils (Gon, 1997:25). Parties are often not sure if a dispute should be dealt with by the bargaining council, the Department of Labour or the CCMA. A

dispute about unilateral changes to terms and conditions of employment could, for instance, be referred to a bargaining council if there is one, the CCMA or could also be dealt with by the Department of Labour. In an attempt to deal with this problem a screening process was introduced and case management scanned the cases to make sure that there is no bargaining councils that have jurisdiction over a specific industry, before setting the case down for conciliation.

In the beginning the CCMA commissioners had to deal with two to three cases of routine dismissals per day. The CCMA allocated approximately two individual cases or one arbitration per day to a commissioner, achieving a monthly average caseload of 45 **cases per commissioner.** This allowed for three hours on a simple dismissal case. This was later increased to five cases per day and later to seven cases per day if it was mostly individual unfair dismissal cases. Gon (1997:25) commented that: "...this level of pressure, however, will not be applied with complex cases...". At that time, in 1997, it was expected that there could be a drop in the settlement rate because it became clear that the CCMA had to deal with a much greater caseload than expected. It was foreseen that the commissioners would have to adopt a far more robust approach to conciliation to ensure that more cases were being dealt with. The 70% settlement rate was, however, still comparable to international standards.

Due to the fact that the CCMA is a relative new statutory body it could have been expected that employers and employee parties would take some time to get to know the system. It seems, however, that even today many employers do not pay sufficient attention to the legal requirements of substantive and procedural fairness unless they get taken to the CCMA for an alleged unfair dismissal. Once an employer and employee have gone through a CCMA process they become much more aware of their rights and responsibilities and then start to pay attention to the universal principles of fairness as laid down by the Code in the LRA (66/95).

The CCMA had intended to grant easy access to users but this has resulted in a flood of cases being referred that have no merit. The fact that there is no fee involved, encourages many undeserving cases to be referred (Moyane, 2002:5). Employees also have high expectations from the CCMA. They are aware of the fact

that the LRA (66/95) grants them some protection but are not aware of the extent of that protection and they are willing to come to the CCMA to take their chances.

Deale (2001b:35) stated that it is the employers' inability to deal successfully with disputes internally that is causing the high rate of referrals to the CCMA. He suggested that alternatives to lengthy internal disciplinary procedures, such as external and impartial, professional chairpersons or arbitrators as well as disciplinary committees should be explored. The need for training of the employer and employee parties is stressed and various training courses are available both from the CCMA and private service providers. The costs involved in training and the time to go on such courses still remains the predominant problems of the small employer and individual employee. This statement by Deale is in line with the problem statement of this study, namely that the lack of capacity of the parties to effectively deal with disputes is a contributing factor to the high referral rate.

South Africa has been criticised for having rigid labour laws that discourage investment. The call for flexibility has not gone unheeded and some concessions were introduced to accommodate this concern with some of the recent changes to the LRA (66/95). The onus on employers when dismissing for poor performance during the probationary period has been reduced – to name but one example (Moyane, 2002:8).

The LRA (66/95) has also recently been amended to provide for a **con-arb process** that will be more expeditious than the conciliation-then-arbitration processes that take place on separate dates. It is now possible – for certain types of disputes concerning probationers – to have the arbitration immediately after the conciliation has failed. There are expectations that this process will have the effect of better attendance of parties at conciliations (Moyane, 2002:4). The effect of this process remains to be seen.

6.3.3 CCMA's dispute prevention initiatives

The dispute prevention initiatives of the CCMA is of relevance for this study as it also focuses on the problems with regard to the handling of conflict before it comes

to the CCMA – or at least before the CCMA statutory processes start. The high caseload forced the CCMA to start a dispute prevention program in 1999. The overall vision of the dispute prevention initiative is the effective management of conflict and grievances at the company - or user – level, but also to improve dispute resolution at the CCMA. In pursuing this vision, a pro-active holistic approach was adopted. However, according to the CCMA (2000:2) there was lesser emphasis on dispute prevention in the past year because the primary focus was still on dispute resolution.

An increasing amount of energy has, however, been dedicated to the area of dispute prevention and dispute management. The high referral rate prompted this shift and the objective is to assist business and labour to effectively manage disputes at the workplace level. Other dispute prevention initiatives such as case screening, public awareness and interventions designed for high referring sectors, have also received attention. It is intended that the entire dispute resolution process, from the source of the problem at workplace level, to the CCMA hearing rooms, should be included in the efforts at dispute prevention. The principle objectives therefore are to support CCMA users in building capacity to resolve problems and disputes at workplace level (which is the focus area of this study), to avoid incorrectly referred and inappropriate disputes being referred to the CCMA, and to effectively manage disputes referred to the CCMA (CCMA, 2000:2).

The emphasis of this current study is precisely on the focus area of the CCMA with regard to dispute prevention at workplace level, and the success of some of the CCMA initiatives will be examined. It was contended - in Chapter four - that a better understanding of the process of conflict escalation in a workplace, and the expeditious resolution of grievances through proper use of the internal conflict resolution mechanisms and processes, will reduce the rate of referrals to the CCMA.

6.3.3.1 CCMA screening project

One of the reasons for the high rate of referrals was the fact that as many as 25% of cases were outside of the jurisdiction of the CCMA, or there were defects in the referral. Dispute prevention activities therefore also include case screening, material

development for high referring sectors and to raise public awareness. As part of the methodology of this study, the views and perceptions of CCMA commissioners on some of these initiatives will be obtained (CCMA, 2000:8-9).

This screening project entails not only that cases are checked for jurisdiction but also involves an informal attempt to conciliate the dispute. The initial success rate is very encouraging. For the period 1 April 2000 to 31 March 2001 a total of 103 096 disputes were referred to the CCMA, of which 27% were screened out for lack of jurisdiction (Moyane, 2002:5).

6.3.3.2 Telephonic assistance

A "duty commissioner" system and telephonic conciliation were also introduced. These initiatives were aimed at providing an improved front desk service to CCMA users. The CCMA advises its users on proper internal procedures to be followed in order to minimise the incidence of disputes. A Call Centre has been established to assist users with advice on labour law and labour relations issues. The internet is yet another useful tool that the CCMA uses to enhance communication and disseminate useful information to its users (Moyane, 2002:5).

6.3.3.3 The Retail Sector Project

The retail sector refers the biggest number of disputes to the CCMA. A major research project was conducted in this sector in 1998. A dispute prevention proposal was formulated entitled; "Options for Managing Dismissal Disputes in the Retail Sector". The proposal concentrates on streamlining the present dispute resolution process for dismissals and puts forward the possibility of alternative dispute resolution mechanisms. This proposal in turn formed the basis for training materials that was being prepared at the end of the financial year for 'best practices' workshops (CCMA, 2000:9).

6.3.3.4 The Local Council Project

A lengthy project entitled; "Exploration and Development of Labour/Management Relations" was conducted at the Johannesburg Northern Metropolitan Local Council

(NMLC). The aim was to review employee relations and to devise a strategy to address problem areas. The focal point was organisational change and dispute prevention. The process culminated with the establishment of a working group, representing all parties involved, tasked with the responsibility of implementing a framework action plan. The working group reported significant improvements in working relationships (CCMA, 2000:9).

6.3.3.5 Model workplace procedures (Best practices)

An important area of dispute prevention is the development of a document highlighting industrial relations best practices at workplace level. This includes the development and use of workplace procedures that are accessible and in line with legal requirements, which optimise workplace problem solving and dispute resolution. To this end the dispute prevention committee initiated the process of drafting model procedures, including disciplinary procedures for misconduct and incapacity, and a probation procedure. Once completed the objective is to promote the use of such model procedures with CCMA users and high referral sectors in particular (CCMA, 2000:9). In the 2000/2001 financial year, the CCMA conducted a total of 45 one-day Best Practices workshops throughout the country with 94 trade unions participating. By training the trade union users, it is hoped that a better understanding of the issues that can be referred to the CCMA will evolve, which in turn may reduce the number of cases referred (Moyane, 2002:5).

6.3.3.6 Provincial initiatives

In various provincial offices of the CCMA a range of dispute prevention initiatives were carried out. These included screening of cases, engagement of unions and employers in high referring sectors such as the security industry in dispute prevention initiatives and extensive public awareness activities such as the distribution of CCMA information sheets and the use of community radio stations.

In the above paragraphs the CCMA as the primary dispute resolution body has been discussed. It was pointed out that the main problem with regard to the operation of the CCMA is the fact that it has been swamped by disputes, handling around 120

000 cases a year, which is almost 350 a day. These figures suggest that South African employers and employees are relying too heavily on the CCMA to resolve their labour problems rather than addressing these problems internally. While it may be convenient to relegate disputes to the CCMA, the process is costly and a time-consuming one (Deale, 2001a: 34). This statement confirms the problem statement of the study. The fact that the CCMA is placing a lot of emphasis on dispute prevention, which among others involves training in workplaces in specific sectors, confirms the contention of this study that the parties dealing with disputes do not have the capacity in terms of knowledge, skills and means to effectively deal with the dispute resolution system as provided for in the LRA (66/95).

6.3.4 The Labour Court and Labour Appeal Court

The Labour Court and Labour Appeal Court also play a major role in the dispute resolution system. Even though they are not the focus areas of this study, a few words need to be said about how these two institutions fit into the broader labour relations and dispute resolution systems and also about their relationship to the CCMA and CCMA procedures.

The Labour Court is established in terms of section 515 (2) of the LRA (66/95) as a superior court with the same standing as a court of a provincial division of the High Court (Du Toit *et al*, 1999:351). According to the LRA (66/95) all labour disputes should first go through a conciliation phase before they can be referred to arbitration or the Labour Court. If unresolved through conciliation or mediation, certain types of disputes will be referred to the Labour Court. The court may decline to hear any matter unless it is satisfied that the dispute has been through a process of conciliation, which promotes settlement. It has jurisdiction over the interpretation of the Act, dismissals for operational requirements, discrimination, organisational rights and protest action. It also has the power to review the work of the CCMA (King, 1996:63). It will therefore not deal with individual dismissals, which are the focus of this study.

The Labour Court is a specialised institution whose primary purpose is to interpret and enforce aspects of labour law within a particular industrial society. Criticisms of

the Labour Courts include, firstly, the judges' limited knowledge of shop floor issues, especially in terms of the informal network of shared understandings and norms, and secondly the potential for the Court to interfere in the substance of any agreement, thereby undermining the viability of long-term arrangements between employers and employees (Kossowski, 1994:53).

The Labour Court (Du Toit *et al*, 1999:39) augments the dispute resolution functions of the CCMA. It has high court status and has jurisdiction over all matters arising from the LRA (66/95) except where arbitration is specifically provided for (ss151 and 157). The most important powers of the Labour Court are to grant interim urgent relief and interdicts, make awards in any circumstances contemplated by the LRA (66/95) as well as cost orders and order compliance with the LRA (66/95). A very important function of the Labour Court is to make any arbitration award or settlement agreement an order of court. This is used in instances where there is an agreement that was reached in conciliation, but where one of the parties - usually the employer - does not honour its side of the agreement. However, this problem of enforcing agreements has been addressed through the recent changes to the LRA (66/95), whereby CCMA agreements are given the same status as an order of court. This function has been delegated to the Director of the CCMA. The Labour Court can also on various grounds review arbitration awards by commissioners of the CCMA. The Labour Court also has jurisdiction to review private arbitration under the Arbitration Act, No. 42 of 1965. This review of both statutory and private arbitration is designed to avoid the uneasy dualism of the pre-1980's where it was considered inappropriate for a judicial tribunal to disturb a collective relationship by inserting its own opinion (Du Toit *et al*, 1999:358).

In proceedings before the Labour Court parties may appear in person or may be represented only by a legal practitioner, a director or employee of the party or any member, office-bearer or official of that party's registered trade union or registered employer's organisation (Basson *et al*, 2000:183). Labour consultants in particular are excluded.

The LRA (66/95) also provides for a **Labour Appeal Court** to hear appeals from the Labour Court. It is a final court of appeal in all labour matters, subject only to the

overarching jurisdiction of the Constitutional Court (King, 1996: 63). The Labour Appeal Court consists of the Judge President of the Labour Court, the Deputy Judge President of the Labour Court and other judges of the High Court. The Labour Appeal Court has the exclusive jurisdiction to hear and determine all appeals against final judgements and the final orders of the Labour Court. The Labour Appeal Court may make any order that the Labour Court would have been entitled to make although it would not normally sit as a court of first instance (Basson *et al*, 2000:183).

Bendix (1996:519) provided an evaluation of the Labour Court and held that the intention was that the Labour Court should be separate from involvement in the day-to-day labour disputes and to assign to it only the more complex disputes that are beyond the powers of the CCMA. The Labour Court's functions also extend beyond dispute settlement in the role of the ultimate overseer and judge on labour matters.

It should be noted that at the time of writing, a Bill (The Superior Courts Bill (B-2003))(Strydom, 2003:21) was serving in Parliament that would incorporate the Labour Court and Labour Appeal Court (LAC) into the normal High Court system, with the LAC being a Court of Appeal.

6.3.5 Bargaining councils

Bargaining councils also have dispute resolution functions. In terms of the LRA (66/95), they must either themselves be accredited to perform such functions, or appoint an accredited agency to perform such functions. All disputes within the registered scope of that council must be referred to the council for resolution. By 31 March 2002 the CCMA had **accredited** 47 bargaining councils for the private sector and one for the public sector. These bargaining councils reduce the work of the CCMA substantially. This allows the CCMA to focus on the more vulnerable employees and small employers who cannot afford private justice (Moyane, 2002:4).

The LRA (66/95) makes provision for the establishment of bargaining councils where representatives from registered unions and employer organisations voluntarily agree to bargain collectively (Bendix, 1996:283). Bargaining Councils

are formal institutions, which regulate conditions of employment and wages and settle disputes. They comprise trade unions and employer organisations' representatives. They conclude and enforce collective agreements and seek to prevent and resolve labour disputes. They are also entitled to establish training and education schemes, develop proposals on industrial policy and they may decide which matters should be reserved for industrial bargaining and plant or enterprise bargaining.

One of the main functions of bargaining councils is to prevent and resolve disputes (Bendix, 1996:283). A dispute concerning any matter of mutual interest can be resolved through conciliation in the council and if the parties consent, through arbitration. Councils can also arbitrate rights disputes if they are accredited to perform these functions by the CCMA (Grogan, 1999:241).

The bargaining councils are required to acquire accreditation from the CCMA and conduct these dispute resolution functions under their own auspices. Alternatively, they may contract with the CCMA to perform their dispute resolution functions or contract with a private dispute resolution agency, which has been accredited by the CCMA to perform the dispute resolution function on behalf of the council. If a council fails to perform this function, the CCMA can take it over and charge the parties a fee (Brand *et al*, 1997:69).

As more bargaining councils are accredited, they will hopefully play a significant role in reducing the backlog created by the excessive caseload.

6.4 Private dispute resolution

The LRA (66/95) gives recognition to, and encourages, **private dispute resolution agencies** to reduce the costs borne by central government. Grogan (1999:266) makes the point strongly by stating that: "In general, the LRA (66/95) exhibits a clear preference that disputants resolve their disputes themselves, where possible". Where parties to a collective agreement have agreed to their own procedure for dispute resolution, they are not required to follow the statutory procedures (King, 1996:63). The number of private dispute resolution agencies has grown enormously

to meet the increasing demand for impartial third-party intervention as an alternative to statutory conciliation arbitration and adjudication.

The LRA (66/95) expects private dispute resolution bodies to play a major role in dispute resolution as agencies accredited by the CCMA or as private bodies. However, since the establishment of the CCMA, it has not accredited any private agencies.

Private agencies may perform dispute resolution functions with or without accreditation. Every dispute contemplated in the LRA (66/95) can, by agreement between the parties involved, be referred to a private agency for conciliation or arbitration. As Brand (2001:7) made it clear in respect of the erstwhile AMSSA (Arbitration and Mediation Services of South Africa), a private dispute resolution institution, such agencies do not compete with the CCMA, but complement the CCMA's services. Such agencies permit parties who can afford it, to select an arbitrator or mediator of their own choice and to arrange the service quickly and efficiently.

The main private agency providing such services in the past was the Independent Mediation Services of South Africa (IMSSA). IMSSA was established in 1984 as an independent, non-profit organisation responsible for pioneering private labour dispute resolution. IMSSA was established in response to a growing need for credible third party assistance in the labour relationship. The number of disputes dealt with by IMSSA has escalated over the years indicating that this process is a valued means of resolving labour conflict (Finnemore, 1998:224). However, IMSSA was liquidated and replaced by AMMSA. AMSSA was incorporated into another private dispute resolution agency, Tokiso, in February 2003 (AMSSA, 2002:1).

The choice of an appropriate mechanism for dispute resolution depends on the interests of the disputing parties and applied statutory limitations (Kossowski, 1994:52). Private dispute resolution is mostly available for bigger organisations where there is a collective agreement specifying that a private dispute resolution body such as Tokiso can be used.

Moyane (2002:8) pointed out that globalisation had resulted in high mobility of employees, where employees can be seconded to various parts of the world. These arrangements are costly and employers want guarantees of certainty in dispute resolution. It is therefore common for contracts of employment to provide for private dispute resolution processes. Private conciliation and especially arbitration has the advantage of being quick as it happens at the convenience of the parties. The parties choose a conciliator or arbitrator in whom they have confidence and accept the outcome as binding on them.

Some of the benefits of private dispute resolution are therefore that the parties to the dispute can come to an agreement about the individual appointed as the conciliator or arbitrator as well as the date for the process. The CCMA on the other hand appoints a commissioner and schedules cases without consulting the parties to the dispute. This results in non-attendance of CCMA conciliation meetings, which could be seen as one of the reasons why so many conciliation attempts are foiled because of the non-attendance of parties. The date for a private dispute resolution process is set up in agreement with the parties and the process is usually completed in a shorter time period. The downside of private dispute resolution is that it is costly and therefore not available to the majority of employees and employers.

Deale (2001b:35) contended that the CCMA does and will continue to play an effective and vital role in the resolution of disputes. However, the option of using private dispute resolution will become increasingly attractive as the benefits of cost savings and preservation of workplace relationships become more apparent.

6.5 Alternative dispute resolution

The concept alternative dispute resolution (ADR) includes all dispute resolution mechanisms other than the formal process of adjudication in a court of law (Pretorius, 1991:264). The primary dispute resolution agencies set up under the Labour Relations Act No 28 of 1956 (for the purposes of this study this piece of legislation will be referred to as the old LRA (28/56)), had proved over time to produce very poor dispute settling performance. These agencies were the old

industrial councils, conciliation boards and the Industrial Court. As stated in previous paragraphs, the conciliation boards only managed to achieve a mere 30% settlement rate against the 70% settlement rate of the erstwhile Independent Mediation Services of South Africa (IMSSA) (Du Toit *et al,* 1999:25). IMSSA was a private, non-profit organisation with a core of full-time staff that arranged mediations and arbitrations, ballots and relationship-building-by-objectives services. According to Pretorius (1992:103) the most commonly used dispute resolution mechanisms provided by the Independent Mediation Service of South Africa (IMSSA) was mediation and arbitration. These processes were conducted by trained persons drawn from its panel (Anstey, 1991:252).

According to Zack (1997:95) ADR offers a means of bringing workplace justice to more people, at lower cost and with greater speed than conventional government channels. It also helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively. Wittenberg *et al* (1997:155) mentioned that more and more disputants, courts, public agencies and legislatures in the USA are embracing the use of ADR in employment disputes. Slate (1998:1) indicated that the American Arbitration Association is dedicated to the promotion of specifically the mediation process for dispute settlement. He saw mediation as a fast, cheap and effective way to resolve disputes. The settlement rate achieved through mediation is as high as 85% in the USA where ADR is used.

Negotiation should also be included in any discussion as a dispute resolution process. However, it is specifically excluded from this section because the focus of this study is on individual unfair dismissal cases and negotiation in the broader sense has more to do with the collective labour relationship. Collective bargaining between trade unions and employers is accepted as the primary method of dispute resolution in collective labour law. Pretorius (1991:264) also excluded from his discussion of ADR any of the mechanisms established by the old LRA (28/58) even though some sort of ADR was intended in the process at conciliation board level.

Before the introduction of the LRA (66/95), the use of ADR has increased significantly. Pretorius (1992:104) concluded that the increase in active trade unions

from the COSATU and NACTU federations had led to an increase in the use of private dispute resolution mechanisms due to the fact that the statutory system had no credibility among the big, sophisticated trade unions and employers. It should be borne in mind that private ADR mechanisms require the consent of both parties for initiation. This could also be an indication that the role players in the labour relations system joined forces in an attempt not so much to change the system, but to overcome the shortcomings of the system existing at the time. As explained in Chapter three, the lack of credibility and ineffectiveness of the dispute resolution system before 1995, when the LRA (66/95) established the CCMA, caused structural strains, which changed the system in order to maintain stability and move back to a state of equilibrium in a changed environment.

Another form of ADR is described by Le Roux (2002:29) as "opting out of the CCMA" through collective agreements. This option, however, is also mentioned in the context of collective labour relations and is of little relevance to small employers and individual employees.

The question to be asked at this point in the study is; what is the current definition of ADR in the South African dispute resolution context? If the definition includes all process outside of the Labour Court, then nearly the whole system of labour dispute resolution in South Africa can be viewed as 'alternative'. The main aims of ADR, which according to Zack (1997:69) is bringing workplace justice to more people, at lower cost and with greater speed, have been encapsulated in the objectives of the CCMA. The processes previously referred to as 'alternative', have now been institutionalised. However, in practice, the arbitration process has assumed a very legalistic and technical character, the process to finalise a dispute has become very time consuming and with the increasing role of labour lawyers it has also become an expensive system. This study aims to find out what would the CCMA commissioners perceive as 'alternative dispute resolution' in the current context and to what extent such practices and processes can be accommodated within the system under the LRA (66/95).

IMSSA, as one of the role players in the old system of dispute resolution raised some concerns when the negotiations around the drafting of the new LRA took

place (Robertson, 1995:67). IMSSA warned that if the new proposed dispute resolution system fails, the legislation that was proposed at that time would also fail. IMSSA embarked on a process where they invited contributions from over 130 arbitrators and 140 mediators as well as administrative staff to include in their submission to the Department of Labour. These submissions drew on the experiences of IMSSA's practitioners over ten years.

IMSSA raised concerns about the fact that the new system of dispute resolution was the result of a tough negotiation process between the social partners involved in NEDLAC. This inevitably resulted in trade-offs between various interests resulting in legislation that reflects a compromise, at the expense of overall coherency. IMSSA suggested a participative dispute system design process facilitated by experts in this field. IMSSA was also concerned about the very prescriptive nature of the proposed Act where processes are defined and the boundaries of processes are fixed. They foresaw serious capacity and cost constraints and they also predicted that particular processes and forums might not work smoothly in the South African context (they referred specifically to the workplace forums). According to Robertson (1995:68) they were also concerned that a relatively sophisticated and complex dispute resolution system will be incorporated in the new LRA (66/95). It would have been more desirable for such a system to evolve over time via a negotiation process than to be imposed by legislation. Cost to government was seen as a further problem because the CCMA system's budget far exceeded the budget that was available to the old dispute resolution system under conciliation boards and the industrial court. From previous chapters in this study it seems as if most of the problems that was foreseen by IMSSA, have become a reality.

The Arbitration Foundation of Southern Africa (AFSA) includes in their services provision for disputes which cannot be neatly dealt with in terms of existing sets of rules and make provision for the need to mend broken labour relationships after disputes (AFSA, date unknown:5). Alongside the concerns of IMSSA that the system is too prescriptive and fixed, Wittenberg *et al* (1997:155-159) contended that parties to a dispute need to be flexible in considering approaches for resolving their disputes. At the moment, however, the employers and employee parties in the South African labour relations system are still concentrating on the system and rules

created by the LRA (66/95). The focus is mostly on the dispute resolution processes as provided by the CCMA and it is only the bigger and more sophisticated employers and unions that might make use of possible alternatives. This can be ascribed to the fact that ADR is mostly offered by private dispute resolution institutions and come at a cost that most individual employees and small employers cannot afford.

6.6 A Systems approach to conflict management

The theoretical background of this study (Chapter three) uses the systems approach to labour relations to identify the internal and external dispute resolution mechanisms, institutions and processes. The process of conflict escalation has been explained in detail (Chapter four) in an attempt to show that there is a relationship between the internal and external mechanisms. How the conflict is managed internally in the organisation has an influence on the external process and ultimately the outcome. Lynch (2001:207) proposed a new approach to conflict management. She referred to a dispute resolution revolution that is occurring where managing conflict has moved beyond the case-by-case settlement of individual disputes. Traditionally organisations introduced dispute resolution methods as stand-alone processes in three distinct phases based on the driving principles of power, rights and interests.

Lynch (2001:207) went on to describe yet another phase, namely the integrated conflict management phase where the focus is on conflict competence. **Figure 6.2** contains a summary of these four approaches.

In the **power** phase, conflict is dealt with by a senior person with authority, or a manager in the company. This refers to an authoritarian way of dealing with disputes, which is characteristic of a market orientated capitalist system where all the power to make decisions is lodged in the hands of the employer. Many South African organisations still have this task-orientated management style, which is based on managerial prerogative and has probably been strengthened by the ideology of Apartheid. This approach is commonly found in a labour relationship that is highly adversarial and unpredictable (Nupen and Cheadle, 2001:116).

Figure 6.2: Four phases in the approach to conflict resolution

	Phase 1 Power	Phase 2 Rights	Phase 3 Interests	Phase 4 Integrated conflict management system
Manage-ment style	Authoritarian management style, Managerial prerogative, task oriented	Relies on legislation, procedures, codes, contracts Substantive and procedural fairness	Alternative dispute resolution, Mediation, arbitration.	People oriented management style, Managing conflict, Conflict prevention
Type of relation-ship	Adversarial relationship, latent conflict	Uncertainty, distrust, incapacity, use of outsiders, hostile environment	Distrust of processes, legalistic, overuse of arbitrations	Employee relations, culture of conflict competence

Source: Adapted from Lynch, 2001:207-208

The second phase that develops is the **rights** phase where dispute resolution and management of conflict relies mainly on legislation, rules, policies and contracts. This is to some extent characteristic of the current dispute resolution system that South African employers and employees find themselves in, where grievance procedures, disciplinary codes, rules and guidelines determine the nature of the relationship.

Nupen and Cheadle (2001:117) identified the fact that the dispute resolution system established by the LRA (66/95), created a hugely increased respect for procedure. The fact that the CCMA is dealing with more or less 120 000 cases per annum is a victory for procedure. However, it exposes a pathology of conflict in the South

African society and specifically in the labour relationship. Management styles are forced to focus on people but in a negative sense of making sure that the rules and procedures are followed, and if not, penalties have to be enforced. The workplace relationship is characterised by distrust and uncertainty, and training that focuses on the mechanistic aspects of substantive and procedural fairness. The high caseload places the system of dispute resolution under strain and the system becomes gradually more and more ineffective and people are looking to alternative methods of resolving their disputes. This usually happens in private institutions for whose services the parties need to pay.

However, many big companies in industrialised countries have moved on to the third phase that provides **interest**-based processes such as mediation, facilitation and arbitration. The dispute resolution system in South Africa has probably progressed somewhat in this direction, but the low settlement rate during the conciliation phase could be an indication to the contrary. This phase focuses on alternative dispute resolution which means that the conflict in organisations have escalated to a point where it had to be referred outside of the organisation to a dispute resolution body. This indicates an inability of the organisation to resolve the conflict internally. Many South African organisations find themselves in-between the rights and interest phases. They have come to rely so much on the fact that they have followed the proper internal procedures that they see no point in attempting conciliation. This could be the reason why employers do not attend conciliations, and if they do they have no mandate to settle. This could therefore be the reason for the low settlement rate.

Lynch (2001:208) proposed a fourth phase where people are offered a choice of all the available inter-connected options and functions to assist organisations to create a cultural transformation to "conflict competency". This fourth phase is referred to as the **integrated conflict management approach.** This phase involves a comprehensive approach to conflict, requiring from the organisation to change the company philosophy and in many cases the terminology of organisational life. Nupen and Cheadle (2001:121) drew attention to the fact that the common law had developed in a very negative way. It did not state what employees 'should' do to prevent disputes, but rather what will happen if they do not do it, namely breach of

contract, etc. The traditional approach to rules is also based on the criminal law model and terms are used such as 'breach' of 'rules' that constitutes grounds for 'sanctions' such as 'discipline' and 'dismissal'.

The disciplinary hearing is also characterised by criminal law phrases such as 'charges' against the employee and the employer 'defending' himself. The enquiry establishes 'guilt' and 'aggravating' and 'mitigating' circumstances should be taken into account.

This fourth phase introduces a new approach where more emphasis is placed on a more people centred management approach and a healthy work environment where the causes and not the symptoms of conflict are treated. The aim is to create a culture of conflict competency. The integrated conflict management system requires organisations to go beyond ADR to a systems approach to conflict management (Lynch, 2001:211).

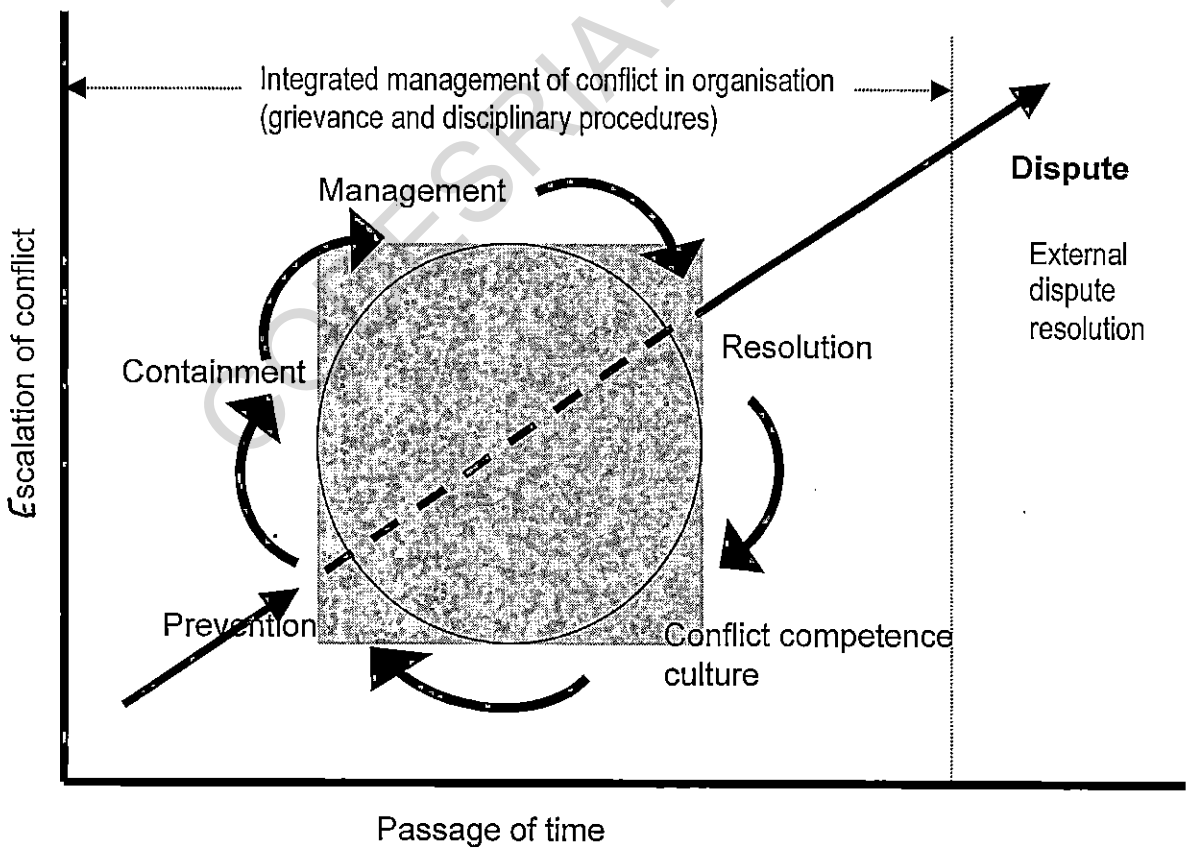
From **figure 6.2** it is clear that each of these phases have implications for the type of management style and the type of relationship in the organisation.

In line with the conflict escalation model that was introduced in Chapter four of this study, Lynch (2001: 212) proposed a system in which managers are expected to prevent, manage, contain and resolve all conflict at the earliest time and lowest level possible. It could be viewed as the implementation of alternative conflict resolution internal to the organisation and not waiting for the dispute to be formulated and referred to the CCMA.

Figure 1.1 in Chapter one gave an indication of the internal handling and management of conflict. The emphasis is placed on the grievance and disciplinary procedures as instruments to managing conflict. In terms of the integrated conflict management approach of Lynch (2001: 108) the picture should look different. The emphasis in the organisation should be on 'conflict' and not 'disputes' and on offering assistance and not decision-making.

Figure 6.3 explains that conflict is inherent in the organisation and it has the potential to escalate if not managed properly. The best way of dealing with conflict is to prevent it by providing a healthy system that includes voluntarism, privacy and confidentiality, neutrality, qualified assistance, respect for each other and for diversity, protection and access to information. If the conflict escalates it should be contained, meaning it should be resolved at the lowest possible level by offering the widest possible range of interventions and mostly enabling people to help themselves. This is brought about by people oriented management providing support structures through sincere and visible championship by management, management training for all in leadership positions and comprehensive education and awareness programmes. If there is a settlement it strengthens the conflict competent culture and trust in the organisation. If there is no internal resolution of the conflict, a dispute is declared and both parties should work together to dispose of the dispute through the available (statutory or private) dispute resolution mechanisms.

Figure 6.3: Integrated conflict management approach



Source: Adapted from Mischke, 1997a: 10-13 and Lynch, 2001:209

One of the aims of this study, as explained in Chapter one, is to establish what the CCMA commissioners perceive ADR to be in the current system of dispute resolution. It is also to explore the possibility of predicting future changes to the system arising because of the current problems experienced by commissioners. It is furthermore an attempt to explore 'alternative' alternative dispute resolution methods under the LRA (66/95) and to find out if changes need to be effected by legislation (from the outside) or if the system will change from the inside and adapt to the needs and perceptions of the parties involved in dispute resolution.

6.7 International perspective

Systems of labour relations, at national, sectoral and local levels represent an important feature of industrial societies' capacity to adjust to structural change. These systems have evolved to constitute a set of complex social arrangements including a web of rules relating role players who, while keeping distinct interests of their own, are bound to reach a degree of consent and some form of more-or-less co-operation (Rojot and Tergeist, 1992:9). These arrangements are shaped by countries' national legislation, labour market conditions, attitudes towards work, conflict and co-operation that make up the cultural system. The systems of industrial relations that have evolved over many years show a number of common characteristics: they are all experiencing the current challenges posed by the need for structural adjustment, more flexibility and work reorganisation.

A comparative study of dispute resolution systems in various countries was attempted at the start of this study. This, however, proved to be a daunting task and also assumed a very legalistic character. It soon became clear that the dispute resolution system in any country is a culmination of historical events, political processes, labour market conditions, cultural and population groupings and various stages of legislative developments. This can be illustrated by a brief overview of the labour relations system in Britain, the United States of America and Germany.

The British labour relations system has been characterised by a spirit of individualism, where the principle of social equality has not always been enshrined. This gave rise to a strong sense of class in the society and a collective

consciousness among the working class. The existence of a liberal-individualist ideology resulted in an almost completely voluntary system of labour relations with the greatest possible non-interference by the State. The State had, however, in the course of historical and political events provided some labour relations machinery in the form of an industrial court and boards of arbitration to facilitate the settlement of disputes. The government has also set up the Arbitration, Conciliation and Advisory Service (ACAS) to investigate recognition disputes and to assist employers and employees in conducting their relationship. According to Grossett and Venter (1998:61) it seems likely that the law will continue to play a key role and that the trend away from the tradition of voluntarism will continue.

Clark (1999:319-328) found that the UK and South Africa had certain similarities in the problems experienced with arbitration. Similar to the situation in South Africa, the alternative of arbitration in labour disputes has recently been made available in the UK. This "Arbitration Scheme" came into operation in mid-2000. The old industrial tribunals were intended to be easily accessible, informal, speedy and inexpensive, but by the early eighties, there was doubt whether these tribunals were still achieving these goals. The Justice Committee on the Industrial Tribunals, chaired by Bob Hepple, was formed with the brief to make proposals to transform the tribunals, to achieve the above-mentioned ideals and practices.

This committee focussed on the process as well as the adversarial approach adopted by the parties. It was suggested that the adoption of predominantly investigative procedures would allow tribunals to initiate pre-hearing enquiries to clarify issues in advance and to participate more proactively in the arbitration process (Clark, 1999:320). The old system allowed legal representatives to dominate the process by presentation of cases, examination in chief, cross-examination and re-examination of witnesses. It was also found that if the parties were not equally represented and did not have equal access to resources, an investigative approach, rather than an adversarial approach, is more likely to achieve results that are just and fair. It was found that parties prefer the investigative approach and even though the arbitrators were of the opinion that the adversarial approach was relaxed, the parties did not share this view because the system of examining and cross-examining was found to be adversarial. In South

Africa the commissioners apply a mixture of the adversarial and the investigative approach. Section 138(1) of the LRA (66/95) gives the commissioner discretion to conduct the arbitration in a manner that he or she considers appropriate.

American labour relations are in essence also a voluntarist system. Its main purpose is the promotion of collective bargaining, which is usually of an aggressive and antagonistic nature. Bargaining is mostly localised within the prescription of the law and employers and unions establish their own structures and procedures, usually at enterprise level. The ideology of individualism is shared by most Americans and there is no marked differences between the beliefs and values of employers and employees (Grossett and Venter , 1998:65-66).

The German system is viewed as a model system that has proved to function well in times of prosperity. The trade union movement has played a significant role in shaping the social and labour relations system. Unions viewed themselves as co-operative enterprises with a duty to protect members. Secondly it saw itself as a political movement with a high degree of centralisation, and worker participation in the workplace. The result has been a much more ordered system than in other countries, with less labour unrest. Union policy is co-operative and extensive and German authorities leave many issues for regulation to the social partners. Issues such as work hours, holidays and dismissal protection are laid down in collective agreements rather than law. If there is no collective bargaining agreement and no employer and employee associations, intervention by Government is permitted (Grossett and Venter, 1998:67-68).

Germany is among a group of countries such as Belgium, Canada, Denmark, Sweden, Switzerland, the United Kingdom and the USA in which an important proportion of labour disputes are settled through agreed procedures of conciliation and arbitration. In some of these countries the agreed procedures have assumed importance in connection mainly with grievance disputes. The legislative framework in Germany makes provision for the development of agreed procedures concerning conciliation and arbitration (ILO, 1984:61). Any dispute settled exclusively through agreed conciliation machinery shall have priority over any statutory conciliation

machinery. Organised labour and businesses across the sectors of the economy have concluded special conciliation agreements.

Government conciliation systems can be of a voluntary or a compulsory nature. In voluntary systems the parties are free to use or not to make use of the Government's conciliation facilities. The provision of conciliation by government is mainly conceived of as assistance or a service to industry. Examples of such voluntary systems are those in Austria, Belgium, Italy, Japan, the United Kingdom and the United States. In Canada and New Zealand conciliation is compulsory but there is a separate mediation procedure that is voluntary (ILO, 1984:87). In compulsory systems, the parties are required to make use of the governmental conciliation machinery.

The administrative framework for conciliation may be granted directly to the conciliating body such as to the Australian Conciliation and Arbitration Commission, the regional labour tribunals in Brazil, the Federal Conciliation and Arbitration Board in Mexico and the CCMA in South Africa. The administration can also be exercised by the Ministry of Labour or the state department responsible for labour affairs. This used to be the position in the United Kingdom and in South Africa under the old LRA (26/58). Autonomous bodies can also be set up to deal with the administration. In Belgium conciliation used to be a function of the labour inspectorate.

Dispute resolution systems in various countries have to concern itself with the appointment of either individual conciliators or conciliation boards. Decisions must be taken about the qualifications and appointment of conciliators (ILO, 1984:97-103).

In some countries the procedure of conciliation is generally carried out in only one stage. In a number of countries such as Indonesia, Iran, Venezuela and Zaire the reference of a dispute to a conciliation board is obligatory following a conciliator's unsuccessful attempt to deal with it. In Mexico, the intervention of an individual conciliator may be by-passed by the initiation of a pre-strike conciliation procedure before a conciliation and arbitration board. In New Zealand it is possible to deal with a dispute directly by a conciliation council without the parties benefiting from the

services of a mediator. The situation in Canada is different in that under the compulsory conciliation procedure, the Minister may refer a dispute either to a conciliation officer, to a conciliation commissioner or to a conciliation board (ILO, 1984:8).

Aligisakis (1997:73) argued that there was a decline in industrial disputes in Western Europe over the past twenty years. One explanation offered for this is the decline in trade union membership due to mass unemployment, which has weakened the union's power. Another explanation is that alternative dispute settlement procedures have reduced the need to resort to industrial action. Conflict has been institutionalised, giving rise to a new phase of industrial peace, with open or manifest conflict yielding to negotiations and consensus.

A lengthy discussion of dispute resolution systems in other countries would add little value to this study, and is therefore outside the scope of this study. Dispute resolution systems are complex in nature and a comparative analysis becomes technical and legalistic (ILO, 1984:85-107). Such a comparative analysis needs to be preceded by a thorough discussion of the internal and external mechanisms and processes available in each country. These could only be understood if the background of the political and economic factors influencing the labour relationship have been discussed. The focus of this study is not on such a comparison but rather on the understanding of the South African system of dispute resolution from the perspectives of the CCMA commissioners and life experiences during their day-to-day involvement in dispute resolution and the problems they experience.

6.8 Conclusion

This chapter focussed on the CCMA as the cornerstone of the labour relations system in South Africa. The aim of the study is to understand the system from the perspective of the commissioners. To enable a better understanding of the problems they are experiencing it was necessary to have a clear picture of how the system developed, what are the most pressing problems, how does the CCMA fits into the broader system of labour relations and how do the processes work that is available for conciliating labour disputes.

The point was made in the preceding sections that it would take a paradigm shift in the workplace to have effective resolution of conflict, and the integrated management systems was offered as a possible solution to the problem. It was suggested that South African organisations are caught up in a rights and interest phase with regard to dispute resolution. It was emphasised that the parties should move away from viewing conflict as negative and recognise the value of resolving disputes as soon as possible. The grievance and disciplinary procedures should not be viewed as the only mechanisms for managing conflict but they should be viewed as forming part of an integrated conflict management strategy. Conflict should not be avoided at all costs but it should be prevented if possible, contained, managed and resolved, preferably within the organisation. The contention is that if internal mechanisms and processes are understood and used effectively, fewer disputes will be referred outside of the organisation to specialised dispute resolution bodies such as the CCMA.

In this chapter the CCMA as the most important statutory **institution** for external dispute resolution was discussed and reference was made to other institutions of the labour market that play a role in the dispute resolution process. Other means of resolving disputes, besides those provided for in the LRA (such as CCMA conciliation and arbitration) was explored and 'alternatives' to alternative dispute resolution were explored.

The preceding chapters have set the scene for the research by stating the problems and aims of the study. The theoretical framework was created in Chapters two and three. Chapters four to six was used to explain the internal and external mechanisms and processes inherent in the South African dispute resolution system and to explain that there is a specific relationship between these mechanisms and processes.

Chapter seven will be devoted to explaining the methodology that was used to operationalise the aims of this study.

CHAPTER 7

METHODOLOGY

7.1 Introduction

Mills offered the following advice in ***Sociological Imagination:***

> *"You must learn to use your life experiences in your intellectual work: continually to examine and interpret it. In this sense craftsmanship is the centre of yourself and you are personally involved in every intellectual product upon which you may work."* (Neuman, 1997:16)

This study is based on the researcher's experience firstly as a commissioner of the CCMA since its inception in 1996 and secondly as a lecturer, teaching various courses in industrial relations and dispute resolution. The research problem and aims of the study are the products of observation and the life experiences of the researcher over many years as a CCMA commissioner.

The methodology used in this study is designed around the aims that this study sets out to achieve. The primary aim of this study is to explore the experiences and perceptions of CCMA commissioners regarding the ability of the parties involved in the dispute resolution process, to effectively deal with labour conflict and disputes. The question to be asked is whether the lack of capability of the parties in dealing with the grievance and disciplinary procedures could be the reason for the high rate of referrals to the CCMA? The open system approach to labour relations holds that the system will adapt to the environment in an effort to maintain stability. The aim is thus to explore the ability/inability of parties to deal with conflict as a possible cause of structural strain in the industrial relations system. The way in which the system attempts to compensate for the instability caused by the high referral rate will be explored.

As stated in Chapter two, a multi-perspective approach is used in this study. The macro-theories of functionalism and conflict theory are used to describe the system of labour relations and to indicate where dispute resolution fits into this broader framework. Furthermore, it helps to explain that the internal conflict handling processes and mechanism have a direct influence on the effectiveness of the external mechanisms and processes for dispute resolution. The micro-theory of interactionism will be used as the basis of the methodology in this study and the reasons for this have been explained in section 2.5 in Chapter two. Although the macro-sociologists have a tendency to do research from a positivistic approach by using questionnaires and structured interviews, and the micro-sociologist prefer using interpretive methods such as unstructured interviews and participant observation, a number of studies have sought to utilise mixed methods of research. There is evidence to suggest that the strategy of mixing methods is becoming more widely used in contemporary sociological research and is enriching the quality of the research (Marcus and Ducklin, 1998:52).

The CCMA commissioners are the representatives of the state tasked with the resolution of these disputes. They are trained and well aware of the technicalities involved in conflict resolution and are caught up on a daily basis in having to deal with the incapacity of employer and employee parties. This study will explore the perceptions of the CCMA commissioners regarding the ability of employers and employees to engage in successful dispute resolution.

7.2 Methodology defined

Bailey (1978:26) made a distinction between 'method' and 'methodology'. **Method** refers to the research technique or tool used to gather data. **Methodology** refers to the philosophy of the research process. There is a wide range of methodologies or approaches and criteria for understanding social phenomena ranging from qualitative to quantitative (Bailey, 1978:27). Other terms frequently used in research also need to be defined for clarity. **Theories** are ways of looking at society focussing on particular issues and types of questions (Marcus and Ducklin, 1998:23). Babbie (1989:36) defines theory as an idea and Neuman (1997:37) sees

it as a system of interconnected abstractions or ideas that condenses and organises knowledge about the social world. An '**approach**' is associated with different traditions in social theory and diverse research techniques (Neuman, 1997:62). Three approaches are associated with sociology namely the positivist, interpretive and critical social science approaches. Each approach is characterised by a specific methodology of research. A **perspective** is a viewpoint that involves interpreting data in a certain way. Marcus and Ducklin (1998:27) stress the difference between positivist (scientific or macro) and interpretive (phenomenological or micro) approaches to the subject. The terms 'approach' and 'perspective' are used in this research to refer to the same thing.

Qualitative social research relies largely on the interpretive and critical approaches to social science and although they differ in important ways, they are both alternatives to positivism (Neuman, 1997:329).

The study is firmly based in the structural functionalism theory and according to this approach, the discipline of sociology should study the relationship of parts of a society to each other and to society as a whole. To study the function of a social practice or institution such as the CCMA, the contribution of that practice or institution to the continuation of society is analysed. However, to study one institution or practice, we need to know how it relates to other parts of the labour relations system. In the structuralist approach the focus is on the whole of society, and individual action is explained by how that whole is seen to work. The social world can only be understood by using the proven methods of the natural sciences. It goes further to say that the actions of individuals are the product of social forces and that sociologists can uncover the nature of social reality by using the positivist approach (Cuff and Payne, 1981:165).

Weber, however, believed that to model sociology exclusively on the methodology of the natural sciences is a serious mistake (Cuff and Payne, 1981:166). Weber saw sociology as a science, which attempts the **interpretive understanding** of social action to arrive at answers. He insisted on an interpretive understanding of social behaviour and the development of methodological tools to arrive at that end because it is important to understand the subjective meanings human beings place

on their actions (Cuff and Payne, 1981:168 and Martindale, 1971:385). Weber developed an 'ideal type' which is something developed by a researcher to help him or her analyse a particular set of actual events. It consists of the researcher's own selection of evidence and observations from reality to create a tool to analyse a specific problem he or she has identified. The researcher in this study has used life experiences as a commissioner and the basic knowledge of sociological theory and systems theory to create a tool to analyse a specific set of problems regarding dispute resolution in the South African labour relations system.

Weber (Martindale, 1970:385) used the concept of *Verstehen*, or emphatic understanding as a mechanism to be able to explain conduct. Weber, however, saw the method of *Verstehen* only as of secondary significance and not a complete method in itself. Verification of subjective interpretation (this refers to the views of the CCMA commissioners) by comparing it with concrete evidence (the statutory dispute resolution system and the problems according to literature) is indispensable (Martindale, 1970:386). The study of human behaviour shows that meaning is only one of the causal components of action. The system of dispute resolution and the problems of the CCMA were firstly elaborated on to set the background against which the commissioners' life experiences could be interpreted.

Blumer (Cuff and Payne, 1981:170) highlighted some basic differences in the research strategies practiced by structuralists and symbolic interactionists. Structuralists focus on societies as a whole and the structure and functioning of collectivities, whereas the symbolic interactionists tend to start with assumptions about and questions relating to man as a social being. Man is not a passive object whose actions are determined by societal forces but an active 'attacher of meaning' to the world. This ontology belongs to anti-positivism, which is *inter alia* found in symbolic interactionism. They stress the need to determine people's meanings, their definitions of the situation and changes in these over time. They do not set up explicit hypotheses before they move into the field. Their research strategies tend to be qualitative rather than quantitative. Symbolic interactionists place the accent on attitude and meaning (Martindale, 1970:339). Thomas (in Martindale, 1970:339) saw the problem of sociology as one of tracing the influence of society and culture on the individual and the individual on society. Attitudes represent a process of

individual consciousness, which determines real or possible activity of the individual in the world.

Although the theoretical approach of this study is grounded in the structural functionalism, the methodology is of a qualitative nature. The structural functionalist theory was used to analyse and explain that labour relations are made up of interconnected parts, which forms a whole. Functional analysis raises the question whether the CCMA as a dispute resolution institution is the most appropriate institution to maintain the system of labour relations. The systems theory was then used to identify the internal an external mechanism and processes for conflict resolution. The parties to the conflict process were identified and it was pointed out that CCMA commissioners as representatives of the State, play a crucial role in the whole process of dispute resolution. The commissioners are tasked with the resolution of disputes. They do not only have to deal with the structural problems of the system and the rules prescribed by legislation to maintain the system, but they also have to bear the brunt of criticisms from employer and employee parties if the system seems to malfunction.

The interactionist perspective will be used to explore the experiences of CCMA commissioners. They are viewed in this study, not as passive objects, whose actions are determined by societal forces but, as the active contributors of meaning to the dispute resolution function of the labour relations system. Their perceptions will be used to give definition to the situation of dispute resolution and the changes in the system over time. The influence of the labour relations system on the individual commissioner and the influence of commissioners on the system will be explored. Their attitudes and perceptions represent a process of individual consciousness, which will be used to construct the reality of CCMA commissioners in the labour relations system. Their perceptions will be used to explore changes over time, to identify problems in the system, to explore alternatives, to establish where the structural strain lies in the system, what the causes for this structural strain are and to seek possible solutions to the problems.

7.3 The qualitative orientation

The qualitative orientation in research relies largely on the interpretive approach as opposed to the critical and positivist approaches to social science. The researcher focuses on subjective meanings, definitions, metaphors and descriptions of specific cases (Neuman, 1997:331). The interpretive approach is more concerned with achieving an empathic understanding of feelings and world views than with testing laws of human behaviour (Neuman, 1997:75). It is concerned with how ordinary people manage their affairs in every day life and how they get things done. It is defined by Neuman (1997:68) as "...the systematic analysis of socially meaningful action through direct detailed observation of people in their natural settings in order to arrive at understandings and interpretations of how people create and maintain their social worlds".

7.3.1 Type of research

This study has elements of **exploratory, descriptive** and to a lesser extent also **explanatory** research questions. It involves qualitative research methods, and non-probability selection techniques and is more hypothesis generating than hypothesis testing (Mouton, 2001:48 – 152).

This study is **exploratory** in nature because it explores the perceptions of commissioners about various aspects of the dispute resolution system such as: "What are the problems with the current dispute resolution system as embodied in the CCMA and what are the needs of the various parties (employers and employees)?" It will also explore the operation of the CCMA as a dispute resolution institution and the perceptions of the commissioners involved in the processes of conciliation and arbitration. This kind of study is difficult to conduct as there are few guidelines to follow and everything about the topic is potentially important and the direction of the inquiry changes frequently (Neuman, 1997:19).

The study is also **descriptive** as it is premised on certain highly developed ideas about the escalation of conflict, the incapacity of the parties and structural requirements of the labour relations system. Descriptive research gives a picture of

a specific phenomenon but also gives specific details of a situation (Neuman, 1997:19). The researcher begins with a well-defined picture and then does research to describe it accurately. In this study, the research will start with a well-defined picture of conflict in the workplace and the dispute resolution process, after which the perceptions, problems and needs of the parties involved in using the dispute resolution processes (both within the workplace and at the CCMA) will be described. Quantitative data is usually used to present basic background information (Neuman, 1997:19). Data such as the number of cases referred to the CCMA, the settlement rate, number of full and part-time commissioners in a specific region, number of conciliations per commissioner per day and number of cases referred to arbitration are examples of such data required to describe the system. The focus of this study is, however, not on quantitative data but rather on the qualitative data obtained through the interviews.

There is also an element of **explanatory** research where a lot is known about a phenomenon or an issue - you have a description of the issue and one wonders "why" things are the way they are. Why are so many cases referred to the CCMA for resolution? If the rules of fairness are spelled out so clearly in the LRA (66/95) why is it that employers are taken to the CCMA so often? Explanatory research builds on exploratory and descriptive research and goes on to identify the reasons why something occurs (Bailey, 1978:32).

7.3.2 Units of analysis

The units of analysis in this study are the individual commissioners. As explained in the previous section, the commissioners are the representatives of the state in the process of dispute resolution. They are confronted with the reality of the problems and strains of the dispute resolution system. They have to deal with the other role players in the labour relations tri-partite system, namely the individual employers and employees. The commissioners are in the midst of a set of sophisticated rules and regulations pertaining to the labour relationship and are experiencing the incapacity of the employers and employees to function effectively within the system.

7.3.3 Data collection

7.3.3.1 Geographical area

This study focuses only on the problems in the Gauteng region of the CCMA. The reason for this is that the Gauteng region has the highest referral rate (36% of all cases referred to the CCMA during the 2001/2002 period was in Gauteng) and the lowest settlement rate (47% compared to more than 60% at the national level – see section 6.3.2 above). According to the CCMA (2002:12) the Gauteng region has 27 full-time commissioners and 149 part-time commissioners in 2001/2002. The list of part-time commissioners obtained from the CCMA offices, however, only contained the names of 115 part-time commissioners of which only 34 e-mail addresses could be obtained. The telephone list provided by the CCMA contained the names of 29 full-time commissioners. The limited number of respondents also played a role in the decision to approach this study from a qualitative perspective.

7.3.3.2 Sampling and data collection strategies

Initially it was decided to send questionnaires to all the full and part-time commissioners in Gauteng. All the commissioners would have been given an equal chance to be included in the study. Babbie (1989:166) refers to this kind of sampling technique, where all members of a specific population have an equal chance to be included in the research, as "**probability sampling**". Even with a relatively high response rate, it would not have been possible to do justice to quantitative data analysis.

The main reason for changing the data collection strategy, became clear during a meeting with the CCMA Director. He pointed out that commissioners were under tremendous pressure due to workload and that their time to attend to this research would be very limited. It was also stressed that CCMA management could not force participation of the commissioners in this research. Since the inception of the CCMA, commissioners have also been subjected to various research initiatives and they have reached a point of resistance to these kinds of interventions in their daily routine. It was also discovered that the response rate of commissioners in the

surveys done by the CCMA itself was very low. An alternative strategy had to be considered.

- **Individual interviews**

At this point it became clear that the study will have to focus mainly on qualitative data and that a questionnaire will not be able to deliver the depth required for proper qualitative analysis. It was thus decided that an interview schedule should rather form the primary data collection instrument. The strategy was then to use a non-probability sampling technique to obtain the views of commissioners. This meant that certain members of a specific population – the Gauteng commissioners - have no chance of being included in the sample (Welman and Kruger, 2000:61).

It was decided to start interviewing colleagues who are known to the researcher. This method is called **purposive sampling** which is an example of non-probability sampling, where the researcher selects members from a difficult-to-reach population (Neuman,1997:206). During a training session on the implications of the new changes to the LRA (66/95) and the CCMA Rules, the researcher explained the nature and purpose of the research to co-trainees and some of them agreed to take part in the study.

The **snowball technique** was also used to identify participants. After an interview, a specific participant would be asked for the names and contact details of other commissioners with relative long experience of the CCMA and dispute resolution, who would be able to make a contribution to the study and who would be willing to spend time on an interview. These commissioners were contacted and they co-operated.

During the interviews the need was identified to also interview other experts in the field of dispute resolution. Two of the participants mentioned differences between the CCMA processes and private dispute resolution processes and it was discovered that some CCMA commissioners are also involved in private dispute resolution. A meeting was then arranged with one of the directors of one of the most well-known private dispute resolution bodies. Even if the views of the

commissioners differ from the views of the CCMA management, it does not lessen the importance of the reality of the commissioners' experiences. It does not change their reality and it does not mean that their views and inputs cannot contribute a great deal to the understanding of the problem and aims of this study.

These interview schedules will form the primary sources of data in this research.

The problem with this method was, however, that it was only the part-time commissioners who were included in the sample. Numerous unsuccessful attempts were made to get hold of the full-time commissioners telephonically. The reason for this could be that they were involved in CCMA processes during normal working hours. Some commissioners who were contacted declined to take part in the research due to lack of time and also concerns that their direct head of department was not aware of this research project.

- **E-mail questionnaires**

In an attempt to involve the full-time commissioners and also to enhance the representativeness of the sample, it was decided to use the questionnaire in an attempt to see if the full-time commissioners are more willing to complete an e-mailed questionnaire than be interviewed. The decision was then taken to also send the questionnaire to all the part-time commissioners whose e-mail addresses could be obtained. The e-mail addresses of all the full-time commissioners were obtained.

The questionnaire was sent to all these commissioners with a covering letter explaining the research. After a week, an informal letter explaining the necessity of the inputs to the success of this study was sent to all those who had not yet responded. After another week attempts were made to phone the commissioners and request their participation. The problem was again the unavailability of the commissioners due to their constant involvement in processes during the day. All the efforts paid off and fifteen questionnaires were received. These questionnaires will be used to complement the information obtained from the in-depth interviews.

The purpose of qualitative research is not to generalise to the population but to get an in depth understanding of the life experiences of those commissioner who were interviewed.

The data were thus collected through two methods namely a structured interview (mostly the part-time commissioners) and an e-mail questionnaire (mostly full-time commissioners). The questions in the interview schedule covered the same issues that were dealt with in the questionnaire.

7.4 Operationalisation

Conceptualisation is the refinement and specification of abstract concepts. Operationalisation is the development of specific research procedures that will result in empirical observations representing the concepts that were defined in the first four chapters of this study (Babbie, 1989:129).

As mentioned in the previous section it was decided to use two different procedures to gather data namely the interview schedule and the self-administered questionnaire. Although it might seem that this study attempts a combination of quantitative as well as qualitative research techniques, something that some authors warn against for various reasons, the emphasis is on the qualitative method. According to De Vos (1998:359), Knafl, Pettengill, Bevis and Kirschoff highlighted **triangulation** as *the* method of combining the quantitative and qualitative approaches. But De Vos (1998:359) explained that the term triangulation was first coined by Denzin for referring mainly to the use of multiple methods of data collection with a view to increasing the reliability of observations and not specifically to the combination of quantitative and qualitative approaches.

De Vos (1998:359) emphasised that the researcher must make it clear what is meant by triangulation. This study makes use of three practical types of triangulation. **Theoretical triangulation** is relevant because several frames of reference or perspectives - as explained in Chapter two – are used in the analysis of the same dataset. **Data triangulation** is also relevant because data is gathered through the use of a variety of sampling strategies to ensure that a theory is tested

in more than one way. **Methodological triangulation** involves the use of two or more methods of data collection within a single study.

Creswell (De Vos, 1998:360) identified three models of triangulation. The first one is the **two-phase model** where the qualitative and quantitative parts of the study are kept separately. The **dominant-less-dominant** model is where a study is predominantly of either a qualitative or quantitative nature, but it is supplemented with a small component of the other paradigm. The **mixed methodology design model** provided the specific niche for this study. The mixed paradigms became clear from Chapter one of the study. The multi-perspective approach was explained in Chapters two and three and it became clear in the formulation of the aims and the research questions.

7.4.1 The interview schedule

Merton (see Babbie, 1989:174) explained that the semi-structured interview involves individuals who have been involved in a particular situation (CCMA commissioners, having been involved in conciliations and arbitrations). The hypothetically significant elements, patterns and processes, and structure of the situation have been analysed by the researcher. The interview schedule has been developed by setting out the major areas of enquiry for data to be collected in the interview. The interview is then focussed on the subjective experience of persons exposed to the pre-analysed situation in an effort to ascertain their definition of the situation.

The interview schedule that was used for the semi-structured interviews, consists of thirteen questions, which form the basis of the interview. The questions in the questionnaire were based on the problem statement of the research, the aims of the study and the research questions.

The main aim of this study is to explore and describe the experiences and perceptions of CCMA commissioners regarding the ability of the parties involved in the dispute resolution process to effectively deal with labour conflict and disputes within the legal framework provided by the LRA (66/95). The more specific aims of

the study are to explore the perceptions of the commissioners regarding various issues as summarised in **figure 7.1.**

Figure 7.1: Aims of the study

1. Relationship between conflict and disputes
2. Reasons for the high referral rate
3. Appropriateness of the system for small to medium sized employers and individual employees
4. Employers' orientation towards conflict and use of internal mechanisms
5. Ability of the parties to deal with conflict and disputes
6. Role of labour lawyers and consultants
7. Problems and needs of the role players
8. To explore the way in which the system copes with and adjusts to strains caused by high referral rates and incapacity of parties
9. The influence of the dispute resolution system on the labour relationship

Source: Researcher, 2003.

The **research questions** – on which the interview schedule is based – are derived from these aims and are as follows:

1. "What are the perceptions of the commissioners of conflict in the workplace and the dispute resolution processes and mechanisms of the LRA?" The question is whether there is a basic understanding amongst the parties that there is a relationship between internal conflict, the proper management of such conflict and the effective resolution of disputes at the CCMA?
2. "What are the perceptions of the commissioners of the reasons for the high referral rate?"
3. "Is the current system of dispute resolution appropriate for small and medium sized businesses and individual employees?"
4. "Do the parties to a dispute have the ability to deal with conflict and disputes within the legislative framework and what is the role played by labour lawyers and consultants in the dispute resolution process at the CCMA?"

5. "What are the needs and problems of the employers and employees with regard to conflict management?"
6. "How can the problem of high referral rates be addressed?" "How does the system need to change to accommodate this high case load and the incapacity of the parties?"
7. "What is the influence of the dispute resolution system on the individual labour relationship?"

Figure 7.2 contains the questions in the interview schedule. Under each of these questions is an explanation of the rationale behind the question and also an indication of how it relates to the aims and research questions. (See Annexure A: Interview schedule).

Figure 7.2: Interview schedule

1. Reasons for the high referral rate and how it should be dealt with.
This question refers to the primary and secondary aims and the second research question. It was also a good question to start the interview with as it is common knowledge that there is a high referral rate and commissioners feel the strain of working under such a caseload.
2. Relationship between internal mechanisms, effective dispute resolution and the high rate of referrals of individual unfair dismissal cases.
This question refers to the second, third, fourth, and fifth aims. The question was asked to find out if the commissioners perceive a direct link/relationship between the internal conflict resolution mechanisms and the external mechanisms. This question relates to the first research question, which deals with the relationship between internal conflict management and the effective resolution of disputes at the CCMA.
3. Appropriateness of the system for small to medium sized employers.
The third question deals with the third and the fourth research questions as well as the third, fourth, fifth and seventh aims. Literature has shown that the system of dispute resolution is a sophisticated one and this is an attempt to find out how the commissioners perceive the position of small to medium sized employers.

4.	Appropriateness of the system for individual employees.
	The fifth, sixth and seventh aims are dealt with in this question and research questions three, four and five is involved. Most of the disputes at the CCMA are individual unfair dismissal cases and the question arises whether the CCMA can deal with its caseload and whether there is not another alternative method to deal with these cases
5.	Reasons for low settlement rate in Gauteng
	This question was added to the schedule after the meeting with the CCMA director where the concern was raised that the Gauteng region has a very low settlement rate compared to other regions. This question relates to all the aims and research questions but is particularly relevant for aim eight and research question six. Could the low settlement rate be due to the structural strain experienced by the system?
6.	The role of labour consultants and labour lawyers, including their future role
	Research question four and aim number six formed the basis for this question but the question could also shed some light on the ability of the parties to function within the system. However, the way in which the system adapts in reaction to the strain experienced, is also significant in this question.
7.	Needs and problems of employers and employees with regard to conflict management and dispute resolution
	This question refers to all the aims that imply incapacity of role players but more specifically to the fifth research question and the seventh aim.
8.	Whether the dispute resolution system should change and if yes, how.
9.	The response to the statement: "The CCMA is part of a sophisticated system of dispute resolution created by the LRA in which most role players are not capacitated to operate effectively".
	These two questions deal with aim number eight and research question six, and explore the views of commissioners about the appropriateness of the dispute resolution system and possible changes to the system.

10.	Views on the following statement: "The technical requirements of dispute resolution, as spelled out in schedule eight of the LRA, prevent parties from seeking alternative dispute resolution methods".
11.	Definition of Alternative Dispute Resolution (ADR), and whether it is an alternative to the CCMA. Whether there are alternatives to Schedule eight of the LRA.
12.	Views on private dispute resolution.
13.	The rigid system prescribed in Schedule eight seems to have changed the labour relationship drastically (no need for loyalty etc, only need to follow rules).

These questions refer to all the aims and the research questions in an attempt to establish if commissioners can offer alternatives to the current system of dispute resolution, how they foresee the system changing and adapting to circumstances, and what the impact of the system is on the employer/employee relationships at work.

Source: Researcher, 2003.

This interview schedule was used as a guideline during the interviews with the Commissioners. The number of interviews depended on the responses obtained. When the researcher found that no new information was forthcoming from participants, it was an indication that enough interviews were conducted. Time, costs and availability of participants also played a role in determining the number of interviews. In total, eleven interviews were conducted.

While awaiting the consent of the CCMA director and the research department, it was decided to start with the process of gathering data. The problem statement and aims of the study are the products of the experience of the researcher. The qualitative nature of the research enabled the researcher to discard the notion of external objectivity by approaching a friend who has also been a part-time commissioner. The thirteen questions were put to the commissioner in an informal manner in an attempt to explore this commissioner's perspective on the various issues that form the basis for the problem statement and aims of this study.

A number of lessons were learned from this first interview. The first one was that it is preferable to conduct an interview in the mother tongue of the participant. Secondly, it was found that it is better to allow the participant to talk freely than to stick to the sequence of the questions. The participant is more relaxed and genuine if it is a relaxed conversation.

The first few interviews also took quite long and the participants were sometimes caught off guard with the questions and wanted to think about them before they answered. The first questions in the interview took too long and the last questions were rushed through. Later on it was decided to send the questions to the participant a day or two before the interview in order for them to scrutinise the questions and think about the issues. It was also a good strategy to let the participant hold the questions in front of him/her so that they can determine the pace of the interview. This allowed them to spend more time on the questions that they have specific views on and allowed a deeper understanding of these issues. The interviews took approximately one hour to complete. Where participants were very resourceful the interviews took up to two hours. These interviews were recorded and later transcribed.

7.4.2 The self-administered questionnaire

The questionnaire was initially only based on the aims and research questions of this study. After a meeting with the director of the CCMA and the head of the CCMA's research department some questions were included to address some of their concerns. The issues raised were, however, in line with the aims of this study and could be incorporated successfully.

The questionnaire consists of nine sections as indicated in **figure 7.3.**

Figure 7.3: The nine sections of the questionnaire

1. Background information of the respondent such as qualifications, length of service and previous work experience.

2. Two open-ended questions on the reasons for the high rate of individual unfair dismissal cases (*Aim two and research question two*).
3. Individual dismissal disputes, including most of the aims and research questions.
4. The appropriateness of the system for small to medium sized employers (*Aims three, four, five and seven and research questions one, three, four and five*).
5. The capacity and orientation of the employers, employees and trade unions towards conflict and dispute resolution (*Aims five and research question four*).
6. The role of labour lawyers and labour consultants (*Aim six and research question four*).
7. The problems of commissioners (*Aim seven and research question five*).
8. The low settlement rate (*Aim five and research question five and six*).
9. How the system copes, and adjusts to the strain caused by the high referral rate (*Aim eight and research question six*).

Source: Researcher, 2003.

A covering letter explaining the nature and purpose of the research and a questionnaire was sent to **all** the full and part-time **Gauteng** commissioners of whom the e-mail addresses could be obtained. The reason for using the e-mail was because this appeared to have become the most common and popular method of communication, presenting the greatest likelihood of positive responses. The completed questionnaires were scrutinised and follow-up interviews arranged with those commissioners who showed a specific interest and insight into the problem of high referral rates and competency of the parties to the conciliation process.

7.5 Data capturing

Hubermas and Miles (De Vos, 1998:334) define a process of data management that refers to the activities aimed at achieving a systematic, coherent manner of data collection, storage and retrieval. Qualitative data are usually in the form of transcriptions of interviews, written descriptions of observation (field notes) and reflections – as the case was in this study. These are usually voluminous, and make the management of documentation of vital importance (Poggenpoel,

1998:335). The method of data capturing is different for the two methods of data collection that are used in this study, namely interviews and self-administered questionnaires.

7.5.1 Data capturing of the interviews.

According to Schurink (1986a:1) there are various techniques of recording data, including note-taking (field notes) and transcribed taped interviews.

7.5.1.1 Field notes

Welman and Kruger (2000:198) stress the importance of the interviewer's records and they suggest that the researcher should compile reports as soon as possible after an interview has been completed. This study is partly based on the reflective notes that the researcher jotted down while the interviews took place or as soon afterwards as possible. In these notes the researcher attempts to capture as accurately as possible the essence of the contents and of the recurring themes, which bind them together. Schurink (1986a:2) emphasises the importance of asking and dealing with the following questions: What was involved? Who was involved? Where did the activities take place? Attention must also be given to the views and theories of the writer and the procedure employed in constructing the notes. A model for consideration is the one by Schatzman and Strauss (1973:100) and it includes three elements, namely observational notes, theoretical notes and methodological notes.

- Observational notes

These notes focus on what has happened and require no interpretation. It merely describes aspects such as, who, what, when, where, how and who said what under what circumstances.

- Theoretical notes

These contain self conscious, systematic attempts to derive meaning from the observational notes. At this point the researcher "makes whatever private declaration of meaning he feels will bear conceptual fruit" (Schatzman and Straus, 1973:101). He or she interprets, infers, hypotheses, develops new concepts, link these concepts to others and relates one observation to another. Some interview participants mentioned specific issues relating to the theoretical background. Other mentioned specific issues that should also be explored. Their views and ideas gave rise to new debates and issues that needed to be followed up. These were also written down on each interview participant's file for further reference during the analysis.

- Methodological notes

The methodological notes are mainly reminders, instructions and critical comments to the researcher himself.

These elements were considered in the field notes. During the interview the researcher made notes on each of the questions, specifically where a new idea was raised or new information was forthcoming. At first the researcher tried to make the notes in the same numerical order that the participant answered the questions. This, however, did not seem to work as the participants tended to jump from one issue to another. It would have been disruptive to stop the participant to focus attention on another issue. Some interviews were a bit more formal and thorough notes could be taken. Other interviews assumed the character of a very relaxed discussion and note-taking might have seemed rude and inconsiderate. The field notes were also hand-written and done in telegram style. After the interview the researcher made the theoretical notes that served as the basis for and part of the analysis of the qualitative data.

7.5.1.2 Transcribed taped interviews

At the beginning of the interview it was explained that the information gathered during the interview would be used not only for purposes of a PhD study but also for a report to CCMA management. It was explained that the research is of a

qualitative nature and that it is necessary to make a tape recording of the discussion to allow analysis of the data at a later stage. The commissioners who were interviewed are qualified individuals who in many instances work for themselves. Before agreeing to the interviews they wanted to know what the research's problem statement and aims were and also for what purpose the research is being done. If any commissioner was concerned that the information would be used against their will, they could have refused to grant the interview, they could have objected to the use of the tape recorder or they could have requested to remain anonymous. The only thing that some commissioners were concerned about was the time allocated to the interview as they fitted the interview into a very busy schedule.

- **Storage of the data**

After each interview a file was opened. On this file was placed the name and contact details of the participant, address and directions to the interview venue. A short paragraph was written on the background of the participant, including how he/she was identified, length of service at CCMA, other business interests and how and why this specific commissioner was included in the sample.

The field notes of each interview, which were in the raw and original handwritten form and a copy of the transcribed tape recording (Annexure B) was also placed on the file. Schurink (1998:7) referred to this type of file as the "master file" and it is suggested that they are catalogued according to date. The date of each interview is also recorded in the researcher's diary. Schurink (1998:7) also referred to "mundane" or background files. These files contain information of people, places and material accumulated during the course of the study. A separate file was opened for names and addresses of commissioners that were mentioned by participants who might be interested in the research topic and who would be willing to participate in the research. Information about private dispute resolution institutions was included in this file when it became clear that the absence of any information on these institutions would create a serious gap in the data. Another set of files mentioned by Schurink (1998:8), are the "analytical files". These files are also called "thematic files" because they contain the responses arranged according to specific themes or theories. In this study, the responses of the participants were

accordingly 'cut-and-pasted' from the original transcripts, and re-arranged into such thematic files according to the interview schedule. The information contained in the thematic files was rearranged into a document referred to as the "synthesising and interpretation of interviews" document. This document is included in the study as Annexure C, with the transcriptions of the interviews (Annexure B) for easy reference. The data was rearranged according to the specific themes under the thirteen headings in the interview schedule. The data derived from the thematic files were interpreted, analysed and synthesised into specific findings as discussed in Chapter eight.

7.5.1.3 Storage of questionnaires

The original questionnaires were stored together in one file. Nine separate files were opened, a file for each section of the questionnaire. As indicated in the previous paragraphs, each of these sections has relevance to specific aims and research questions of the study. Copies were made of the questionnaires. The original questionnaires were kept intact and the copies were split up and filed according to the specific themes and according to the specific aims. As some of the questions have a bearing on more than one aim and research question it was necessary to make more than one copy of specific questions.

Schurink (1998:8) stressed the importance of using strategies to manage, store and retrieve qualitative data once it has been collected. Copies of the transcribed files were stored on two different home computers and a compact disk. The field notes were photocopied and a back-up file system was kept at the office of the researcher.

7.5.2 Data capturing – interviews

The responses to the thirteen questions in the interview schedule were analysed qualitatively. Thematic files were used to capture the responses to each of the questions. Each of the study aims and research questions were dealt with separately. The information obtained from the interviews was the main source of data and it was supplemented by the responses to the open-ended questions in the questionnaire.

7.5.3 Data capturing - questionnaires.

Baily (1978:94) stresses the importance of clarifying, explaining and justifying the goals of the study to the respondent. This was done in the covering letter that was forwarded to the commissioners who were sent the self-administered questionnaire (see Annexure D). The questionnaire – as explained in the previous section – contained mostly open-ended questions. The answers generated by open-ended questions are often of a qualitative nature and need to be coded before they can be processed for computer analysis. The sample is, however, relatively small and the response rate not particularly high. The data were not processed by using a computer and doing a statistical analysis (Babbie, 1989:140). The coding process often requires that the researcher interpret the meaning of the responses opening the possibility of misunderstanding and researcher bias. According to Bailey (1978:107) open-ended questions are used for complex questions that cannot be answered in a few simple categories but require more detail and discussion. They are used to elicit the respondent's unique views, philosophy or goals. The disadvantages of this type of questions are that it makes the questionnaire very lengthy, it requires superior writing skills and the ability to express one's perceptions and views in writing. It requires much more of the respondent's time and effort and may engender a low response rate.

A code list was compiled by following the same structure as the questionnaire. The responses of each questionnaire respondent were captured in writing under each question. It enabled an overview of all the responses to a particular question on one or two pages. This code list is included in the study as Annexure E for easy reference.

By implementing the process of methodological triangulation the responses from the interview schedules and the questionnaires were then combined to address the issues raised in the problem statement, aims and research questions of this study according to the layouts in **figures 7.1** and **7.2.**

7.6 Data analysis

Poggenpoel (1998:336) contended that a researcher should have a reasoning strategy with a logical chain of events to support the conclusions after data analysis. This study has elements of both the inductive and deductive approaches and borrows from both the analytical induction and grounded theory strategies for data analysis.

Cresswell (De Vos, 1998:361) states that the **mixed methodology design model of triangulation** makes use of the advantages of both the qualitative and the quantitative paradigms. The research process works back and forth between inductive and deductive models of thinking. This also applies to the analysis of the data. According to Neuman (1997:46) the **deductive** approach begins with an abstract, logical relationship among concepts and moves toward concrete empirical evidence. The researcher had certain ideas about the dispute resolution system in South Africa and wanted to test these ideas against "hard data". The **inductive** approach begins with detailed observations of the world and moves toward more abstract generalisations and ideas. As you observe, you refine the concepts, develop empirical generalisations, and identify preliminary relationships. The study started of with the life experiences of the researcher as a CCMA commissioner (which is typical of the inductive approach). Instead of building up a new theory, the researcher looked to various sociological theories to try and make sense of the problems experienced in the dispute resolution system.

Both deductive and inductive methods were used in the analysis of the responses to both the open-ended questions in the questionnaire and the interview schedule questions. The responses to the open ended questions were coded firstly, according to the themes in the interview schedule. According to Babbie (1989:48) this could be referred to as deductive reasoning, where the themes in the interview schedule were identified as the key concepts related to this topic of research. A second process of coding was done in certain instances where new or secondary themes evolved in an attempt to arrive at principles that were possibly more or less universal. According to Babbie (1989:52), this method could be seen as an inductive

method of analysis. This is one of the characteristics – and benefits - of using the mixed methodology design model of triangulation.

According to Mouton (2001:108) analysis involves "breaking up" the data into manageable themes, patterns, trends and relationships. Interpretation involves the synthesis of one's data into larger, coherent wholes and relating one's results and findings to existing theoretical frameworks and models and showing whether these are supported or falsified by the new interpretations.

Various approaches to data analysis were considered such as the 'Constant comparative method' of Lincoln and Guba, Huberman and Miles's approach, Morse and Field's approach, Marshall and Rossman's approach and Tesch's approach (see De Vos, 1998:338 – 344).

The constant comparative approach entails comparing units and identifying categories after which the categories are integrated. Huberman and Miles's approach entails three basic processes of data reduction, data display and drawing of conclusions. Morse and Field's approach includes comprehending (making sense of the data), synthesising (describing phenomena), theorising (systematic selection and fitting of alternative models to the data) and re-contextualisation (development of theory). Marshall and Rossman's approach consists of five stages: organising the data, generating categories, testing hypothesis, searching alternative explanations and writing the report. Tesch's approach proposes eight steps from reading through the data and making notes, compiling a list of all the themes and topics mentioned, clustering op topics, codify the topics, describing the topics, ordering the topics through codes, analyse material under each topic and recoding data if necessary.

The method of analysis followed in this study is a combination of Huberman and Miles, and Morse and Field's approaches. It is broken down in seven steps or processes that are interlinked and mutually inclusive.

i) Data reduction

The process of data reduction started with the researcher's conceptual framework, which is reflected in the questionnaire and the interview schedule.

ii) Comprehending

The process of making sense of the data started with the researcher doing intra-participant microanalysis of interview transcripts until a picture could be formed of a phenomenon or a story can be told about it, patterns of experiences were uncovered and outcomes predicted. The fifteen questionnaires that were received were coded. A code list was compiled where a separate page was created for each question in the questionnaire. (See Annexure E). The responses of those commissioners who completed the questionnaires were then consolidated under the specific topics as it was dealt with in the questionnaire under specific questions. The interviews were dealt with differently. Thirteen thematic files were opened according to the thirteen different themes in the interview schedule. A fourteenth file was opened containing the background information on each respondent. During the analysis of the responses it became necessary to open two additional files. Although the issue of management and administration was not in the interview schedule there were so many responses on this topic that a specific file was opened. Another theme that kept recurring was the problems that the commissioners experienced and a specific file was opened to deal with this issue specifically. This process resulted in sixteen thematic files that were created (see discussion in section 7.5.3).

iii) Data display and Synthesising

The reduced data sets provide the basis for thinking about meanings. The data were displayed in two forms. The first was the coded data in the code list compiled by linking the commissioners' responses to the questions in the questionnaire under the topics that was dealt with in the different sections of the questionnaire (see code list Annexure E). The second set of data was incorporated in the document referred to as "Synthesising and interpretation of interviews" (Annexure C), which was compiled from the thematic files,

where all the responses were dealt with under the different themes according to the questions in the interview schedule.

Description can be provided with confidence about a phenomenon through either inter-participant analysis of transcripts, and/or analysis of categories of responses. This stage is characterised by synthesis, interpretation, linking, identifying relationships and verifying findings. The responses to the questions in the questionnaires were firstly analysed because the information was more cryptic and did not deal with the issues in too much depth. The responses were scrutinised, interpreted, and synthesised. The responses to the interviews were then analysed and linked to the responses to the questionnaires to establish relationships between the data collected in the interviews and the questionnaires. This provided for much more depth in the understanding of the responses.

v) Theorising

Alternative models and theories were selected and fitted to the data. Alternative explanations were constructed and compared with the data until the best fit could be obtained that best explained the data. Questions were asked in an attempt to link data to existing theories. The theoretical questions that were raised in Chapters two and three were then raised and attempts were made to find confirmation of these theoretical statements that were made.

vi) Conclusion drawing and verification

The researcher interpreted and drew meaning from the displayed data by comparisons, noting patterns and themes, clustering, looking for negative cases and checking responses with respondents.

vii) Recontextualising

The goal was to be able to place the results in the context of established knowledge and to identify the results that supported the literature or that amounted to unique contributions.

Poggenpoel (1998:344) stressed that there are not a wrong or a right way to perform qualitative data analysis. It is more important that the researcher should be able to logically account for stages in data analysis and that the final conclusions should be based on generated data.

7.7 Scientific validity of the study

According to Schurink (2003:5) qualitative researchers are often confronted with difficult questions about customary standards that are set for scientific research. Qualitative studies strive towards an understanding of meanings and the emphasis is therefore placed on internal validity or the production of accurate findings about the participants' life experiences. The two paramount issues associated with internal validity are reliability and validity. **Reliability** concerns consistency in collecting, analysing and interpreting the data. **Validity** refers to the fact that a particular method yielded accurate and true-to-life results about the phenomenon that was studied. Becker, in Schurink (2003:6) urged qualitative researchers to compile a natural history or a chronological overview or account of the study to enable the reader to establish its credibility and it should be kept in mind that, decisions and steps are taken while the research is being done and not before the study commences. The natural history of this study is therefore not a separate document but it is included in the discussion on how and why the different data gathering techniques were used.

Reliability of the measuring instruments, namely the questionnaire and the interview schedule, was dealt with by showing the relationship between the questionnaire/interview schedule, the aims of the study and the research questions. As explained in **figure 7.1** and **7.2**, care was taken that the research questions reflected the aims of the study and that both measuring instruments, namely the questionnaire and the interview schedule, deal with the same issues.

It was also explained in Chapters two and three how and why the various perspectives, namely the structural functionalism and systems theory, were used and why the empirical study was approached from an interactionist perspective. The reason for the combination of the inductive and deductive reasoning was also explained.

Throughout this methodology chapter, the origin of the study was explained in detail, including the methods considered, why and how the participants were identified, how the sample was obtained, what were the problems that were experienced and how these problems were overcome. During the analysis phase of the study, the research participants were phoned if there were issues that were not clear or where further information was required. Specifically with regard to the questionnaires, a research participant was e-mailed if the answer to a specific question was not clear.

Various efforts were also made to ensure a higher response rate. A personally addressed letter was written to each individual commissioner requesting him or her to respond to the e-mail questionnaires. After a week a similarly addressed letter was sent in an attempt to get a better response.

Right in the beginning of the study another methodology was tried. The case study method was explored. The researcher decided to investigate the perceptions of the role players in the dispute resolution process by doing case studies. It was decided to choose two weeks in July 2000 as the period to do the case studies in. The researcher worked continuously at the CCMA during that period and requested to only do conciliations. During those two weeks every individual unfair dismissal case was taken as a unit of analysis. During the conciliation the researcher would establish what the reasons were for the dismissal, and the capacity of the parties to deal with this dispute was investigated. After the conciliation there was a short questionnaire to be completed by both the employer and the employee party where they were asked what their perceptions were of the conciliation process, the CCMA, the commissioner, the process and the provisions in the LRA (66/95). Questions were also directed at their internal policies, mechanisms and procedures.

However, many problems were experienced with this approach. It was difficult for the parties who have just been in the process where the commissioner had to attempt to resolve conflict to then relate to the commissioner as a researcher. In cases where there was a settlement it was easier to get the co-operation of both parties, but where no agreement could be reached the emotions were still high and both parties were sceptical towards the changed role of the commissioner to that of a researcher. Employers are also busy and wanted to get back to work as soon as possible and did not see their way open to stay another 30 minutes for the interview or to complete a questionnaire. The completion of a self-administered questionnaire also presented a problem since many individual unfair dismissal cases involve domestic workers and labourers who were illiterate.

Another method to enhance reliability and validity was to attempt to involve the various categories of commissioner namely the full- and part-time commissioners, level A, B and senior commissioners, legally trained and non-legally trained commissioners, those involved in private dispute resolution institutions, those involved in bargaining councils and those not and those with long experience and the so called new-intake commissioners.

There are multiple sources of bias that can negatively affect the validity of the research results such as differences between the researcher and the research participant and factors associated with the research context such as broad social factors and the research settings. The fact that the researcher was also a commissioner helped to create the necessary rapport that was needed. The commissioners involved in the interview situation were phoned, the purpose of the study was explained and they were asked for approximately one and a half hours for the interview. They were sent the interview questions beforehand and had the opportunity to think about the questions. They were not rushed by the researcher and were able to allocate more time to those questions that they had specific strong opinions on. The interviews mostly took place at the offices of the participants where they felt at ease.

The fact that the full-time commissioners could complete the questionnaires at their own time and pace allowed them to give detailed answers. Due to the fact that their

e-mail addresses were known they could be contacted where clarity was needed on specific issues.

The method of triangulation, as explained earlier in section 7.6, was used to further enhance validity.

7.8 Conclusion

This chapter contains a detailed explanation of the methodology that was followed in the execution of this research. This study is of a qualitative nature and was conducted in an exploratory manner. The units of analysis are full- and part-time commissioners, who were included in the sample by using a non-probabilistic selection technique called purposive or judgemental sampling. In-depth interviews were held with commissioners that were selected in this manner, making use of an interview schedule containing thirteen questions. This sample was supplemented by e-mail questionnaires that were sent to all full- and part-time commissioners of whom e-mail addresses were available. It was mostly the full-time commissioners who responded to the questionnaire. Eleven interviews were conducted and fifteen completed questionnaires were received. Data analysis was in the form of content analysis and analysis of themes and topics to arrive at suitable explanations, theorising and re-contextualisation.

The analysis and interpretation of the data will be dealt with in the next chapter to arrive at the findings.

CHAPTER 8

ANALYSIS, INTERPRETATION AND FINDINGS

8.1 Introduction

The purpose of Chapters one to seven of this study was to carefully map the theoretical basis and background against which the respondents' perceptions of the dispute resolution system could be reconstructed, interpreted and understood. In this chapter, the responses of the research participants will therefore be analysed and interpreted. The structure of the interview schedule is used to structure this chapter. The aims of the study and the research questions, as anticipated in Chapter one and as set out in **figure 7.1** in Chapter seven, will be addressed in this chapter. The respondents will be described and their responses will then be systematically analysed. The questionnaire and interview responses will be integrated in an attempt to consolidate the aims and research questions with the findings. In conclusion the findings will be re-contextualised in terms of the theoretical framework of this study.

8.2 Background

8.2.1 General description of the respondents and participants.

As it was indicated in Chapter seven, two methods were used to gather data. The one method entailed a self-administered e-mail **questionnaire** that was sent to all the full-time Gauteng commissioners and to those part-time commissioners whose e-mail addresses were available. The other method was to identify CCMA commissioners using a purposive sampling technique to participate in in-depth interviews, where an **interview schedule** was used.

Even though the interview schedule structure will be used to structure the presentation of the findings – because it reflects the themes derived from the aims

of the study - the responses to the questions in the questionnaire will be analysed first. The reason for this is that the information obtained from the questionnaires is, because of the nature of the instrument, too fragmented and in the form of short statements, whereas those obtained through the interviews are more in-depth and analytical. The rationale for the difference in the structure of the questions in the questionnaire was simply to increase the likelihood of a positive response, by allowing shorter answers, obtaining perceptions and breaking down the theoretical issues into practical examples. As will be indicated, the fact that a specific issue is addressed from different angles actually enhances the validity of the study. The questionnaire also contains additional information that was included at the request of the CCMA management. The commissioners who answered the e-mailed questionnaire will be referred to as the questionnaire 'respondents' due to certain elements of quantitative data being reflected by their responses. The commissioners who were interviewed will be referred to as interview 'participants', as is normally done in qualitative research. The generic term 'respondents' will be used where no specific distinction is drawn between the two categories.

8.2.2 Questionnaire respondents

Fifteen commissioners responded to the e-mail questionnaire, eleven of whom were full-time and four were part-time. Four of these commissioners had experience of being involved in the CCMA both as full- and part-time commissioners. Most of the commissioners (seven) have more then five years service and most of them (twelve) are either senior or level A-commissioners. Eleven commissioners are older than 40 years, ten commissioners have a legal qualification and all the commissioners have undergone all the training courses offered by the CCMA including mediation, conciliation, conflict resolution, facilitation, arbitration, negotiation, substantive law and training in new legislation that impact on the work of the CCMA. Previous occupations include trade unionists, academics, community dispute resolution practitioners, teachers, magazine writers, change management consultants, human resources and industrial relations managers, practising advocates and labour consultants.

8.2.3 Interview participants

All of these participants were either senior or A-level commissioners, mostly with legal qualifications, more than six years experience and over the age of forty. The snowball technique of identifying the participants and the difficulty of getting hold of full-time commissioners, resulted in only part-time commissioners being interviewed. Three of these interviewed commissioners are associated with academic institutions and the rest are labour consultants, labour lawyers, advocates, private mediators and arbitrators and trainers. Two of the participants are not CCMA commissioners at the moment but are associated with private dispute resolution institutions and were involved in the establishment of the CCMA at its inception. The reason why they were included in the sample was that it became clear during the interviews that most of the part-time commissioners were also involved in private dispute resolution. It was found that there are certain differences in the experiences of the commissioners of the statutory and private dispute resolution mechanisms and the need arose to learn more about the relationship between private and statutory dispute resolution commissioners.

8.2.4 Presentation of data

The structure of this chapter is determined by the questions in the interview schedule as indicated in Chapter seven. Each theme will be dealt with separately by first analysing the questionnaire responses. The reason why the questionnaire responses were analysed first is because some of the answers were very superficial and sometimes in the form of single words, concepts and terms that needed verification. The interviews were then scrutinised for any additional information as well as more in-depth explanations for issues raised in the questionnaires. Only new information and clarification of issues will be added to the questionnaire responses, as it is not the purpose of a qualitative study to count the responses, but rather to understand the issues underlying the responses. A concluding section is then presented with the findings as well as a discussion and verification of the data where applicable.

Figure 8.1 explains the presentation of the data in this chapter. The interview schedule questions are used as the basis. The questionnaire responses are presented first, followed by the responses of the interview participants, and thereafter the concluding paragraph.

Figure 8.1: Example of the presentation of data

Section 8.3: Reasons for high referral rate...

Explaining why the question was asked and how it relates to the aims and the research questions

a) Questionnaire respondents

b) Interview participants

c) Conclusion and verification

Source: Researcher, 2003.

Figure 8.2 gives an indication of the way in which the questions of the interview schedule (part-time commissioners) were integrated with the questions of the questionnaire (full-time commissioners).

Figure 8.2: Integration of interview and questionnaire data

Interview schedule	Issue	Question-naire
Q1	Reasons for the high referral rate, and how it should be dealt with	Q2
Q2	Relationship between internal conflict management and external dispute resolution	Q2 & 3
Q3	Appropriateness for small to medium sized employers	Q.3 & Q.4
Q4	Appropriateness for individual employees	Q.3 & Q4
Q5	Low settlement rate	Q.8
Q6	Consultants and labour lawyers	Q.6
Q7	Needs and problems of the parties	Q.5 & Q.7

Q8	System change	Q.9
Q9	Sophisticated system – unsophisticated parties	Q.3
Q10	Technical nature of internal mechanisms prevent parties from seeking alternatives	Q.3
Q11	ADR	Q.9
Q12	Private dispute resolution	Q.9
Q13	Impact on individual relationship	---
---	Personal/life experiences of commissioners	---

Source: Researcher, 2003.

Using this structure, most of the rest of this chapter will be dedicated to analysing the data. The annexures contain the raw data relating to the interviews and the questionnaires. Annexure A contains the interview schedule, Annexure B the transcriptions of the interviews, Annexure C, the synthesis and analysis of the interviews according to the thirteen themes in the interview schedule, Annexure D contains the questionnaire and covering letter and Annexure E, the code list.

8.3 Reasons for the high referral rate of individual unfair dismissal cases and how it should be dealt with

This is the first theme in the interview schedule and it refers to the primary aim of the study as well as the second study aim, as indicated in schedule 7.1.

The primary aim of the study is to explore the perceptions of commissioners regarding the ability of the parties involved in dispute resolution and the reasons for the high referral rates as well as the influence of the high referral rate on the system. The second study aim focuses on the reasons for the high referral rate of individual unfair dismissal cases.

The second section of the questionnaire consists of two open ended questions on the reasons for the high rate of individual unfair dismissal cases and possible solutions to this problem.

8.3.1 Reasons for the high referral rate

a) Questionnaire responses

The reasons mentioned in the questionnaires can be divided into five categories.

The **first category** deals with the **ease of access** to the CCMA. It was mentioned that the CCMA is very accessible, that there are no costs involved in bringing a case to the CCMA, there are no consequences for referring a frivolous dispute, and that unions refer all cases and do not make a distinction between cases with merit and those without merit.

The **second** category involves the **high expectations** of applicants and their perception that one will always get some kind of compensation irrespective of the merits of the case. Some commissioners compare these perceptions of applicants to viewing the CCMA as *'...a one arm bandit...', '...lottery...'* or *'...an ATM machine...'* where one has to press the right buttons and money will be thrown at them.

The **third** category refers to the fact that applicants do not have **knowledge** of the system or their rights and obligations, and are poorly advised by trade unions, labour consultants and the Department of Labour, who lead them to believe that they have a good case and that they should pursue the matter further at the CCMA.

The **fourth** category encapsulates reasons pertaining to the poor **economic climate**, the high unemployment rate and poverty. It is argued that employees struggle to find employment and refer their case to the CCMA in the hope that there might be some kind of financial compensation forthcoming even if it is so-called *'nuisance money'* that the employer is prepared to pay just to get rid of the dispute.

The **fifth** category deals with **employers' lack of knowledge** of labour legislation, a total disregard for substantive and procedural requirements for fairness and the fact that it is easy to replace dismissed workers. It is also mentioned that employers are ignorant of their responsibilities and do not have, or they do not use their internal grievance and disciplinary procedures.

b) Interview participants

The interview responses clarified certain of the above issues and added some more reasons for the high referral rate.

Participant one indicated that the high referral rate is an indication of 'a **pathology of conflict'** in the labour relationship, which could be the result of a very paternalistic approach to human resources in the workplace. Participant nine, who mentioned that the labour relationship in many companies is still very adversarial, supported this view: *"... Because of the historical imbalances in the workplace the employees question the motives and fairness of the employer..."*. This participant, however, indicated that the high referral rate could be an indication of the trust that the employees have in the system of dispute resolution as embodied in the CCMA.

According to participant ten, the high case load is the result of the enormous jurisdiction that was given to the CCMA by the inclusion of the former 'homelands', the extension of the LRA (66/95) to the public service and various other pieces of new legislation adding to the responsibilities if the CCMA.

8.3.2 Solutions to the problem of high referral rates.

The respondents offered far-reaching solutions to the problem of the high referral rate of individual unfair dismissal cases.

a) Questionnaire responses

The **most** important solution that was offered involves the payment of some sort of a **referral fee:**

- The one option is that a revenue stamp should be required on the referral form: "...*Each referral should have a R20,00 revenue stamp, same as a Magistrate's Court summons and reviewed on a similar basis to discourage frivolous claims and abuse of the system...*".
- Another option is that both parties should pay an initial fee calculated at a percentage of the employee's salary. If the parties settle at conciliation, they both get their portion of the fee back. If not, then the party against whom the arbitration award is given, forfeits his or her portion of the fee.

- More cost orders should be made for frivolous and vexatious referrals and these costs must be enforced more strictly.
- There is a suggestion that employers must be fined for procedural unfairness.
- It was also suggested that all employees earning more than R 8000,00 should be charged a fee to use the CCMA's services.

The **second** important solution to the problem of the high referral rate was the **training and education** of employers, employees and trade union representatives. Awareness levels should be increased and problematic sectors should be targeted for information sharing and training. This training should involve requirements for substantive and procedural fairness in internal mechanisms and processes as well as on the rights and obligations of employers, employees and trade unions.

- It was suggested that the CCMA compile a small booklet with basic information about what can be expected at the CCMA and what type of cases does not have merits. These booklets should be available in all the official languages and should be handed out with the referral forms to prospective applicants, with the instruction that these booklets must be scrutinised before referring a dispute.

The **third** category of solutions involved the use of **advisory forums** such as Legal Aid Centres where more professional advice can be given with regard to the merits of cases. It was suggested that prospective applicants should receive more realistic and professional advice on the merits of their cases.

- A suggestion was made that these advisory forums, including the CCMA help desk, should provide qualified reports on the merits of a case before it is referred. If it is found in arbitration that the case was pursued in spite of the fact that the report stated that the case had no merits, some sort of a penalty could be invoked – it is not clear if this is in addition to a cost order or not.
- Another suggestion was the appointment of a special tribunal by the Department of Labour to deal specifically with domestic workers' cases as these cases are "...*clogging up the system*...". The Department of Labour could institute a similar tribunal for individual retrenchments.

b) Interview participants

The interview participants supplemented the above-mentioned suggestions.

Participant four emphasised the benefits and successes of the conciliation and arbitration '**case rolls**' to deal with the high referral rate. Parties are informed that their cases will be heard on a specific day at nine, twelve or two o'clock. There is a group of commissioners that take the cases as they are called and if parties are not there they call the next one. This is normally done to deal with the backlog and the participant suggested that this should be standard practice.

Participant three referred specifically to the merits of the **pre-mediation screening process** for reducing the high referral rate. When an applicant comes to the CCMA to refer a dispute there is a practice where a commissioner will contact the participant and attempt to do 'telephone conciliation'. This participant was, however, of the opinion that these commissioners should be specifically trained in telephone skills. This is supported by participant eight who felt strongly about the fact that case management should not do the screening of cases, as it requires the skills and knowledge of commissioners to decide on the type of dispute, jurisdiction, complexity and time allocation of a dispute. (Also see problems with telephone usage of administrative staff at the CCMA, section 8.16.1.1 and skills that commissioners need, section 8.16.3.2 below).

Another suggestion by participant three is that powerful mass media such as Yiso Yiso or Isidingo should be used to increase public awareness of the CCMA. "... *It is amazing that one still finds, eight years down the line, people still do not know what the CCMA is doing...*"

Participant ten was of the opinion that employers should be allowed to dismiss workers at will, with or without just cause, provided that he or she pays **compensation** equal to the amount of say, three months' salary. If the employer does not pay this compensation, the employee can challenge the dismissal and claim reinstatement. By doing this, the emphasis is on reinstatement and not on financial compensation.

Participant eleven suggested that a different system, similar to the **Small Claims Court** should be looked at, for small labour issues ('small', is determined by the monetary value of the claim). It has got to be a state run system but it does not mean that the state cannot outsource. This system would take care of most of the individual unfair dismissal cases that clog up the CCMA at present.

The interview participants clarified the issue of **'fees'**, '**costs**' and '**penalties**'. The first suggestion is that there should be a minimal referral fee to discourage people from referring a dispute without merits such as a revenue stamp or small amount of R 20,00 or R 50,00. The second suggestion is that there should be a penalty for applicants referring a frivolous and/or vexatious case. The third suggestion is a penalty for employers who have not followed proper internal procedures, assuming that if they did follow proper procedures the case would not have been referred. The fourth suggestion is that more cost orders should be made against employees who have referred a case with no merits (this is over and above the penalty) and the fifth suggestion is that these cost orders should be more strictly enforced.

However, participant nine was adamant that there should be **no costs** involved in referring a dispute to the CCMA. He reiterated: "... *in our society with the high incidence of illiteracy and low level workers, unemployment and poverty, there is a need for a very accessible system ...I also do not think that so many of the cases are frivolous. Maybe from the employer's side but not for that employee who has to travel for miles by taxi to come and tell his or her sad story in the hope of a month's poverty wages...*".

Participant nine referred to the fact that the historical imbalances in the workplace resulted in employees questioning the motives and fairness of the employers. There is not enough communication and transparency to create that **trust and credibility** that is needed. "... *Once employees start to view the internal procedures as credible, and buy into it, then the referral rates might come down...*".

c) Conclusion and verification

The aims that were addressed in the preceding section were to explore the perceptions of the commissioners regarding:

- the ability of the parties,
- the reasons for the high referral rate, and
- possible solutions.

It was found that employers and employees are experiencing difficulties to understand the system of dispute resolution due to a lack of knowledge of labour legislation, which spells out their rights and obligations and specifies the substantive and procedural prerequisites for fairness. Their ability to operate effectively in the system of dispute resolution is thus questioned and is seen as a reason for the high referral rate.

The respondents' perceptions of the reasons for the high referral rate varied from the fact that the CCMA is too easy accessible, to the fact that the high referral rate is an indication of a pathology of conflict and a motion of trust in the CCMA. Their suggestions for addressing this problem range from a minimal fee to refer a dispute to some screening mechanism.

It was established that the commissioners are of the opinion that the high referral rate places strain on the system, which renders it less effective than it could be.

8.4 Relationship between internal and external dispute resolution mechanisms and the high referral rate

This relates to the second, third, fourth, and fifth aims namely the reasons for the high referral rate, the appropriateness of the system for small to medium sized employers and for individual employees, employers' orientation towards conflict and the use of internal mechanisms, and the ability of the parties to deal with conflict and disputes.

a) Questionnaire responses

In response to an open-ended question, one respondent stated that there is still a **flagrant disregard for the law** amongst employers. Another indicated that employers remain ignorant of their responsibilities towards employees and another commented that in most of the individual unfair dismissal cases there is procedural unfairness on the side of the employers. These responses support the fact that there are problems with the internal procedures in companies.

Section three of the questionnaire deals with individual dismissal disputes. The questions in this section took the form of statements that were made, to which the commissioners had to respond by indicating if they agree or disagree with the statement. These statements dealt mostly with the internal mechanisms of the employer.

There were no decisive responses to the statements that employers do not have internal mechanisms (questions 3.1), that they do not properly use these mechanisms (question 3.2), that they do not follow the guidelines in Schedule eight (question 3.4) and the fact that employees are afraid of being victimised by their employers if they use the grievance procedures (question 3.9). The reason for this could be that a distinction was not made between small and large employers. However, there was an overwhelming agreement with the statement in question 3.7 that most small employers do not follow internal procedures before dismissing a worker.

Questions 3.3, 3.8 and 3.10 deal with the fact that conflict is viewed by the parties as destructive, that it should be avoided at all cost and the resultant reluctance to make use of the internal mechanisms for dealing with conflict. There was an overwhelming agreement to these three statements, indicating that internal mechanisms might not be used properly because of **negative perceptions** towards conflict and that it could be an attributing factor to the high rate of referrals to the CCMA.

There was also an overwhelming support for the statements that employees (of small employers) are not aware of the proper internal procedures to be followed (question 3.11) and that trade union representatives are ill-prepared to represent their members in disciplinary and grievance procedures (question 3.12). It can be concluded that the respondents were of the opinion that there are problems with regard to the ability of individual employees and their trade union representatives to deal with conflict and disputes.

b) Interview participants

Participant eight indicated that the relationship between the use of internal mechanisms and the referral of a dispute to the CCMA is only **theoretical** since there is nothing preventing an employee from taking the case to the CCMA irrespective of how the conflict was handled in the organisation. Participants two, three and four offered an explanation by adding that the most important prerequisite for successful handling of conflict is **credibility.** Although they agree that employers should do much more to attempt to follow fair internal procedures, it will not deter employees from referring a dispute to the CCMA if they do not perceive it as credible and have not bought into these procedures.

Participant six attributed the ignorance of employers to the fact that laws in the past have been written in a very **legalistic manner**. "*...The LRA is also deceptive as it seems quite straightforward with simple language on the surface, but we know that it has all kinds of twists. People don't read it because they assume it is going to be difficult...*".

Participant one pointed out that the disciplinary procedures are usually well developed whereas the grievance procedure is not. This gives an indication of the **paternalistic** approach to the labour relationship that still exists in the workplace.

Participant eight highlighted a specific problem regarding the use of **power.** He was concerned that small and medium sized employers perceive the grievance proceedings as a challenge to their power. In both the grievance and disciplinary hearings the employer tries to reaffirm his/her power. This allows conflict to escalate and make the resolution of the dispute in conciliation very difficult.

c) Conclusion and verification

It has been established that commissioners were of the view that especially the **small employers** do not know the law and do not apply fair procedures in the workplace. The second view was that both employers and employees perceive **conflict as negative** and that the internal mechanisms should be avoided where possible. The third view was that **employees** do not have sufficient knowledge of the law, are not aware of their rights and are badly advised by their trade union

representatives regarding how to deal with conflict. The fourth view was that these procedures are **complex** and that employers do not read the Act because they perceive it as being written in a **legalistic** manner.

In accordance with the above-mentioned study aims, it has been established that the respondents are of the opinion that there is a definite link between the internal mechanisms and procedures for handling conflict and the high referral rate, albeit possibly only theoretical at this point in time.

8.5 Appropriateness of the system for small to medium sized employers

This section deals with the third, fourth, fifth and seventh aims namely the appropriateness of the system for small to medium sized employers and individual employees of these employers, small employers' orientation towards conflict and the use of internal mechanisms, the ability of the parties to deal with conflict and disputes, and the problems and needs of the role players.

Literature has shown that the system of dispute resolution is a sophisticated one. An attempt was thus made to find out how the commissioners perceive the capacity and position of small to medium sized employers in the dispute resolution system.

a) Questionnaire responses

Question 4.1 in the questionnaire deals with the appropriateness of the system for small to medium sized employers. Only two respondents were of the opinion that the system is not appropriate and mentioned that: "...*The system is designed for medium to large scale employers. This is especially so in respect of extended collective agreements and operational requirements dismissals. Many ideal procedures are almost impossible in the domestic sector...*", and "... *It is difficult for the owner of a one-man-hamburger-shop to follow procedures before dismissing the potato peeler for stealing...*"

The rest of the respondents reiterated the fact that it is a straightforward, cheap, **simple**, low-cost, informal system, but stressed the point that regard should be given to the size of the employer. The benefits of the con-arb process for the small employer were emphasised and also the fact that small employers have to involve outside **consultants** for assistance. The responses were in many ways

contradictory when the system is viewed, on the one hand as simple and uncomplicated, and on the other hand it is suggested that the assistance of consultants is needed.

A number of short questions that deal with individual unfair dismissals were asked in section 3 of the questionnaire to elicit responses of an agree/disagree type. All the respondents – except one – indicated that small employers are less inclined to use internal mechanisms properly than the bigger employers do (question 3.7). All the respondents agreed that employers view conflict as destructive (question 3.3) and this could be the reason why employers do not deal with the conflict at the earliest stage. The same applies to question 3.11 where all the respondents, with the exception of one, felt that employees **of small employers** are not aware of the proper internal procedures to be followed during grievance or disciplinary hearings.

b) Interview participants

Participants one, two, three, six and nine were of the opinion that the system is appropriate for small to medium sized employers because "*...the principles on which it is based are good and small employers should also adhere to the principle of procedural and substantive fairness. The reason why they do not follow these procedures is because they do not read the Act. They have a negative perception towards the Act without really knowing what it says...*".

Participant six was of the opinion that the system is appropriate but steps should be taken to force employers to take note of the legislative requirements by having them register at the Department of Labour. This participant agreed that "... *the system has been designed for large employers with not enough flexibility for small employers, but one cannot change the system for small employers without losing its integrity...*". Participant nine agreed but added; "*...employers will have to change their organisational culture and management style and start to treat their employees like they would their diesel engine, by reading the manual and following the appropriate procedures...*".

Some participants held strong views that the system is not appropriate for small to medium sized employers. Participant ten was of the view that "... *to work through the mine field of the LRA (66/95) to be able to get the internal procedures right, acquires a highly knowledgeable and skilled person... The system has high competence requirements*

for a fair dismissal and highly competent people should become involved in the system at the earliest stage possible...". This participant and participant eleven were also of the view that labour legislation has had a detrimental effect on job creation.

Participant seven pointed out that the ways in which the small employers deal with the difficulties they experience around the LRA (66/95) is detrimental to the employees as well as the labour relationship. The small employers join employers' organisations – which are in many instances consultants operating as employers' organisation to be able to represent their clients at CCMA proceedings – thereby creating a distance between themselves and the employees. He also mentioned the existence of specific insurance policies against CCMA awards that can be acquired, which would enable employers to hire and fire at will.

c) Conclusion and verification

From the questionnaire responses there were little indication that the respondents perceive the system as not appropriate for the small to medium sized employers because it is "*...simple and straight forward...*". Most of the interview participants were also of the opinion that the system is appropriate for small employers, but highlighted the fact that small employers do not have the time, the resources or the will to familiarise themselves with the rules and requirements for fair labour practices.

In accordance with the above-mentioned aims it was established that although commissioners perceive the system as appropriate for small to medium sized employers, they have also submitted that the employers have a very negative perception of the internal requirements for fairness, they do not have the ability to properly deal with conflict internally and they have specific needs for assistance, which they obtain from labour consultants and employer organisations.

8.6 Appropriateness of the system for individual employees.

The third, fifth, sixth and seventh aims dealing with the appropriateness of the system for individual employees, the capacity of the parties to deal with disputes, role of lawyers and consultants and representatives, and problems and need of employees are dealt with in this section.

Most of the disputes at the CCMA are individual unfair dismissal cases and the question arises whether the CCMA can afford the caseload and if there is not an alternative method to deal with the individual dismissal disputes without prejudicing employees.

a) Questionnaire respondents

Most of the respondents agreed that the system is appropriate for individual employees for reasons pertaining firstly to the fact it is **easily accessible**, low cost, user friendly and that the employees know about the CCMA and are aware of their rights. The second set of responses refer to the fact that **commissioners** are trained and skilled to assist individual employees, will inform them of their rights and the fact that the commissioners guide the parties through the process. It was also felt that the system does not prejudice individual employees who are not represented by unions.

There were four commissioners that were of the opinion that the system is not appropriate for individual employees but their answers deal more with the position of the employee **in the organisation** than with the dispute resolution system outside of the organisation. They highlight the problem of the unrepresented individual in a disciplinary hearing where there is a legally trained industrial relations practitioner of a big company representing the employer. It was argued that individual employees should have the right to be represented by lawyers if they are not union members, even in internal procedures. This problem was emphasised even more in the responses to question three. Most of the respondents agreed that employees are reluctant to use the internal grievance procedures (question 3.8), they are not aware of the proper procedure to be followed in the organisation (question 3.11) and trade union representatives are ill-prepared to represent their members during grievance and disciplinary hearings (question 3.12).

b) Interview participants

Most of the interview participants agreed that it is a simple, easily accessible and free system. According to participant seven "... *an illiterate individual can literally go and physically knock on the CCMA's doors for help...*" and participant two viewed the system as "... *drafted in particular for the lay person and members of the public...*". Participant nine referred to the "...*CCMA's national footprint...*" meaning that there are offices in all regions of South Africa, making the CCMA very accessible for individual employees. This participant also suggested that more use should be made of "...*a travelling CCMA office bringing the CCMA to the people...*".

Some of the participants, however, were concerned that the above-mentioned accessibility is one of the reasons why the CCMA is so overburdened with individual unfair dismissal cases. Participant five suggested that the CCMA should "... *look at ways to get rid of these individual unfair dismissal cases...*". She highlighted the benefits of the pre-dismissal arbitration (that is when a CCMA commissioner chairs the internal hearings) but reiterated that many employers would not be able to afford the R 3000,00 per day to get the CCMA commissioners involved. She suggested that a presiding officer from any recognised panel should be accredited to do the pre-dismissal arbitration, thereby bringing justice to the employee in the workplace and alleviating the pressure on the CCMA. Participant three suggested that some low level disputes, such as domestic worker disputes, could be outsourced to NGO's, church groups and academic institutions.

Participant one, however, contested the idea that it does not cost the employee anything to pursue a case. "... *Cases can get very technical and most white-collar workers usually approach labour consultants or labour lawyers to assist them when there was a dismissal...*". There are also costs involved for the domestic worker who has to travel to Johannesburg to refer the dispute, then to go there for the conciliation, and then for arbitration.

c) Conclusion and verification

In accordance with the aims pertaining to this section, it was established that the respondents are of the opinion that the system is appropriate for individual employees and that capacity is not a requirement for their utilisation of the system. However, their lack of knowledge and skills poses a problem for the system and the

commissioners because of their high expectations and the fact that they cannot make the distinction between a case with, and one without merits. The role of the labour lawyers and consultants who assist them in processes will be elaborated on in section 8.8.

8.7 Reasons for the low settlement rate in Gauteng and possible solutions to the problem

This was an issue added to the interview schedule after a meeting with the CCMA director, where the concern was raised that the Gauteng region had a very low settlement rate compared to other regions. It relates to all the aims and research questions but is particularly relevant for aim eight and research question six regarding the possible structural strain that the system could be experiencing due to the high referral rate.

a) Questionnaire responses

Section 8 of the questionnaire deals with the low settlement rate in Gauteng. The first question was an open-ended question to allow the commissioners to give their own reasons. This open-ended question was supplemented with a list of reasons provided by the CCMA, which they thought could be possible reasons for the low settlement rate and the commissioners were requested to indicate if they agreed or disagreed with these statements. This was followed up with an open-ended question allowing them to elaborate on any of the issues they felt strongly about. Another set of statements was made about possible factors that influence their ability to settle disputes and this was also followed by an open-ended question where they could mention any other issues influencing their ability to settle disputes. All the open-ended questions were analysed simultaneously and compared to the responses on the closed questions.

The **first** set of responses deals with **non-attendance.** There are two reasons why parties do not attend conciliation hearings. The one reason is because the employer specifically wants to get to **arbitration** and the other problem has to do with **poor case management and administration.**

The preference for **arbitration** could be an indication of a gradual move back to a quasi-judicial system due to the problems experienced with CCMA processes. Bigger employers use industrial relations specialists and labour lawyers to ensure complete fairness in their internal processes. They have a policy of not settling in conciliation due to the costs involved in getting the internal procedures right. Another interesting view was that the parties want to go to arbitration because they have trust in the CCMA's arbitration awards. This is in stark contrast to criticism in the media about the quality of the CCMA commissioners' awards (De Villiers, 2001:74).

The other reason for the non-attendance was because parties have not been properly and timeously notified because of **poor case management** and administration. (See section 8.16.1.1).

The **second** set of reasons for the low settlement rate is because CCMA management is not providing any **incentives** for high settlement rates. There is no report back on settlement rates and no awareness of the importance of high settlement rates.

The **third** set of responses refers to **attitudes** of the parties. The respondents mentioned that some trade union and employer organisation representatives refuse to settle and turn the conciliation into power play and posturing to impress their members/clients. This could be ascribed to a lack of training in conciliation and negotiation skills of the parties. Such attitudes make settlement of the dispute a very difficult task for commissioners.

The **fourth** set of responses refers to the role of the **commissioner.** There was a perception that commissioners have not been properly trained for conciliation, that they do not try hard enough, there is insufficient time for conciliation and there are no incentives from management for higher settlement rates.

The **fifth** reason for the low settlement rate is the **high expectations** of applicants. This could be because of a lack of knowledge or because they have been wrongly advised by unions and consultants to believe that they are entitled to huge amounts of money. Even if the offer made by the respondent is reasonable, they think they

will do better at arbitration. One respondent offered the following suggestion to entice parties to settle in conciliation: "... *If an offer was made to the employee at conciliation and it is not accepted, the employee must pay the cost of the arbitration if he or she does not get more at arbitration. The offer must be taken into account when compensation is decided on ...* ".

Another respondent suggested in similar fashion that the offer that was made by the respondent in conciliation, should be taken into account in the arbitration award. If it is found that the offer was reasonable and that the applicant unnecessarily prolonged a dispute that could have been settled at conciliation, it should be taken into account in the awarding of costs against the applicant. Such a system would force applicants to consider the merits of their cases more seriously, to be more realistic about their claims and take conciliation seriously. It could also create an incentive for employers to attempt to settle instead of 'fighting it out in arbitration or Labour Court' if they know there is a chance that a reasonable offer at conciliation will be accepted.

The **sixth** reason for the low settlement rate is the perception that there are no **costs** involved to refer a dispute to arbitration. Applicants are under the impression that they have nothing to lose, as they are not aware of the possibility of a cost order for frivolous and vexatious referrals. Although theoretically possible, such cost orders are uncommon and difficult to execute in practice.

The closed ended questions revealed overwhelming agreement among the respondents that the low settlement rate can be attributed to uncooperative parties (a), non-attendance by employer parties (b), opportunism of applicants (i) and their high expectations (j). Four respondents indicated that their settlement rate is influenced by the fact that not enough time is allowed for conciliation. The question to be asked is why do we have uncooperative parties and high expectations specifically in Gauteng?

In question 8.3 a number of factors were mentioned that could possibly have a negative influence on commissioners' ability to settle disputes. The only two factors on which there was agreement among the respondents were 'uncooperative' parties

(d), and the fact that bigger employers have sophisticated internal procedures and that they only come to the CCMA to get a certificate (k).

b) Interview participants

The **first category** of reasons for the low settlement rate offered by the interview participants dealt with the skills and training of **commissioners**. Participant two was of the view that special skills are required to become a good conciliator. Even if you have very sophisticated parties who come to the conciliation with no intention to settle, a skilled commissioner would be able to resolve such a dispute. What is needed, however, is "... *expertise to dig deeper to get to underlying factors and enough time allocated for conciliation.... and one hour is not enough...*". Participant six agreed that commissioners are not properly trained to do successful conciliations and suggested that non-legally trained commissioners should be used for conciliations and not for arbitrations since they are sometimes more successful in conciliations. Participant eleven reiterated that good conciliators have more success but "... *the good conciliators do not work for R 1 500,00 per day and have therefore left the CCMA...*".

Participant three is of the opinion that settling disputes is "... *tremendously strenuous and when you get to dispute number 59 the last thing you want to do is to listen...and the easy option is to just issue a certificate...*". If CCMA management wants conciliations to be taken seriously, commissioners should be listened to and assisted. There is an Employee Assistance Programme at the CCMA but what is needed is "... *a little compassion for commissioners* ...". From this it could be deducted that the high caseload could be one reason for the low settlement rate.

The **second** category of reasons for the low settlement rate relates to how the low **attendance rate** can be increased. Participant four suggested that the con-arb process should be made compulsory for all misconduct cases. Participant six agreed that more use should be made of the con-arb process because '... *if parties know the arbitration is in the next hour and not 6 months down the line, the chances are that the settlement rate will increase...*". It was also suggested that the parties should be phoned a day or two before the hearing to find out if they are going to attend or not in an attempt to curb the problem of non-appearance. Participant five agreed with the other participants but suggested that there should be some sort of penalty such

as a fine for non-appearance at conciliation and this amount should be made part of the arbitration award. The attitude of many employers is; *"... why should I pay now if I can do so 5 to 6 months down the line at arbitration?..."*.

The **third** category of reasons also has to do with the con-arb process but renders the **conciliation process** obsolete. Participant seven questioned the future of the conciliation process as it has become superfluous: "... *Most employers refuse to settle because there is always the chance that the applicant will lose interest and they would rather settle six to eight months later on the day of the arbitration...*".

The **fourth** reason identified an unintended consequence of the system. In the past, the **certificate** indicating that the dispute remained unresolved was the last requirement before going on strike or referring the dispute to arbitration or Labour Court. Today, the certificate is built into the negotiation process. Parties know that they will negotiate further once they have a certificate, or there would be another chance of settling the dispute just before arbitration. However, on the CCMA statistics, it reflects as a low settlement rate.

c) Conclusion and verification

The respondents were of the opinion that one of the main reasons for the low settlement rate was the non-attendance of parties at conciliation for various reasons. The inability of the commissioners to resolve disputes due to a lack of training and conciliation skills was emphasised. Another problem dealt with the attitudes of the parties. Employees have high expectations due to a lack of knowledge of the possibility of cost orders for frivolous and vexatious cases. Employers do not want to settle at conciliation because there is a possibility that the applicant could lose interest in the case or that there would be another opportunity to settle on the date of the arbitration.

It is very important not to lose sight of the aim of this specific question, namely the reasons for the low settlement rate in **Gauteng** as the settlement rates in other provinces are not at issue. From the perceptions of the respondents it became clear that the dispute resolution system in Gauteng is under strain due to the high referral rate, the high caseload, not enough time for proper conciliation and the inherent

problems in the system. These problems refer to the fact that conciliation, as an isolated process has probably become obsolete. Other important reasons for the low settlement rate have to do with low levels of motivation of commissioners due to the high caseload, little support from management, bad administration and no incentive to get settlement. These reasons will be further elaborated on in section 8.16 dealing with CCMA management, case management and administration. It should be kept in mind that the Gauteng office of the CCMA is a huge operation with all the characteristics of a bureaucracy, with the associated problems.

8.8 The role of labour lawyers and consultants

Research question four and aim six pertains to the role and future role of labour lawyers and consultants. It could also shed some light on the ability or capacity of the employer and employee parties to function within the system. However, the way in which the system adapts in reaction to the strain experienced, is also significant in this regard.

Future changes to the system could be explored by studying the views of commissioners regarding the perceived role and function of labour lawyers and consultants in the future and the positive or negative influence they have on the experience of the commissioners of the conciliation process. Will the system change to accommodate and legitimise them or will there be efforts to further eliminate them from processes?

a) Questionnaire respondents

Question six in the questionnaire required from respondents to first give an indication of their perceptions of lawyers and consultants in various situations and then to give reasons for their perceptions.

The respondents were in general more positive towards lawyers than consultants were, which could be expected since most of respondents have legal qualifications and have practiced as lawyers. The negative perceptions of **lawyers** in **conciliation** centred around the fact that they tend to be very legalistic, raise unnecessary points *in limine*, have a limited role to play in conciliation and can even be obtrusive since it is not in their best interest to settle in conciliation. If the case remains unresolved

there is the prospect of an arbitration, preparation of the case and representation, which means more money. The positive perceptions were due to views that they advise their clients of flaws in their cases and they know the law and understand the process. Although the perceptions towards **consultants** were generally negative, it was recognised that they sometimes assist parties to settle.

The role of **lawyers** in the **arbitration** process was perceived as very positive because they assist in defining the dispute, streamline proceedings, focus on important issues, have experience in litigation, do research and prepare for cases and make the arbitrator's job easier. It was mentioned, however, that they sometimes attempt to "score points" by being very technical and argue irrelevant issues. **Consultants** are not perceived to play a role in arbitration due to a lack of knowledge and litigation skills.

The commissioners' perceptions were that **lawyers** tend to "*... push even when there are no merits, because they might be able to score on a technicality in arbitration...*". However, it was pointed out that the assistance of lawyers and consultants is unnecessary in 70% of the individual dismissal cases, as commissioners can deal with these.

The responses did not indicate specific negative perceptions with regard to the **fees** charged by **lawyers** because they assumed that these are market related and regulated by the Law Society. There was a concern that **consultants** are driven by money, that there is no regulation on their fees and that *"... they work with clients' money without having a trust account to manage such funds..."*

In terms of their future role, the respondents perceive the role of consultants in the labour relations system as one of chairing internal hearings, advising the employer on what constitutes fair labour practices in the workplace and ensuring that the employer's "house is in order". Although the employer pays the consultant, he or she can act as a mediator between the employer and the employee, provided that he or she is seen as being objective and unbiased. The prerequisite for the effective incorporation of consultants into the dispute resolution system is, however, that there should be a professional, regulatory body to oversee the conduct of consultants and to which they are liable if they have done something wrong. The

perception is that there are too many consultants without qualifications. (*..."low quality opportunists..."*). Their role in future might increase because there are still many small and medium sized employers who think that labour legislation is too complex. The fees of consultants are also lower that that of lawyers. Consultants will gain access to the processes more and more through the establishment of employer organisations for their clients. Some respondents are of the opinion that the role of the consultants will decrease as people burn their fingers with the *"...bad ones..."*. It is also expected that if the law doesn't change too dramatically the employers will become more and more knowledgeable of their rights and duties and more skilled in conflict and dispute resolution and will eventually be able to represent themselves. Another view was that consultants would not survive the legal competition as there are no standards for their conduct, no measurement of their services and the public will realise that they do not get good service.

The current and future role of labour lawyers in the dispute resolution system was viewed as more centred outside the workplace where parties need to be represented in statutory bodies such as the CCMA and Labour Court. They assist clients to prepare cases and are mostly involved in complicated cases in arbitration. Their role within the organisation is viewed as chairing hearings and advising parties in a grievance of their rights and obligations. Although it was recognised that they have enough legal knowledge to frustrate the process if they want to, they play an essential role specifically where technical, legal issues are involved.

Question 7 of the questionnaire deals with the problems that the commissioners experience with regard to employers, employees, trade unions, consultants and lawyers. These problems are addressed in section 8.9.

b) Interview participants

The interview responses were predominantly **supporting the presence** of lawyers and consultants in processes. Participant one was of the view that "*...the CCMA is absolutely paranoid about labour lawyers and consultants...*" and that both these parties have a very specific role to play. The consultants have a preparatory role and the labour lawyers assist in arbitration. Participant one perceived the fact that the LRA

(66/95) does not allow them in certain processes as problematic because *"... there already exist a relationship of trust between them and their clients and they are usually more clued up than their clients. However, I do not allow them in processes because commissioners have to follow the Act...."*.

Participant two elaborated on the reasons for allowing them in processes: "*...they do 'reality testing' with their clients by informing them of the merits of their cases...*". It also **expedites** the hearing if they are inside the meeting rather than sitting outside, when the parties frequently request caucuses to consult. In many instances the lawyers and consultants hear the other side's story for the first time at conciliation and are only then able to reconsider the merits of the case and advise their clients accordingly.

The participants were, however, insistent that the commissioners must retain the **discretion** to decide to send the representatives out if they frustrate the process. Participant three stated that "... *I'd rather have the terrors inside than outside. If they are going to sabotage me, I want to see it and want to be able to stop it. I'd rather have them on board because in the room I find them quite helpful...*". Although some of the participants indicated that they do not allow the lawyers and consultants in the processes, it was interesting to find most of the participants admitting that they allow them in, with the consent of both parties and a firm warning that they will be sent out if they disrupt the process.

Participant ten was of the view that a **commissioner** should be able to deal with those 'bad' consultants and lawyers *"... but you cannot ban them from the system if there is such a huge need for their services among employers and employees...*".

Participant eleven emphasised the fact that even if their presence leads to a more protracted process, individuals cannot be denied their **right to representation** in arbitration. He also indicated that labour lawyers and consultants are not a big issue in private dispute resolution as lawyers seldom come to conciliation.

Not all the participants were positive towards the consultants as participants three, four and nine perceive them as **exploitative** by asking a fee between R 500,00 and

R 650,00 to fill in a referral form. Participant eight felt that the consultants are bad for the system because there are so many 'fly-by-nights'.

Their future role in the dispute resolution system will entail that the lawyers focus on the hard issues (what you can and cannot do in terms of law) and the consultants will focus on the soft issues (what you may or may not do). Participant nine, however, was of the view that more use should be made of advice centres and non-profit organisations to assist employees to refer their cases in future.

c) Conclusion and verification

The perceptions of the respondents were mostly positive towards labour lawyers, and to a lesser extent, consultants. The perceptions were that both parties have a specific role to play in the dispute resolution system and will continue to play an important role. Consultants will be focussing more on the internal processes and preparation of the cases, and the labour lawyers focussing more on the legal technicalities in arbitration and Labour Court. The respondents indicated that there is a huge need for the services of both these parties in the dispute resolution system since most of the employers and employees do not have the capacity to deal with conflict and disputes in terms of the system as provided by the LRA (66/95).

There seems to be significant support for changes to the system to allow representation by these parties, provided that the commissioner retains the discretion. It would be interesting to see if these views would be reflected in future changes to the LRA (66/95) and CCMA Rules.

8.9 Needs and problems of employers and employees with regard to conflict management and dispute resolution.

This refers to all the aims of the study that imply some sort of incapacity of the role players. It applies specifically to the fifth research question and the seventh aim that deals with the needs and problems of the parties.

a) Questionnaire responses

Section five of the questionnaire deals specifically with the commissioners' perceptions of the capacity of the parties in terms of their knowledge, skills and means to deal with disputes. The problem, however, was that respondents were not clear on the meanings of these terms when they attempted to answer question five, since the definitions of knowledge, skills and means were only provided in question seven of the questionnaire and the. The following is an analysis of the respondents' perceptions of knowledge, skills and means needed by the parties to be able to deal effectively with disputes.

- **Problems regarding knowledge**

The respondents were in agreement that employers, employees and trade union representatives need to have knowledge of the LRA (66/95) and other relevant labour legislation. There is a need for all three these parties to have a basic understanding of the theory behind conflict escalation and management, and the fact that conflict is inherent in the relationship and that it should be managed properly. Knowledge of the various internal and external mechanisms available for managing conflict and dealing with disputes is very important. However, the specific needs and problems mentioned below, have been identified.

Most respondents agreed that **employers** need knowledge about the causes of conflict in the workplace, conflict management, conflict resolution, internal procedures to manage conflict, how to chair hearings and the inherent nature of conflict in the workplace. Employers need to know that conflict must be dealt with unemotionally and that there are alternatives to dismissal. The last set of responses referred to knowledge of the theory behind dispute resolution, the labour relations system, the CCMA and the CCMA Rules.

Employees need to know that they have rights and what these rights are. They need to know what is expected of them in the organisation such as what is seen as misconduct, what constitutes an unfair dismissal and what is seen as poor performance. They also need to know that conflict is inherent in the labour relationship but that there are procedures prescribed by the LRA (66/95) to deal with these conflicts and that conflict should be managed.

Trade union representatives need knowledge of the procedures prescribed in Schedule eight of the LRA (66/95), but also knowledge of procedures to be followed during disciplinary hearings and at CCMA processes. There is a need for training in arbitration proceedings and the law of evidence. Knowledge of jurisprudence is also important. It was interesting to note that the respondents felt that the trade union representatives also need to understand the inherent nature of conflict in the labour relationship, the theoretical basis underlying conflict and how conflict should be managed. The importance of knowledge regarding representation in disciplinary and grievance hearings, at conciliation and arbitration at the CCMA and the Labour Court, as well as the actual presentation of the case in these different forums was emphasised.

- **Problems regarding skills**

The most important skill that was identified by the respondents for all three the parties to the dispute resolution process, was a negotiation skill. Human relations skills such as communication, listening, conflict resolution and presentation skills were also identified.

Apart from the negotiation, human relations, listening, communication, leadership and management skills, **employers** need to be aware of the importance of empathy for employees. Another category of skills had to do with arbitration such as skills to participate in arbitration proceedings, basic skills to pursue a case in arbitration and presentation skills. The management of cultural diversity, language skills, the management of employee performance and skills to chair hearings were also identified.

Apart from the skills relating to negotiation and presentation at arbitration, the respondents were of the view that **employees** have problems to express themselves. This could be the reason why they suggested that employers need to improve the language skills and management of diversity in the workplace. Employees need to develop skills to participate in meetings, to present their cases, joint problem solving, conflict management, and interpersonal skills. One

respondent mentioned 'reading' skills and this could be a reflection of the fact that many employees who do come to the CCMA are uneducated and even illiterate.

The respondents identified the need of **trade union representatives** to acquire conciliation, joint problem solving, presentation, negotiation and facilitation skills. It is also recognised that they need specific skills to participate in arbitration proceedings and skills to represent employees in workplace interaction.

- **Problems regarding means**

As mentioned earlier, there was a difference in interpretation among the respondent over the meaning of 'means'. The responses are however, interesting.

The respondents were of the opinion that most employers have access to all the means to enable them to deal with conflict and use the dispute resolution mechanisms. Employers need to make "*...greater use of external experts...*" and "*...attend CCMA workshops...*" and "*...attend more seminars and training...*" to deal with conflict and use the dispute resolution mechanisms. Employers "*...have the means to prolong the employees suffering by requesting postponements and reviewing awards...*". Employers need to provide "*...access to qualified experts for employees...*" and must ensure "*...access to information to the employees to properly prepare a case...*".

The respondents mentioned that **employees** do not have the means to deal with disputes and propose that they should be allowed to attend appropriate courses. "*...Employees do not have the means to review awards and sometimes don't even have the means to attend proceedings...*". They need properly trained shop stewards, and to be educated through the media. They also need to *"...be given all information necessary for them to prepare their cases...*".

Some respondents were of the view that **trade unions** mostly have transport and fax machines. The respondents suggested that trade unions should "*...learn about leadership, the world around them and the economy...*". They should be trained through the CCMA because unions are in need of properly trained union officials. It is recognised that the union has limited means to review awards.

The next question attempted to establish **the extent** of the knowledge, skills and means of these parties.

Most respondents felt that the **employers** have 'average' to 'excellent' knowledge, 'average' to 'good' skills and 'good' to 'excellent' means. **Employees'** knowledge, skills and means fluctuated between 'not good' to 'none at all' and **trade union representatives'** knowledge, means and skills were rated mostly as 'average' to 'not good'.

The answers to another question also provide some indirect pointers about the problems and needs of the parties. Question 7 of the questionnaire deals with the problems that the commissioners experience with regard to the employer, employee, trade unions, consultants and lawyers. The respondents' problems with the lawyers and consultants are addressed in section 8.8 and will not be elaborated on in this section.

- **Problems with employers**

The respondents viewed employers as having a very autocratic approach to management of conflict. They perceive employers to be inflexible, think they are always right, reluctant to accept that they are wrong, arrogant, racist, believe they cannot make a mistake and just want to go to arbitration. Yet, they experience problems with employers who do not follow procedures before effecting dismissals, do not know what is expected of them and make unnecessary mistakes. There is a perception that employers' organisations still make use of "... *outdated methods and dirty tricks and will insist on referring a dispute to Labour Court simply to frustrate the employee...*". A huge problem for the respondents was the non-attendance of conciliations and in so doing wasting the time of the CCMA, the applicant and the commissioner. Non-attendance of arbitration is also a problem that gives rise to default awards, rescission applications and a further waste of time and money. They do, however agree that the CCMA is sometimes at fault due to notices of set down not being sent out timeously, to wrong addresses and to wrong people in the organisation. There was a perception that employers think commissioners are biased in favour of employees.

- **Problems with employees**

The **most important** problem that the respondents experienced was related to expectations of employees that are too high and unrealistic. They are "*...just taking a chance...*", "*...are being frivolous...*", are "*...not willing to accept responsibility...*" and do not prepare for their cases.

The **second** biggest problem experienced by the commissioners was the ignorance of the employees about their rights and their lack of knowledge of the dispute resolution system. They are unsophisticated, don't understand the procedures, cannot articulate their problems and are unable to argue the merits of their case.

The respondents indicated that, as in the case of employers, some employees are sceptical about the impartiality of the commissioners and think they are biased towards the employer.

- **Problems with union representatives**

The respondents' responses were not at all favourable towards trade union representatives. The biggest problem had to do with their lack of knowledge, low level of skills and the fact that they do not prepare for their cases. The trade union representatives are described by one respondent as "*...a lethal cocktail of disparaging arrogance and inexcusable ignorance...*" and "*...they think commissioners should bend over backwards to accommodate their shadiness...*". It was felt that due to the fact that they are not prepared, they spend a lot of time on irrelevant issues. The large number of "*...small and poor quality unions are a hindrance to the process....*". The union representatives sometimes have an axe to grind with management, have a wider agenda, and do not concentrate on the issue at hand. They are confrontational, have a 'rights approach' to conflict management and excuse their attitude and behaviour by claiming that they have an obligation to defend their members.

b) Interview participants

In the aforementioned paragraphs the participants were guided by the questionnaire in terms of their responses to the needs and problems of the parties. The purpose of the interview schedule, however, was to obtain more spontaneous responses without these guidelines.

Question seven of the interview schedule deals with all the aims that imply incapacity of the role players but more specifically with the ability of the parties to deal with conflict and disputes as stated in aim five, and the problems and need of the parties as stated in aim seven.

- **Problems with commissioners**

According to participant one, the parties are sceptical about the competence of the new CCMA commissioners. They also feel aggrieved about the fact that arbitration awards are so late. They perceive a difference between the attitudes of CCMA commissioners and commissioners in private processes. The CCMA commissioners are perceived to be arrogant with an attitude of *"...I am the commissioner, I have power and you listen to me..."*.

- **Problems with representation**

Participant three emphasised the fact that employees find it difficult to stand up for themselves because of the power imbalance in the workplace. This strengthens the arguments about the need to change the system to allow consultants and lawyers to represent their clients in all processes. Participant two of the interview responses indicated that he came from a union background and that the most important skill that trade union representatives need is negotiation skills, because this is what they do most. Due to the work-load pressure, they also need to acquire better time management skills.

Participant one and two supported the view that trade unions are unprepared specifically with regard to individual dismissal cases but explains that this is largely due to the fact that they are also overburdened with cases: *"... They stand in for colleagues, get the file right before the hearing or they don't get the file at all..."*.

Participant four explained the incapacity of unions as a vicious circle: "...*Their best players have gone into government, those working for unions now are not that sharp, the lower the calibre of people who work for the unions the lower the membership figures, the lower the membership figures the lower the calibre of the people they attract and the less capacity they have to attract new members...*".

Participant ten was of the view that unions have *"... the most weird attitude towards dispute resolution...*", as they think that nobody should ever be dismissed and the system should be designed in a way that discourages dismissals and forces compensation for everybody, guilty or not guilty.

- **Problems with the system**

Participant five viewed the system as totally unfair towards the employers who follow proper internal procedures. He has to go through an internal process, then through conciliation and then through arbitration or Labour Court. This is very costly in terms of time and money "... *and even if there is a cost order at the end against the employee for frivolousness of vexation, the chances of getting his or her money are slim...*".

- **Problems with case management and administration**

Participant seven was of the view that both the parties are experiencing problems because they are not properly notified, resulting in a high non-attendance rate, low settlement rate, default awards, rescission applications and endless delays. This participant suggested that the whole process of serving of documents and filing of papers should be revised. Documents should be served on a party, who would subsequently be required to acknowledge receipt and confirm that the contact details are correct. It was suggested that the possibility of utilising the services of the sheriff should be investigated.

Another suggestion to increase the attendance rate was that case management should phone the parties a day or two before the process to establish if they are going to attend or not. Another suggestion that was not mentioned by any of the participants in this study, but that could be considered, was that commissioners could be given the details of their cases beforehand so that they can – provided they have access to telephones – make these calls themselves.

c) Conclusion and verification

The problem statement of this study as set out in Chapter one, focussed on the possibility that the parties might experience problems with regard to dispute resolution and that these problems might be related to capacity and the fact that the dispute resolution is too sophisticated. The primary aim of this study was to explore the ability of the parties to effectively function in the dispute resolution system. The findings in this section indicated that both the employer and employee parties experience specific problems relating to knowledge, skills and means. The respondents' problems with the incapacity of the employers, employees and union representatives were highlighted. Other problems that the parties experience, such as credibility of commissioners and problems with the CCMA's administration and case management were identified. The findings indicate that there are various problems that hamper the ability of the parties – including the commissioners - to successfully operate within the dispute resolution system.

8.10 Future of the CCMA and possible changes to the dispute resolution system

Interview schedule questions eight and nine deal with aim eight of the study, which explores the ways in which the system copes with and adjusts to strains caused by high referral rates and incapacity of parties. Section nine of the questionnaire contained four questions regarding the role of the CCMA, the impact of private dispute resolution bodies on the operation of the CCMA, what could be done to alleviate the strain on the system caused by the high referral rate and if the legislation with regard to individual unfair dismissals should be changed.

It is not possible to integrate the answers in this section as was done in previous sections, because the questions were framed too differently. The first question deals with the questionnaire respondents' views regarding the future role of the CCMA, the impact of private dispute resolution bodies on the system and what could be done to alleviate the strain on the system caused by the high referral rate.

The second part will deal with the responses of the interviewed commissioners regarding whether the system should change, and if so, how should it change.

a) Questionnaire respondents

- **The future role of the CCMA**

Only one respondent was not sure if the CCMA will still play an important role in dispute resolution in the future "*...because it is not seen to be delivering according to expectations...*" . The most important reason for the optimism of the rest of the respondents was that "*...it is a cheap and efficient way to access justice...*" and there is a need in South African labour relations for such a system. The alternatives are costly and only open for bigger employers and bigger cases. The more optimistic respondents commented that the CCMA is "*...still an effective and open system...*", "*...one of the best systems currently available...*", "*...the general level of the commissioners are good...*", "*...the waiting period is still short compared to courts...*" and the CCMA has done a good job so far in mediating and keeping the industrial relations arena stable.

- **The impact of private dispute resolution bodies on the work of the CCMA**

The predominant perception was that the impact of private dispute resolution bodies on the CCMA will be marginal: "*...it remains and will probably remain for long an elite phenomenon for a minority...*" because most employees and small employers cannot afford to pay the costs involved in private dispute resolution. One respondent indicated that private dispute resolution would play a minimal role as some unions have indicated that they prefer the CCMA route. This issue will be further elaborated on in section 8.13.

- **What should be done to alleviate the strain on the system caused by high referral rates of individual unfair dismissal cases**

Most of the suggestions focussed on the problem that there are no costs involved to refer a case to the CCMA (as discussed in section 8.3) and that some sort of referral fee should be introduced. This issue will not be further discussed in this section. Other suggestions were that more bargaining councils should be accredited, incentives should be given by government to employers not falling in the high referrals sectors, a special telephone conciliation system should be provided, better

allocation and management of resources and "...*arbitration awards indicating that the CCMA is not a one-arm bandit that produces money when the claim form is entertained...*"

- **Possible changes to legislation with regard to individual unfair dismissal cases**

The predominant response to this question was that the legislation pertaining to individual unfair dismissal cases should not be relaxed. There was general support for the view that there is a need for stringent laws, that it is better to keep the standards high and that there has to be a consistent application of the law. Further relaxation will cause further escape routes for unwilling parties – usually employers – and the greater majority of workers will suffer prejudice. It is also felt that employees need protection against arbitrary unfair treatment as many employers are still unaware of the law, do not follow proper procedures and employees are treated badly.

Only three respondents indicated that legislation should be relaxed and are very positive about the pre-dismissal arbitration and the con-arb processes that have now been introduced by the recent changes to the LRA (66/95). There is, however, a call for less regulation in terms of internal processes in the organisation. One view was that "... *smaller employers are losing cases because they do not and cannot be expected to know and understand the subtleties of labour law. Picture the corner-greengrocer and the domestic workers...*" "*... It should be easier for employers to deal internally with issues revolving around capacity and probation...*".

Another suggestion was that "...*Domestic worker cases should be handled by a special tribunal, appointed by the Department of Labour...*".

b) Interview participants

This part of the section deals specifically with the interview participants' views. They have provided reasons why the system is changing and offered various suggestions on how it should change.

- **Processes becoming more technical and adversarial**

Participant three indicated that the processes are becoming more and more adversarial and technical and more and more points *in limine* are being taken. Participant eight offered an explanation for this by pointing out that the current system of dispute resolution that places so much emphasis on procedural fairness in the internal processes, has created a generation of employers, consultants, labour lawyers and trade union representatives that turn internal processes into opportunities to show off their power. If the employee then takes the employer to the CCMA, the employer has to do everything possible to restore his or her power. "*...Things have become totally rights orientated and parties are focussing on their rights rather than looking for solutions...*".

- **Role of consultants and lawyers**

The consultants and lawyers' role will definitely increase, with the consultants more involved in the internal processes and the lawyers more involved in arbitration. The following interesting suggestion was made:

> *"... The labour consultants should be brought on board. Give them credibility and legitimacy in the eyes of the employers and employees and let them take care of the disciplinary and grievance hearings. There is a definite problem with internal procedures –so use them. Maybe a panel of consultants should be established that works with the CCMA or a panel accredited by the CCMA...".*

- **Registration as employers at the Department of Labour**

Participant five suggested that the system should change to require employers to register as employers at the Department of Labour. This registration will set in motion a process to ensure that they are aware of their obligations and have proper internal mechanisms to deal with conflict such as disciplinary procedures etc.

- **Private dispute resolution**

Participant six suggested that the bigger parties – employers and trade unions – should be encouraged to use private dispute resolution. She was also of the opinion that employers should include provisions for private dispute resolution in

contracts of employment for more senior employees such as those in management and professionals. "*... the CCMA must get its act together and accredit more outside private dispute resolution bodies...*".

- **Con-arb process and case rolls**

Participant seven indicated that he would like to see the better utilisation of the con-arb process, more conciliation and arbitration rolls and a better system of serving documents on parties.

- **Inability of the system to reinstate dismissed employees**

Participant ten was of the opinion that the test for a system dealing with such a high incidence of unfair dismissal cases is to see how many employees are reinstated and how many remain in their jobs - the system does not achieve this.

- **Allowing employers to dismiss at will, but at a price**

Participant ten proposed a system that, firstly, excluded senior managers and high level employees (as they would be able to look after themselves), and secondly allowing employers to dismiss at will provided he/she pays compensation to the employee. If the employer chooses not to compensate them, then the employee can challenge the dismissal.

The explanation for this proposal is provided in the participant's own words:

> "*... Let me just go back and tell you the story about an employer who I was trying to convince to go to private arbitration instead of the CCMA. According to him the CCMA was the most wonderful thing for employers. It works wonderfully for us, he said, because this is how it works. We fire whomever we like. We just get rid of them. We have an internal enquiry. They are going to refer the matter to the CCMA in any case. The referral time is long and it takes a couple of months before it gets to conciliation. It takes a minimum of three months. Remember it's a poor employee with no resources and a fair percentage does not pitch for the conciliation mostly because they find alternative work. They have to survive somehow, so they disappear. If they do come to conciliation, you do not settle and allow them to refer the case to arbitration. That takes another couple of months. So it takes between 6-9 months to get to arbitration. The CCMA commissioners are so overworked or so 'undiligent' that it takes another 2-3 months to get an award, so we have a year to a year and a half. Show me how many workers will go on fighting a year without pay. Most of*

> *them disappear either by the time of the conciliation or the arbitration, or the arbitration award. If the award is against us we take it on review, and that takes 6-12 months. Then it takes another 2-3 months waiting for a judgement, and if it's against us, we take it to the Appeal Court. It takes a couple of years. It is exactly like the old system. So, the long and the short of it is that people are not given their jobs back because they are exhausted by the process. If you look at the statistics, there are very few cases where they are in fact reinstated. Compensation is rather awarded and even if they are reinstated the employer just challenges it and eventually he settles on some money.*
>
> *I think the test of whether an unfair dismissal regime is working, is what is the percentage is of people being reinstated and remaining in their job...and the current system fails to reinstate...".*

The participant was of the opinion that instead of the state spending a fortune on the CCMA, and the employer spending all the money on lawyers and other costs, there should be a system in place that makes a lot more sense. The current system does not protect the employee and does not provide for lasting reinstatement. The interests of the individual employee would be better served by the alternative as mentioned above.

- **Re-designing the system**

Participant ten was also of the opinion that the system should change; "...a full-scale Wiehahn commission style change going back to the drawing board..." .

- **Move back to a judicial system**

This response came from the fifth question in the interview schedule dealing with reasons for the low settlement rate, but it impacts on changes in the dispute resolution system. The participants pointed out that the reason for the low settlement rate was because the parties specifically want to get to **arbitration.** This could be an indication of a shift in the aims and function of the dispute resolution system. Where the intention before was to have a less legalistic, simple and expeditious system, there is a need for legal certainty and a gradual move back to a judicial system due to the problems experienced with the alternatives offered by the CCMA.

c) Conclusion and verification

The eighth aim of the study is to explore the respondents' views regarding the manner in which the system copes with and adjusts to the strain caused by the high referral rate. The respondents indicated that the system is experiencing strain and they foresaw that the system will have to change. Various possible solutions for the current problems were mentioned and suggestions were made for changes to the system. The perceptions were that there is a move back to an adversarial, power-based judicial system because of the fact that the parties are experiencing problems with the alternatives that the system provides, namely conciliation.

8.11 The inability of parties to deal with the sophisticated system

The purpose of this question was to explore commissioners' view regarding the sophistication of the dispute resolution system and the inability of the parties to effectively operate within the system.

a) Questionnaire responses

The questionnaire did not specifically deal with this issue and the focus of this section will be on the responses obtained from the interviews.

b) Interview participants

The question in the interview schedule was formulated as follows: "The CCMA is part of a sophisticated system of dispute resolution created by the LRA (66/95) in which most of the role players are not capacitated to operate effectively". The commissioners were requested to respond to this statement. There were participants agreeing and others disagreeing with this statement.

Participant one agreed with the statement but reiterated that it was **not the intention** to create such a sophisticated system. The onus is on commissioners to interpret the guidelines in Schedule eight correctly and to follow a conciliatory and not an adversarial approach to the resolution of labour disputes.

Participant three pointed out that it is mostly the **big employers** that have the capacity to effectively deal with such a sophisticated system. Participant seven was of the opinion that the CCMA is an 'applicant driven system' but a large part of the population do not have the capacity to effectively function in such a system.

Participant six questioned the "sophisticated" adjective. The CCMA forms have been **simplified** and are very informative. The notification letters that are being sent out also contain a lot of information and guidelines. She also felt that the legislation should not be relaxed for small to medium sized employers as "*...for every fair employer there are eight exploiters.....we must never underestimate human greed...*".

c) Conclusion and verification

It can be deducted from the interviewed participants that it was not the intention of the legislature to create such a sophisticated system. The system of dispute resolution has, however, evolved into this highly technical process due to the interpretation of Schedule eight by commissioners who had to interpret the disputes and take difficult decisions for which there were few guidelines. The jurisprudence developed by the industrial and Labour Court was the sources that were turned to for guidelines. This led to the development of a whole new set of guidelines and case law to guide the dispute resolution process.

It should also be remembered that it is a relative new system in a fast changing labour relations environment. Employers responded to the system after having been penalised for procedural or substantive fairness. They became aware of the emphasis placed on internal procedures and the strict application of Schedule eight of the LRA (66/95) in awards. This made them very apprehensive and they started to involve labour lawyers more and more to assist them. The more the lawyers became involved, the more technical the system became. The more technical the system, the more emphasis were placed on rights and obligations and less emphasis on conciliation. The fact that the CCMA implemented various initiatives to train employers and trade unions is an indication of the realisation that the system had become technical and that the users of the CCMA need assistance.

8.12 Technical requirements preventing parties from seeking alternatives

The rationale for this question was that employers are so worried that they would be found guilty of procedural unfairness that they do not seek alternative ways of dealing with the conflict. The question in the interview schedule was formulated as follows: What is your view of the following statement: The technical requirements as spelled out in Schedule eight of the LRA (66/95) prevent parties from seeking alternative dispute resolution methods.

a) Questionnaire responses

In the answers to question three, most of the respondents did not feel that there are better methods to deal with conflict than those described in the LRA (66/95) (question 3.5) and most of them agreed that employers are reluctant to use any other method to deal with internal conflict (question 3.6). This could be seen as confirmation of the statement that the technical requirements of dispute resolution, as spelled out in Schedule eight of the LRA (66/95) prevent parties from seeking alternative dispute resolution methods.

b) Interview participants

Participant three pointed out that the only reason why people do not use alternatives is because they are not aware of alternatives. Participant six did not agree with the statement and held that the LRA (66/95) provides a set of guidelines regarding procedures for dealing with misconduct or incapacity due to illness or poor performance, once the employer has made a decision to go the disciplinary route. Prior to that, employers should be encouraged to go ahead with RBO's (Relationship building by objectives), sensible grievance management, problem-solving exercises etc. *"...I would say to employers, do all the nice stuff but make sure that you do it in the framework of the law and don't put yourself at risk...."*

Participant eight, however, was of the opinion that employers will not seek the human orientated relationship solutions to the problem because of the technical requirements of Schedule eight. He also held that commissioners are at fault if they

do not consider Schedule eight, but if they apply it too strictly to small employers, they are also at fault.

Participant ten was of the opinion that "... *we have a system with high competence requirements for a fair dismissal and to be able to get the internal procedures right you need highly knowledgeable and skilled people...*".

c) Conclusion and verification

Two issues have been identified in these responses. The **first** one is that employers do not know what alternatives are available. The respondents' perceptions and suggestions with regard to alternative dispute resolution will be dealt with in the next section.

The **second** issue deals with when and where in the conflict management process these alternatives are applicable. The suggestion made by participant six limits the possibilities for using alternative methods in the workplace in terms of the conflict escalation model of dispute resolution as discussed in Chapter four, to the pre-grievance and dismissal phase. It was pointed out in Chapter four that dealing with conflict when it has not gone through the process of naming, claiming and blaming is very difficult. The employer's only options in this phase of conflict management lie in sound human resources. The employer might perceive his or her practices as being fair and the next moment he or she could be confronted with a constructive dismissal case where he or she will be judged in terms of procedural fairness. The question is thus, at what stage does an employer decide that the 'disciplinary route' will be followed, because the disciplinary route starts with the first verbal warning, consultation or counselling session.

The other respondents, however, supported the statement and agreed that the technical requirements of the system prevent the parties from seeking alternatives.

8.13 Alternative dispute resolution

This question was included to establish what the respondents perceive as alternative dispute resolution (ADR). The concept of ADR, as discussed in Chapter six, has been institutionalised in the South African system of dispute resolution. The CCMA provides a form of statutory ADR. However, ADR is usually voluntary, whereas in the CCMA processes there is a large element of compulsion.

a) Questionnaire responses

This section will also just focus on the interview participants, as there were no questions in the questionnaire specifically dealing with ADR. The questionnaire responses that might have had a bearing on ADR such as those dealing with the technical nature and appropriateness of the system for small to medium sized employers have been dealt with in previous sections.

b) Interview participants

Questions ten to thirteen in the interview schedule deal with possible alternatives to the current dispute resolution system, but question eleven specifically addressed the issue of ADR.

The responses were categorised into five groups namely those addressing:

- The nature and definition of ADR,
- The alternatives just before dismissal,
- Assistance with the technicalities of current dispute and grievance procedures,
- Alternatives to the grievance and disciplinary phase, and
- Private dispute resolution options as the only real ADR.

• The nature and definition of ADR

Participants nine, ten and eleven emphasised that the definition of ADR has not changed and it is in essence any conciliatory process outside of the judicial system. ADR is also more than conciliation, mediation and arbitration. It includes processes such as facilitation and third party intervention in problem solving. The prerequisites

are that it should be voluntary and the third party must be seen as impartial and credible.

Participants ten and eleven, however, were of the opinion that CCMA arbitration is a misnomer for state adjudication without a right to appeal. Arbitration is in essence a voluntary process "... *but at the CCMA the employers are forced into arbitration and they will do anything in their power to get out of it. The incidence of review for private arbitration is less than 1% but for CCMA arbitrations it is more than 30%...*". Participant ten was not supportive of the term "alternative" dispute resolution and preferred the term "appropriate" dispute resolution. Participant eight pointed out that unions and bigger employers are uncertain themselves as to what ADR is and if it will be recognised by the courts.

- **Alternatives just before dismissal**

Participant two and nine suggested the establishment of a "... *review committee...*" or a "... *review panel...*" in the organisation, consisting of management and trade union representatives. This committee evaluates a case, even after appeal, and the dismissal would only be effected if the committee agrees. If the credibility of this committee is acknowledged by the workers and the union informs the employee that they will not represent him or her at the CCMA - because they are satisfied that justice had been done - then the chances of this employee referring the case to the CCMA are less. "... *Such a committee can actually bring management and the union closer together* ...". This alternative applies mostly to bigger organisations where there is an established relationship between the employers and the union. Participant six suggested that big companies and sectors such as the mining industry could develop their own system of '*peer review*' or '*sector ombudsman*' that fulfils the same role as these internal committees.

- **Assistance with the technicalities of the internal procedures**

Participant six referred to the pre-dismissal arbitration process as an alternative. This process has become available with the recent changes to the LRA (66/95) and entails that a CCMA commissioner does the arbitration as part of the internal

processes of the organisation. This, however, has not taken off so far because "... *big companies invest a lot of money in training and developing their personnel to do the internal processes 100% correctly and are not prepared to spend an additional R 3 000,00 per day on a CCMA arbitrator to come and do something that they can do themselves...*".

- **Replacing the grievance and disciplinary procedures**

Participant three suggested a process called "conflict resolution facilitation": "... *People are scared to deal with conflict and need a facilitator to assist them...*". This process requires management to arrange a meeting between the parties, on neutral ground, with a 'conflict resolution facilitator' who should be a highly skilled person to assist parties to work through the issues and emotions underlying the conflict. "... *At the CCMA there is no time to deal with emotions and if this could be handled internally the chances are firstly that conflict will not escalate to become disputes, and if it does, there will be a better chance of settling in conciliation. If not, the issues will be much clearer at arbitration making the commissioner's work much easier...*". She also suggested that the professional boards for psychologists and social workers should be approached to train their students in the field of workplace conflict facilitation and to allow them to do their practical courses at the CCMA or in companies.

- **Private dispute resolution – the only real ADR**

Participant eleven was of the opinion that the only true ADR is found in private dispute resolution. "... *Employers think it is too expensive but after four or five appearances at the CCMA they begin to think differently...*". According to participant one, "alternative" only means going the non-CCMA route, namely private dispute resolution. If the parties are sophisticated enough, such as professional and high level workers as well as unionised sectors of the economy, it should be private dispute resolution. If the parties are unsophisticated and highly adversarial such as in the majority of individual unfair dismissal cases involving small to medium sized employers, then it might have to be compulsory.

- **Alternatives to external processes at CCMA**

Participant eleven mentioned the newly introduced con-arb process for probationers as alternative to the conciliation process. Most of the participants in this study had been very positive about this process as a cure for non-attendance, low settlement rate and tedious time delays. However, he pointed out that the con-arb process is not very popular in private dispute resolution. The reason for this could be that the process of conciliation only comes to fruition in a voluntary system. A compulsory system eventually forces out the conciliation phase as a means of resolving disputes.

c) Conclusion and verification

The findings in this section have an important impact on the theory of conflict escalation and conflict management as discussed in Chapter four. It is also an indication of how the system changes and adapts to the strain experienced in the changing labour relations environment. It became clear that the internal mechanisms for dealing with conflict is problematic and there are various attempts to deal with this problem such as involving consultants and lawyers, making use of the proposed peer review or review committees or using the pre-dismissal arbitration that has now been made available by the CCMA. The external mechanisms are also problematic and the respondents indicated that there is a need for more use of the con-arb process due to the fact that employers do not attend the conciliation hearings.

The structural strain and ways in which the dispute resolution system is adapting to the needs of the environments will be discussed further in section 8.15.

8.14 Private dispute resolution

a) Questionnaire responses

The questionnaire responses were dealt with in section 8.10 and the rest of this section will only refer to the interview participants.

b) Interview participants

Private dispute resolution has already been referred to in section 8.10 as an alternative to the statutory dispute resolution through the CCMA.

It was mentioned that the calibre of commissioners doing private dispute resolution is better than that of the CCMA commissioners. "*... Competent conciliators and arbitrators do not work for R 1 500,00 per day...*". CCMA commissioners must provide an excellent service for the majority of individuals who cannot afford private processes. "*... The private commissioners are doing dispute resolution for their own benefit and reputation and are therefore motivated to settle disputes and provide good awards. The problem is, how do you keep CCMA commissioners motivated and instil in them a passion for their work if they work under strenuous circumstances...*". (See responses regarding the problems of CCMA commissioners under section 8.16).

c) Conclusion and verification

The responses to this specific question in the interview schedule indicated that there is support among the respondents for private dispute resolution, and an expectation that it would increase in future, provided that it would not be at the expense of the CCMA and workers who cannot afford it.

8.15 Rigid system has changed the labour relationship

This question was included in the interview schedule to explore the commissioners' perceptions of the impact of the dispute resolution system on the labour relationship. This question addresses the aim pertaining to the needs and problems of the parties as well as the impact of the system on the labour relationship.

a) Questionnaire responses

The questionnaire did not deal with this topic as it was a rather philosophical matter unsuitable for a questionnaire. The analysis will focus on the interview participants.

b) Interview participants

Not all the participants commented on this statement but those who did, held strong views.

- **Nature of the relationship**

Participant eight commented that in the past the labour relationship was in essence a human relationship. The labour relationship has now become a legal arrangement with many legalistic prerequisites. Participant one stated that the main focus of human resources departments is on being procedurally correct and not on good human resources practices such as proper performance appraisals, training and development. The human resources departments of big companies consist of industrial relations specialists, appointed specifically to deal with CCMA cases. They know the system and make sure that cases are being dealt with 100% correctly.

People in the workplace do not want to handle their relationship any more, simply because they do not know how to handle it any more: "*...People needed each other in the past and they were happy to work with each other and there was a burning desire to resolve conflict. People do not have that desire anymore...*".

- **Use of power**

There was agreement that the grievance and disciplinary procedures allow employers to use their positional power against employees: "... *Employees are not equally empowered and if they are reluctant to communicate upward in the organisation they are more reluctant to start grievance proceedings...*". If the employees were empowered in terms of knowledge, skills and funds they could have attempted alternatives to referring a dispute to the CCMA.

- **Management based on fear**

Participants three and seven were of the opinion that employers are fearful of not following the guidelines in Schedule eight. Employers are worried that they will create a president or will be accused of inconsistency if they allow themselves to

deviate from the guidelines in Schedule eight. This confirms the ADR model of Lynch as presented in Chapter six that the management style is based on fear.

- **Effects of the emphasis on the grievance and discipline phase**

Participants one and eight mentioned that there is a changed frame of mind when going into grievance and disciplinary hearings. The parties prefer to focus on their differences and not on what they have in common. It has become a rights based process where the employers can use their power by having labour relations specialists or labour lawyers and consultants involved in the processes where the employee is usually limited to representation by a union or a co-worker.

c) Conclusion and verification

It was found that the dispute resolution system is not bringing the parties to the labour relationship closer together. People are much more aware of their rights and none of the respondents supported the possibility that the employment relationship is becoming less adversarial. The high referral rate is seen as an indication of a "... *pathology of conflict...*" in the labour relationship.

According to the above findings, the labour relationship is affected by the fact that dispute resolution has become stuck in the "rights phase" proposed by Lynch's model of dispute resolution (Lynch, 2001: 207-208). Employers resort to using their positional power, parties do not focus on commonalities but on differences, and there is still a paternalistic management style in many organisations.

The reason for the adversarial nature of the labour relationship in the past was because of collective issues such as exploitation of the masses, inequality and discrimination based on race in the workplace. It seems as if the adversarial nature of the labour relationship has now moved away from these collective issues to individual issues such as discipline and unfair dismissals. It is not the 20% interest disputes putting the system of dispute resolution under strain, but rather the 80% individual unfair dismissal cases.

The findings certainly gave no indication of a growing emphasis on a more people centred and healthy work environment. The recent changes to the LRA (66/95) regarding the provision of the pre-dismissal arbitration process and the con-arb process could be seen as treating only the symptoms and not the causes of organisational conflict and an unhealthy dispute resolution system.

8.16 Life experiences, problem and needs of CCMA commissioners

The reason for approaching this study from the interactionist perspective (as explained in Chapter seven) is to be able to view the dispute resolution system from the perspective of a commissioner. This section focuses on the dispute resolution system as perceived by the respondents in this study. These respondents are caught up in the middle of a dispute resolution system that is experiencing many difficulties. Their views and perceptions are influenced by their life experiences, including their problems and needs. The next section will therefore focus specifically on the experiences of the respondents, in particular the questionnaire respondents. The interview schedule did not specifically provide a question on the problems experienced by the commissioners. This was because the time for the interview was usually limited – the possibility of focusing too much on problems, instead of getting to the real issues, therefore had to be avoided. The responses in this section therefore focus on the questionnaire responses, but where interview participants did mention problems or needs or interesting experiences, this was included.

Question seven in the questionnaire deals specifically with the problems, needs and experiences of CCMA commissioners. The first question addresses the problems that commissioners experience with the parties to disputes namely the employers, employees, trade union representatives, labour lawyers and consultants. These responses were dealt with in section 8.9 as part of the analysis of the problems of these parties. Questions 7.2 to 7.5 were asked to attempt to understand the life experiences of the CCMA commissioners. Right in the beginning of the questionnaire the respondents were also requested to elaborate on what they perceive to be the two most important problems of the CCMA.

8.16.1 Administration and management

The questions regarding the CCMA's management and administration were divided into case management issues, remuneration and administration. An open-ended question provided the opportunity to raise any other problems relating to administration and management.

8.16.1.1 Case management

The terms used to describe the current case management were; unhelpful, poor, no follow up, no accountability, no attention to detail and poor supervision. There was a perception that cases get shifted from person to person, no one takes responsibility, notices for setting down cases are not sent out timeously, and data such as party details, that are entered into the computer system, are not correct. There is a complaint that documents are not being placed on files and this compromises the quality and decisions of commissioners. Case management assistants often advise parties incorrectly and it was suggested that *"...better knowledge of the LRA (66/95) and ancillary legislation will help..."*. This poor performance was ascribed to a lack of job enrichment, low levels of job satisfaction due to the repetitive and monotonous nature of their work, as well as high volumes of work and stress. One respondent felt that – and I have found the same in my experience in the CCMA - *"...replacement of CMO's (case management officers) with CMA's (case management assistants) has dropped the CCMA's standards and the current inefficiency is due to a lack of experience..."*

Some respondents have also worked in other regions and have indicated that case management is not a problem in some other regions. One respondent also mentioned the name of a specific person and commented that in "her team" there are no problems.

It seems as if the process of case management – receiving the referral, allocating cases to commissioners, sending out notices, processing agreements, setting down cases for arbitration, etc - has been broken up into various small tasks of a clerical

nature done by different CMA's: "... *CMA's are highly skilled in so far as typing is concerned...*" and "*...they do not understand the processes evolving at the CCMA...*". This could be the reason why people get sent from pillar to post and why nobody wants to take responsibility. The CMO's (in contrast to the CMA's) were qualified individuals who also underwent training in conciliation, conflict resolution and substantive law similar to that of the commissioners and were in a position to advise parties, to understand the problems of commissioners, could work with the public and take responsibility for problems such as documentation, faxes, claims etc.

- **Interview participants**

Participant three specifically commented on the accountability and telephone skills of CCMA staff:

> "*... Have you ever phoned the CCMA? It's not like 'Good day, how can I help you?'. The other day I phoned a party and the response was; 'Who are you? You are the first person from the CCMA to speak to me like I am a person'...It seems to be a lack of accountability. When people phone in and I answer they would say; 'You are the fourth person I spoke to and nobody wants to take responsibility'...*".

Participant four responded with:

> "*....Faxes never get to commissioners on time – if ever. By the time the parties get to the CCMA they think we are a bunch of monkeys. The respondent in the case showed me 38 proofs of service of documents and we have not responded to one. The condonation was granted without taking his point into consideration...*".

Participant two suggested that; " ... *you need very special people to deal with the screening of cases....*". They should have knowledge of the legislation as well as knowledge of processes and "... *should not allocate one hour for a mutual interest dispute between the Chamber of Mines and NUM...*".

These responses strengthen the plea for better trained case management personnel.

8.16.1.2 Remuneration

The responses to the questionnaire differed from "...*probably too high*..." to "...*far below the market rates and need to be adjusted*..." .

There is a perception that there is no mobility in the hierarchy for commissioners and that there is no recognition or reward for good quality work and the complexity of cases that are dealt with and no demerits for those commissioners who are not pulling their weight: "... *It breeds mediocrity and preference for easy cases*....". The reasons for the rate difference between levels of commissioners (A, B and senior level) are not clear and not justifiable as "... *cases are invariably allocated at random without case management having any knowledge of the commissioners' levels*...". It was also felt that the low rates of pay cause better commissioners to resign from the CCMA.

One respondent felt that it was unfair that claims are not paid if the claim is handed in late even though the award has been delivered within the fourteen day time limit. Various suggestions were made with regard to fees for rulings, fees for default awards etc but the problem was that these fees get adjusted unilaterally and on a regular basis, to the extent that commissioners are often not sure what they should claim for and why the fees have been changed.

8.16.1.3 Administration

The overall perception is that the administration is "... *not service oriented and can be streamlined*...", administration is full of blunders and "...*very poor, insufficient and haphazard*..." due to the high volume of work in the Gauteng region. The management of correspondence seem to be a specific area of concern with statements such as; "...*poor attendance to correspondence*...", "...*it is chaotic with correspondence*...", "...*misplaced documents*...", and "... *they take long to respond to correspondence, if at all*....".

Some responses indicated that case management is "... *biased against part-time commissioners and they are treated like beggars*...". One respondent went so far as stating that; "...*CMO's in Gauteng have a cavalier and careless approach to their work*

and seem to resent part-time commissioners and whites...". This point was also made in one or two of the interviews and I have experienced this in my years as a part-time commissioner myself. This could be due to the fact that part-timers look to CMA's to assist them in their daily tasks at the CCMA and CMA's are frequently interrupted by various commissioners wanting to use a telephone, needing forms and files etc. This problem could be addressed by providing a part-time commissioner's office with a telephone, work area, forms, files and maybe one CMA to assist them.

- **Interview participants**

Participant two also experienced problems regarding parties not being notified. Fax numbers are sometimes incorrect, union fax machines are not working and if the notices are sent out by post three days after the faxes were supposed to go out, the parties get the notices too late and it results in 'no shows".

Participant four was of the opinion that there is no customer service at all. When members of the public come into their offices "*...there is no, Good morning, how may I help you? No sense of ...let me help you, let me find out for you. There is however, a lot of 'go to room 305, it's not my problem...*".

Participant five commented as follows: "... *When I left in 2000 the administration and case management were appalling. When I started again in 2002 the administration and case management were appalling...*".

8.16.1.4 Other problems

Most of the problems that were mentioned in this section dealt with administration, case management and remuneration and these were dealt with under the above headings.

8.16.1.5 Conclusion

The respondents identified similar issues regarding case management and administration as problematic. The respondents' perceptions were not very positive towards case management and they accused those responsible of poor document management, poor telephone skills and that they have no accountability. The

fragmentation of tasks and the replacement of CMO's with CMA's were identified as a source of most of the problems. The CCMA's administration was accused of not being service orientated, there is no customer service and poor attention to correspondence. The respondents' problems relate to the fact that the poor document management and appalling telephone skills of the administrative personnel have a negative impact on their work. They represent the CCMA and if the parties are upset with the CCMA because of endless administrative problems, they have no respect for the CCMA and show no respect for the commissioner. These problems could contribute to the low settlement rate in Gauteng. The Gauteng office's case overload could contribute to the administrative problems and the frustrations of these respondents.

Remuneration does not seem to be a big issue but is was pointed out that the better commissioners leave the CCMA because they are better remunerated in private dispute resolution processes. There is also uncertainty about the criteria for differentiating between different levels of commissioners both in terms of qualifications and remuneration since they are doing the same processes. The case management personnel do not have the knowledge to decide on the level of complexity of a case, and they allocate cases randomly.

8.16.2 Problems with CCMA processes

8.16.2.1 Conciliation

Although the issue of more time for conciliations did not elicit specific responses in the short questions, it was, however, mentioned under this section of the questionnaire that not enough time is allocated to do justice to the conciliation process.

The respondents were divided into two camps; those who thought that the conciliation process is valuable and all efforts should be made to utilise it, and those who feel that conciliation has become obsolete and is a waste of time and resources. The respondents indicated a huge support for more and better utilisation

of the con-arb process: "*...Except for mutual interest disputes, conciliation must be done away with – only con-arbs...*"

Another important problem in conciliations was the extent of 'no-shows' where specifically the employers do not attend conciliations. It was suggested that employers should be requested or forced to inform the CCMA if they are not going to attend a conciliation in which case the applicant can be assisted to proceed to arbitration without spending money and resources on setting down a process with a commissioner, interpreter and a venue. The suggestion was made that the respondent should send a 'fax' to indicate if he/she is going to attend but in the light of the complaints regarding document management at the CCMA, this is unlikely to work and another method should be considered.

Participant one was of the opinion that private dispute resolution commissioners find it easier to settle cases because the parties are there by agreement. CCMA commissioners, however, have to deal with unwilling parties which makes settlement by agreement much more difficult.

8.16.2.2 Arbitration

Many respondents indicated that they do not have problems with the arbitration process. This could perhaps be because most of the respondents are from the legal fraternity.

Poor quality of the representatives at arbitration was, however, mentioned and this supports earlier findings that consultants and trade union representatives do not have the expertise to properly represent employees in arbitration, both in terms of knowledge and skills. The quality of interpreters is also sometimes suspect.

The quality of commissioners in arbitration was criticised as "*...the nefarious results of the lack of edification of statutory arbitrators by the top of the institution which has consequently spread to CCMA users...*".

Some respondents criticised the fact that some commissioners do not comply with the fourteen day statutory limit for awards and others thought that specifically in complex cases, more time should be allowed to do justice to such an award.

8.16.2.3 Other CCMA processes

The only other processes that were mentioned were con-arb and facilitation. The benefits of the con-arb process were elaborated on and a request was made for the better and more frequent utilisation of it. "*...Con-arb should be empowered because it is the way forward...*". "*...Con-arb is a very positive improvement, both from an attendance and settlement point of view...*". The importance of the facilitation process was also mentioned.

8.16.2.4 Conclusion

The respondents were divided on the merits of the process. Some indicated that it is a good process but others argued that conciliation had become obsolete mainly because the parties do not attend, and if they do attend they do not have a mandate to settle. Another problem is the fact that the time allocated is not enough to do justice to the process. The arbitration process is less problematic but the quality of the representatives of the parties is questioned. Even the respondents raised the issue of poor quality commissioners and arbitration awards given after the fourteen day limit. The responses regarding the con-arb process were very positive because it is seen as the solution to the problem of non-attendance and low settlement rates.

8.16.3 Problems with regard to capacity

8.16.3.1 Knowledge

The respondents were questioned on their specific needs and problems around knowledge. Most respondents indicated a need to be kept informed of the most recent case law and indicated that it is a problem if commissioners are *"... not keeping up with jurisprudence and are not being consistent...*". And it is suggested that *"...regular briefing sessions should be convened regarding latest case law...*". The need

for training in advanced labour law and further training with regard to the law of evidence, evidentiary rules and the law of contracts were identified.

Some respondents were of the opinion that *"...non-legally trained commissioners have poor knowledge of legal reasoning, principles and evidentiary matters, cannot conceptualise and panoramically view the issues in dispute..."*. One respondent commented; "...*the new training is great...*".

- **Interview participants**

Participant five was a senior full-time commissioner who left the CCMA for a period of one year and then came back as a part-time commissioner. She suspected that the new commissioners were not properly trained in conciliation as she was settling 50% of the arbitration cases while working on the arbitration back-log. These new commissioners were also doing *"... the most bizarre things..."* like telling the parties to carry on with their evidence while he or she goes out to take a call. I have also heard stories of conciliators having their lunch while parties are busy with cross-examination and other instances where the commissioner were constantly dozing off during the arbitration. Training had become hopelessly inadequate and *"... much more use should be made of mentoring where new commissioners are involved in processes, practising the skill of evaluating evidence and making determinations..."*. There should be a process to oversee their progress and they should gain more practical experience such as a 'candidate attorney apprenticeship' before they are *"...let loose...and thrown to the wolves..."*.

Participant six suggested that commissioners should be encouraged to have group discussions around their cases and asking advice should rather be encouraged than seen as a weakness.

8.16.3.2 Skills

There is recognition among the respondents of the fact that the skills - and knowledge – required to be a good conciliator, differ from that of a good arbitrator and they identified the need for the development of conciliation skills. There is also a need to develop skills in "...*the writing of binding agreements...*". The conciliation

has not been successfully concluded if the agreement has not been drawn up and signed by both the parties. Due to the limited time allowed for conciliations there is usually very little time left to draw up the agreement, with few guidelines in this regard.

Skills for the effective engagement of parties in conciliation and the ability to "... *put themselves in the shoes of the other party...*" were mentioned. Training in negotiation and facilitation skills was identified as a need, as well as the ability "...*to be diplomatically robust...*".

Participant two mentioned that it is not enough just to train the commissioners, they also need to be developed by mentoring and 'twinning' before they do processes. (Twinning is where two commissioners deal with a case, where the one is usually a senior and the other a junior commissioner).

Participant three mentioned the need for training in telephone skills for commissioners who do telephone conciliations.

8.16.3.3 Means

The responses to this question focussed primarily on the needs and problems of the part-time commissioners. The most pressing problem seems to be the need for a room with access to a telephone to conduct telephone conciliations and make telephone calls, sit and write awards between cases, do administration, send and receive faxes pertaining to their own cases and make photocopies. It need not be a separate office for each commissioner but could be a communal room with tables and chairs and, as suggested in another section, a CMA could be allocated to this room to assist the part-timer commissioners.

Problems are experienced with the availability and quality of tape recording equipment for arbitrations.

There is also a need for the allocation of a specific venue to a specific commissioner for the whole day. As put by one disgruntled respondent:

"...Allocation of rooms is problematic. Some cases are not allocated a room and the parties are told to report to reception. When a room is found, invariably some other commissioner arrives a bit later who has been allocated that specific room. The resulting conflict is very unprofessional and embarrassing. All cases should be reporting to reception and rooms occupied on demand...".

Various other needs were mentioned such as on line access to the CCMA's library, subsidies for commissioners when they have to "*...do cases out of town...*", computer training and laptop computers when travelling to outside venues. Participant four confirmed the aforementioned problems:

"... How serious should the parties take you as a commissioner if they have to wait for you while climbing from floor to floor looking for a photocopy machine? What impression does it leave when they come to arbitration and I have to say that we do not have any tape recorders available? How does it look if you drag your parties around the building looking for a room? It is not professional if the commissioners hang around in reception laughing and joking and being very unprofessional. They sit there because they have nowhere to go. There are venue administrators but if you ask them to use their telephones they are not very happy...".

My own experience is one of waiting for the venue administrator to finish his or her calls before you can use the telephone and then you have to stand at reception in front of all the parties trying to convince an unwilling respondent in a case that he or she should take the CCMA serious and come to the arbitration hearing. It is humiliating, unprofessional and degrading.

Participant six was of the opinion that part-time commissioners are definitely more on the periphery of things. They are not in the 'e-mail loop' and do not receive CCMA policies, new case law and CCMA interpretation of Labour Court judgements. More efforts should be made to include part-timers.

8.16.3.4 Conclusions

The respondents indicated that there is a need for training in the law of evidence, advanced labour law and the most recent case law. It was mentioned that the non-

legally trained commissioners do not have the knowledge to do arbitrations. There is a need for better conciliation, negotiation, and facilitation skills as well as telephone skills for those who do telephone conciliations. It was mostly the part-time commissioners who experienced problems regarding means such as a commissioner's room where they can sit between cases and write awards with access to a telephone. Problems regarding tape recording equipment and the availability of venues were also mentioned.

8.16.4 Any other problems

Many respondents utilised this last open question to focus attention on any other problems they felt strongly about.

- **Low morale**

Various factors were mentioned that could be some of the reasons for a low morale amongst commissioners. One respondent explained the problems as follows:

> *"...Disempowering and emasculation of their status is the number one problem. The CCMA has placed them disastrously on par with the parties, undermining the foundation of quasi-judicial functions...".*

- **Frequent unilateral changes to internal practices**

It was also mentioned that some commissioners misbehave and misuse the system but instead of disciplining these commissioners, new rules and regulations are drafted to deal with these problems, which adversely affecting all other commissioners and making their life difficult. An example is where one part-time commissioner used the CCMA telephone and faxes to do private consultation work in his spare time between cases and this is now used as an excuse why part-time commissioners do not have access to telephones.

- **Management's attitude towards personnel and commissioners**

Participant one was of the opinion that the problem is not one of high referral rates but one of poor management. The systems are in place but it is not being run effectively. *"...It is a good system and the principles on which the system is based are good,*

but there is no performance management and no business principles are applied...Telephones can ring for hours on end but there is no discipline....".

Participant two felt that the commissioners are not being "... *looked after...*" by CCMA management. There are no incentives to resolve cases in conciliation, no feedback on settlement rates, no attempts at relationship building, no staff association, an unfriendly company culture and no exit interviews. This participant suggested that commissioners should form an integral part of middle management, with more responsibilities than just looking at arbitration awards before they are sent out.

Participant four indicated that there is a lack of respect for commissioners and the reason is because CCMA management treats commissioners without respect. If incidences of racist remarks, assault, verbal abuse or even having had a gun pulled on you get reported to management, they do not do anything about it. "... *Very often there is only one senior commissioner you can go to with a problem or complaint and often that person is nowhere to be found. If you do find them they are either rude or disinterested. The parties can swear at you, make racist comments and threaten you because they know there will be no consequences...*".

It was mentioned again that part-time commissioners feel they do not belong, are insecure because they do not have job tenure, there is no support and understanding with regard to problems with claims, and there is a lack of support from management. *"... Commissioners are sometimes abused by the users and there is a general feeling that they have no protection from the institution and no support from management...".*

Here again it was mentioned that there is "*...not enough time for conciliation – one hour is not enough...*" and maybe this issue should be addressed.

8.16.5 Conclusion

The problems that were mentioned in this section dealt with low morale amongst commissioners due to the fact that they felt they were not being treated with respect

and there was no regard for their efforts. There are no incentives and career prospects and their positions – especially those of the part-time commissioners - are unsure. CCMA management was criticised for not managing the system properly and not maintaining their human resources, specifically the commissioners. Human resources maintenance, according to Gerber *et al* (1998: 181) refers to performance appraisal, compensation management benefits and services, quality of work life and social responsibility, leadership and motivation of the workforce.

8.17 Theorising and re-contextualising

The problem statement and aims, as stated in Chapter one of the study will be used to integrate the findings with the theoretical background as discussed in Chapters two and three.

Each aim will be discussed as well as the problem underlying the aim. The theoretical background will then be used to form a conclusion about the findings.

8.17.1 The relationship between conflict and disputes

The first aim was to explore the perceptions of the commissioners regarding the relationship between the internal conflict handling procedures and the external dispute resolution mechanisms. The systems theory (Chapter three) was used to indicate how these procedures and mechanisms fit into the overall industrial relations system. Another prerequisite for studying this aim was to understand the difference between conflict and disputes and how each should be dealt with (Chapter four). Schedule eight of the LRA (66/95) provides guidelines in terms of handling conflict in the organisation. This study thereafter explained in more detail the internal mechanisms such as the grievance and disciplinary procedures (Chapter five) and also how the external procedures and mechanisms such as the CCMA work (Chapter six).

Various questions in the questionnaire were asked to establish the respondents' perceptions of the relationship between the internal handling of conflict and the referral of disputes to the CCMA. Most respondents indicated that there is a

relationship between the internal handling of conflict and the external dispute resolution processes. If conflict is handled effectively internally, it should normally not escalate to become a dispute that is referred outside of the organisation to the CCMA. What is required, however, is that both the employer and employee must have the knowledge and skills to use the internal grievance and disciplinary procedures. It was found that employers and employees do not have the knowledge and skills to effectively deal with conflict in the workplace because of the complexities involved. The bigger employers involve the services of consultants or lawyers or highly trained human resources and industrial relations specialists. The fact that the recent changes to the LRA (66/95) enable a pre-dismissal arbitration process is confirmation of the fact that the internal procedures are problematic and that the parties have difficulties in dealing with it.

However, it was also found that just having these procedures, and even following the procedures very precisely is still not enough to prevent parties from referring disputes to the CCMA. What is needed is that these procedures must have credibility among employees.

According to the functionalist perspective it is important to know how institutions and mechanisms in a system (the labour relations system) relate to other parts of the system. It was found that defects in the internal processes (grievance and disciplinary procedures) have an impact on the external mechanism (CCMA). The high incidence of referral of individual unfair dismissals is an indication that there is a lack of consensus about substantive and procedural fairness in organisations. Functionalists emphasise the importance of 'moral consensus' in maintaining law and order and stability in society. Moral consensus is achieved when most people in society share the same values. It can be argued that there is no moral consensus about what is seen to be fair or not fair in the workplace. The LRA (66/95) attempts to enforce such a moral consensus on employers and employees by creating a relatively complex system of requirements for internal conflict handling, based on substantive and procedural fairness. These 'strict guidelines' force the employers and employees into a rights-based relationship, which leads to 'punitive measures' at the CCMA (awards against the employer) for not precisely following the rules of substantive and procedural fairness.

8.17.2 Reasons for the high rate of referrals to the CCMA.

It was pointed out in Chapter one that there was a need for an expeditious and easily accessible system of dispute resolution in South Africa. The LRA (66/95) provides such a system, so that anybody can pursue a labour dispute without any costs involved and without the necessity of involving legal representation. It has been pointed out that the CCMA has a heavy caseload, of which about 80% are individual unfair dismissal cases.

The high referral of cases to the CCMA has been described by some respondents as indicative of a 'pathology of conflict' in the workplace. Part of this pathology is because of the lack of knowledge and skills among the employers and the employees about legislation and the appropriate internal mechanisms for dealing with conflict. Another reason for the high referral rate seems to be the high expectations of employees. They became aware that their rights are protected but they do not know which rights and to what extent their rights are protected. However, with such a cheap and easy accessible system they are willing to take their chances. Moreover in a desperate economic climate with high unemployment, the dismissed employee has nothing to lose since it does not cost anything to pursue a matter at the CCMA. It must be added that these employees are not aware of the fact that a cost order can be made against them for referring a frivolous and vexatious case. The expectation of employees is that there will always be some kind of financial compensation – even if it is only of nuisance value to the employer in order to get rid of the case.

As argued by Durkheim (see Chapter 2, section 2.3.3) these expectations arise from a set of values, perceptions and actions, which are formed by patterns of conduct that are part and parcel of all human relationships. In particular, the LRA (66/95) with its requirements for fairness (as further encoded in guidelines), gave rise to the patterns of conduct in the labour relationship becoming regulated and technical. For instance, it was found that employers were inclined to only follow the procedures prescribed in Schedule eight to resolve conflict because they were concerned that any other method might be regarded as unfair. A perception developed that the

system was biased against them. On the part of employees, the patterns of 'conduct' in the CCMA, specifically their successes in getting some type of compensation, gave rise to the perception that the system would provide them with some benefit, irrespective of the actions they might have taken (for instance misconduct). There is the expectation of "fair" treatment, but there is a discrepancy between the employee and the employer's perceptions of fairness, especially if they do not have a thorough knowledge of the LRA (66/95). Nevertheless, a new value system based on 'rights' and obligations therefore developed in the workplace. This can be likened to Durkheim's collective conscientiousness, which constrains parties (in this case especially employers) and obliges them to behave in particular ways.

The high rate of referrals can thus be ascribed to the high expectations of the employees, the ease of access to the CCMA, the constraints on the employers to deal with internal conflict in any other manner and a new value system based on rights and entitlement that has developed in the workplace.

8.17.3 Nature and appropriateness of the system of dispute resolution for small and medium sized employers and individual employees.

It was indicated in the background and problem statement of this study (Chapter one) that the majority of the South African employers and employees are 'unsophisticated' with regard to their rights and duties in terms of labour legislation (Landman, 2001:76). These are mostly the individual employees (who are responsible for 80% of the case load of the CCMA) and the small employers (70% of the employers are categorised as small to medium sized employers). This is in contrast with a very sophisticated system of rules and procedures that forms the basis of prescribed dispute resolution. It was also argued that most of the role players who operate within the system do not have the ability to deal with the system effectively. They are the parties who are experiencing the negative consequences of the unfair dismissal regime and the shortcomings of the CCMA (Brand, 1999:6).

It was found that the small employers do find it difficult to deal with the dispute resolution system due to the requirements for internal procedural fairness but also

because the system costs the employer a fair amount in terms of time and money. Various suggestions were made by the respondents about how small employers can be forced to increase their knowledge about the legal requirements for fairness.

It was found that the system is appropriate for the individual employee due to ease of access and the assistance of the commissioners in the conciliation and arbitration processes. The high referral rate is also an indication of the accessibility of justice to the majority of the workforce. Not all the respondents were of the view that the system is beneficial to the individual employee. The reason for this is that the dispute resolution system has created a process of conflict resolution in the workplace that alienates the employer and the employee from each other. This is confirmation of Marx's ideas that the capitalist system structured a whole new bond or relationship between human beings, which is characterised by depersonalisation and exploitation (Cuff and Payne, 1981:58-63; see also Chapter two, section 2.4). The employer employs the services of independent consultants to assist him in dealing with the internal processes. The employee, however, does not have the right to be assisted by a consultant or a lawyer, only by a shop steward or a co-worker. This situation leads to an imbalance in power. Power is defined by Anstey (1991:114) as the capacity to bring about desired outcomes or to change the position of another party. The system allows the employer to use his or her procedural power to frustrate the process by focussing on technicalities, request postponements, taking the commissioner on review, non-attendance of conciliation, etc. This is in line with Marx's view of power namely that it is a mechanism to further a dominant group's (the employer) interests.

Marx maintains that the exploitation is not because of the evil nature of mankind, but 'exploitation' is a structural requirement of the whole social system. It was found that the new system of industrial relations and dispute resolution has restructured the relationship between employers and employees. It is now guided by universal principles of fairness required by the LRA (66/95). It was intended to move away from the exploitative nature of the relationship in the previous era of industrial relations under apartheid. However, the complexities of the system and the fear instilled in employers that they are abdicating their power and managerial prerogative have turned the internal process into a last attempt by employers to

correct the power imbalance that they perceive has been brought about by the new LRA (66/95).

8.17.4 The orientation of employers and employees towards conflict and the use of the internal procedures.

In Chapter one the question was asked if it is possible to force the employer and employee parties through legislation to become more co-operative, and if it can, in what type of a society can this co-operation be achieved. The tendency in the past has been to view conflict, from a unitarist perspective, as negative and destructive to the work relationship. The pluralist approach, however, is based on the acceptance and proper management of conflict by means of effective procedures and mechanisms to deal with conflict as soon as it manifests itself in the workplace, and to do so at the lowest level and as speedily as possible (Grossett and Venter, 1998: 294; see also Chapter one, section 1.2).

However, the respondents acknowledged the fact that both the employer and the individual employee are reluctant to make proper use of the grievance and disciplinary procedures. It was also acknowledged that conflict is a highly emotional issue and it is questionable if a system that requires a totally unemotive approach to the resolution of conflict and disputes, is fully reflective of the dynamic of conflict and needs of the parties. Conflict is allowed to escalate because it is not properly dealt with. It is clear that the respondents are of the opinion that the role players are not capacitated to effectively function within a system based on the pluralist approach to conflict.

Parsons (1967:493) identified pattern maintenance as one of the conditions that has to exist if the system is supposed to operate at all. Pattern maintenance refers to the basic patterns of values institutionalised in a society (see also Chapter two, section 2.3.4.6). Dunlop (1958: 29) called this a tension management subsystem and it concerns the motivation of the actors and the integration of the values of the system. Whether the labour relations system complies with this theory of pattern maintenance, is a moot point, and depends on how compelling the "guidelines" in Schedule eight of the LRA (66/95) are regarded. If these are only guidelines and

employers and commissioners have the discretion how to apply the guidelines, then it would undermine pattern maintenance. However, in practice, both employers and commissioners are reluctant to apply anything else than Schedule eight because they might be found to be lacking consistency in their approach to conflict resolution. Pattern maintenance is thus sustained, but to the disadvantage of, for instance, small employers. In order to sustain pattern maintenance but at the same time not disadvantage small employers, a preferable approach could be to amend Schedule eight to provide more specifically for the circumstances of small employers.

The fact that both the employer and employee parties were reluctant to use these internal mechanisms to resolve conflict, could also be partly due to the fact that they do not have the knowledge, skills and inclination to approach conflict in the unemotive manner that the LRA (66/95) requires. Such a system might work better in a homogeneous, highly educated society were there is more of a power balance between the employer and employee.

8.17.5 Ability of the parties to deal with conflict and disputes

One of the main problems being explored in this study is the ability or inability of the role players to effectively deal with conflict and disputes. The fact that so many disputes are referred to the CCMA for conciliation could be an indication that the internal conflict resolution mechanisms are not used properly or fully understood in a specific organisation. Employers and employees still have a tendency to view conflict as negative and destructive – in contrast to the pluralist approach required by the LRA (66/95). They do not deal with the conflict internally and use the CCMA as a statutory grievance procedure (Gon, 1997: 24). The question could be asked if the parties' lack of capacity to deal with the internal mechanisms, is the reason for the high referral rate.

The respondents perceived the capacity of small employers, individual employees and trade union representatives as inadequate. They agreed that employers, employees and trade union officials need knowledge, among others, of the requirements for internal fairness as prescribed by the LRA (66/95), basic labour legislation, conflict management, dispute resolution and how to chair disciplinary

hearings. The skills that these parties need to effectively function in the dispute resolution system are negotiation and communication skills. Most importantly, these parties need to be taught that conflict is inherent in the labour relationship, that there are specific ways and means prescribed to deal with conflict and that proper conflict management requires an unemotive approach to conflict and dispute resolution. The means necessary to function effectively are telephone and fax machines and transport to attend hearings. The small employers experience problems to afford labour lawyers and consultants to assist them in dealing with disputes and many employees do not have access to fax machines. Travelling to attend processes costs them money, especially if they are unemployed.

The needs of the parties as outlined above must be distinguished from the needs of the system (Parsons 1967:493; see also Chapter two, section 2.3.4.1). One of the functional imperatives for the dispute resolution system to function is that both of these needs must be addressed. One of the most important needs of the dispute resolution system, is that employers and employee parties must be knowledgeable of their rights and duties and of the processes prescribed in Schedule eight. This, however, will take a long time and the incapacity of the parties is in the meantime putting a lot of strain on the system, which is forcing the system to adapt. One of the ways in which the system is adapting is through legislative changes making provision, for instance, for the pre-dismissal arbitration.

8.17.6 The role of labour lawyers and consultants

Another example of how the system is adapting to the strain, is the increasing role that labour lawyers and consultants came to play in the dispute resolution system.

Spencer pointed out that societies also go through a process of evolution from very simple structures to highly complex structures and with this differentiation the parts of the organisation become more and more specialised (Martindale, 1970: 66; see also Chapter two, section 2.3.2). It was found that the respondents agreed with the notions of Spencer, namely that the dispute resolution mechanisms in the labour relations system has, due to specialisation, evolved into highly complex and sophisticated mechanisms and procedures giving rise to the need for labour lawyers and consultants.

This incapacity of the parties to deal with conflict and disputes has opened up a window of opportunity for knowledgeable individuals to become involved in assisting these parties in dealing with conflict. Labour lawyers and consultants became increasingly involved in CCMA processes despite the efforts of legislation to keep them out or to limit their involvement. The respondents' perceptions towards the labour lawyers and consultants varied between positive and negative for various reasons. There was, however, consensus among the respondents that both the lawyers and consultants often play a valuable role in the dispute resolution processes. They viewed the future role of consultants as more focussing on assisting the employers with the internal procedures and the role of the labour lawyers as more focussing on representing the parties in external processes at the CCMA (especially arbitrations) or Labour Court.

It was suggested, and it is foreseen that future changes to legislation or to the CCMA Rules will eventually make specific provision for the role of labour lawyers and consultants.

8.17.7 Problems and needs of the role players

The problems and needs of the role players were discussed under section 8.16 and focussed on their incapacity to effectively deal with conflict and disputes. The problems and needs of the commissioners should also be addressed, as they are also role players in the dispute resolution system. Their problems and needs were divided into problems that they experience with the parties, problems with processes and problems with administration and management.

Spencer pointed out (Martindale 1970:66) that the parts of the system that makes societies 'orderly' are various institutions and processes (see also Chapter two, section 2.3.2). In the same way it can be argued that some of the parts that make an industrial relations system an "orderly" system are the institutions and processes for dispute resolution. The commissioners are a vital component of the dispute resolution system.

Spencer referred to three vital functions for the survival of society (in this instance the system) namely regulation, distribution and sustenance. This implies that

societies (the dispute resolution system) must be governed and controlled (managed and resourced), economic goods must be produced (the aims must be reached and the services delivered) and distributed and the population must be maintained (the well being of the commissioners should be looked after).

The respondents indicated that poor management, appalling administration and inadequate resources impede their efforts to fulfil their role in dispute resolution. There was recognition, however, that the high caseload is a major contributing factor to the poor quality of case management and administration. The incapacity of the parties furthermore frustrated their ability to function effectively, whereas the lack of knowledge and co-operation of the employers, employees and trade union representatives made their task very difficult. The attitude of these parties to the CCMA, for instance as reflected in employers who do not attend conciliations, employees who are taking a chance, and trade union representatives who are ill-prepared for processes, has a negative impact on their ability to contribute to maintaining the system and to function properly. The respondents also indicated that they are not maintained – meaning that there is no performance management, no prospects for promotion, no participation in decision making and a general hostility towards commissioners, especially the part-time commissioners.

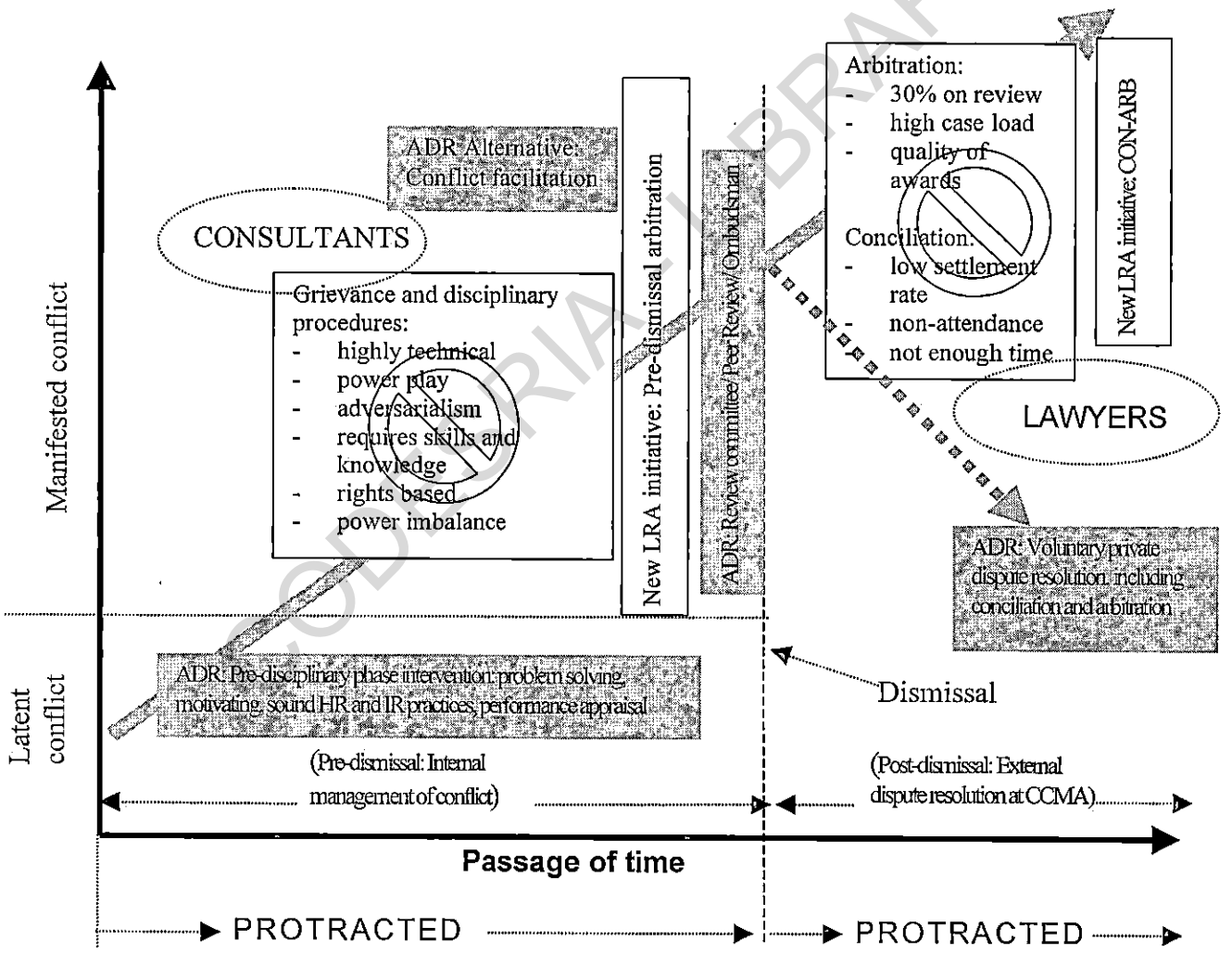
If the views of Parsons (See Chapter two, section 2.3.4) regarding the prerequisites for the survival of a society (or system) are applied to the dispute resolution system as provided by the CCMA, it can be deducted that there are serious problems in the Gauteng region that need to be addressed. It was mentioned by the respondents that the better commissioners leave the CCMA to become involved in private dispute resolution, the new commissioners are not properly trained, quality of arbitration awards is not up to standard (30% are reviewed), there are very long time delays for both conciliations and arbitrations and the system has become fraught with problems and inefficiencies.

This raises a question about the future role and function of the CCMA in the labour relations system and the alternatives available to the parties.

8.17.8 To explore the structural strain in the system and ways in which the system of industrial relations copes with and adjusts to the structural strain.

This section deals specifically with changes to the system and ways in which the system adapts to the environment. According to the respondents' views regarding ADR, the process of conflict management and dispute resolution should be changed as indicated in **figure 8.3.**

Figure 8.3: ADR and proposed changes to the conflict management and dispute resolution system



Source: Researcher, 2003

Figure 8.3 is a representation of conflict management and dispute resolution as viewed by the respondents. It elaborates on the understanding of conflict as indicated in Chapter four.

Figure 8.3 explains that the internal mechanisms for the management of conflict have become very technical and problematic. It has become so to the extent that the legislator had to intervene and provide an option where a CCMA commissioner could come to the assistance of the employers to enable them to properly deal with internal processes (in the form of the pre-dismissal arbitration). This is also the area of dispute resolution where the consultants have become involved in the dispute resolution system and where the respondents saw them to be playing an increasingly important role in the future due to the need for their services in the organisation. This is confirmation of the fact that the South African system of dispute resolution is in the 'rights phase' of dispute resolution according to the model proposed by Lynch (2001:207), as discussed in Chapter six. The rights phase is characterised by emphasis on, for instance, the grievance and disciplinary procedures and arbitration.

One of the respondents suggested that the current, rights based approach to internal conflict resolution should be replaced with a conflict facilitation process, as indicated in **figure 8.3.** Lynch (2001:208) described dispute resolution based on processes such as facilitation and mediation as an 'interest phase' in dispute resolution and suggested that an "integrated conflict management phase" needs to be reached, which focuses on a choice of methods and which is not predetermined by Schedule eight. This is in line with the suggestion of one respondent that one should not refer to 'alternative" dispute resolution but to 'appropriate' dispute resolution. This can only be reached in a culture of 'conflict competency' that focuses on how people treat each other as discussed in Chapter six (**figure 6.3**). (See discussion on integrated conflict management system in section 6.6). The current system creates the opposite, namely animosity in the labour relationship. (See responses to interview question thirteen in section 8.15).

Figure 8.3 also incorporates another ADR option that was mentioned in section 8.13. A respondent suggested that ADR can be applied even before the employer

takes the decision to go the disciplinary route. This suggests that the conflict resolution alternatives to the grievance and disciplinary procedure are confined to a very narrow line between conflict manifestation and the grievance phase. The focus in this approach is on good human resource and labour relations practices such as motivation, performance appraisal and development.

Another ADR initiative of the respondents, namely the pre-dismissal initiative is also indicated in **figure 8.3**. These 'before dismissal ADR' options include 'peer review', 'review committees', 'review panels' and the ombudsman system. If these processes are analysed, two conclusions can be drawn. On the one hand it could be seen as a move towards co-operation and building trust in organisations where employers and trade unions have better relationships and can work together, seeing that these alternatives will only bear fruit if the employees regard them as credible. However, on the other hand it could simply be a way of making doubly sure that proper legal procedures are followed. If the case does go to arbitration, employers would be completely sure that they had been following the very technical prerequisites of the LRA (66/95). In the latter case, this alternative might simply be regarded as an attempt to deal with the shortcomings of the system, rather than moving towards an integrated conflict management approach.

More confirmation for the assertion that we are in the rights phase as identified by Lynch (2001:208) were received from respondents, who indicated that the internal mechanisms and processes are characterised by power play in and that employers prefer to go to arbitration because they need to reaffirm their power. The use of the grievance procedure is seen as a challenge to management's power, which needs to be corrected in the subsequent processes.

Figure 8.3 also shows that the external mechanisms have been under strain as indicated by the high referral rate, the high rate of non-attendance and the low settlement rate. It seems as if the conciliation phase as implemented by the CCMA has become obsolete. There is quite a lost of consensus among the respondents that con-arb should replace the conciliation-then-arbitration system. However, the fact that the con-arb process is not popular in private processes, could be an indication that the con-arb is not necessarily a better process but it is simply a short-

term solution to address the problems that commissioners and parties currently experience.

In **figure 8.3** it can be seen that private dispute resolution is an alternative to the statutory dispute resolution system but its utilisation is probably limited to bigger and more sophisticated role players.

Not only is it clear from the responses that the internal procedures have become very technical, but it has also been emphasised that there is a need for alternative methods of conflict handling and dispute resolution. There is, however, uncertainty over whether these alternatives will be recognised by the formalised system (for instance the Labour Court in reviews).

8.17.9 The impact of the dispute resolution system on the individual labour relationship

If the output for the organisation is high litigation costs, excessive time spent at the CCMA, high "penalties" where internal procedures have not been followed, then negative perceptions with regard to the CCMA is fed back into the system.

The feedback into the other sub-systems in the environment can be seen in the various attempts by employers to introduce flexible work practices and reduce employment. Employers are fearful of entering into permanent employment relationships and are making use of labour brokers, short-term contracts and sub-contractors. Labour is no longer seen as an asset but as a liability. The 2002 changes to the LRA (66/95) specifically addressed the issue of defining sub-contractors in an effort to curb these practices that have developed among employers. The increase in the number of labour lawyers and consultants as well as the many trade unions that have emerged, might create some job and income opportunities, but also impacts on legislation (Albertyn, 2002:1723).

The outcomes become inputs into the labour relations system through the feedback loop that the systems theory proposes (Craig, 1981:17). The outputs of the labour relations system affect community attitudes towards labour and management through the feedback into the system.

This study emphasises the importance of the fact that the labour relations system must be beneficial and functional to all the parties in the labour relationship. If a specific part of the system, such as the dispute resolution mechanisms or procedures, is not beneficial to the parties in the system, then a natural process will start to change that specific part. If the one part continues to be dysfunctional, it will have an effect on the parties and the environment, which in turn would then also react to influence that particular part.

It could be argued that the adversarialism that has characterised the collective labour relationship in the past has now moved to the individual labour relationship. It seems as if the big organisations and the sophisticated unions are not experiencing the problems that the small employers and the individual employees experience. Dealing with conflict in the workplace has become a matter of following the rules. It is not the 20% interest disputes putting the system of dispute resolution under strain but rather the 80% individual unfair dismissal cases.

It was found that the dispute resolution system is not bringing the parties to the labour relationship closer together. People are much more aware of their rights and there was no support among respondents for the possibility that the employment relationship is becoming less adversarial.

According to the above findings, the labour relationship is affected by the fact that dispute resolution has become stuck in the "rights phase" proposed by Lynch's model of dispute resolution (Lynch, 2001:207-208). The employers resort to using their positional power, parties do not focus on commonalities but on differences, and there is still a paternalistic management style in many organisations.

The findings certainly gave no indication of a growing emphasis on a more people centred and healthy work environment. The recent changes to the LRA (66/95) regarding the provision of the pre-dismissal arbitration process and the con-arb process could be seen as treating only the symptoms and not the causes of organisational conflict and an unhealthy dispute resolution system.

Merton (Cuff and Payne, 1981:48) referred not only to manifest and latent functions but also to latent dysfunctions (see also Chapter two, section 2.3.5). Some of the latent functions of the dispute resolution system are that employers are suddenly becoming aware of the principles of fairness and the value of following due processes. They are gradually getting their house in order in terms of following proper internal procedures – not because they want to but because they have to. One of the latent dysfunctions, however, is that employers have become reluctant to employ workers on a permanent basis, services are outsourced, and the system fails to reinstate workers.

8.18 Conclusion

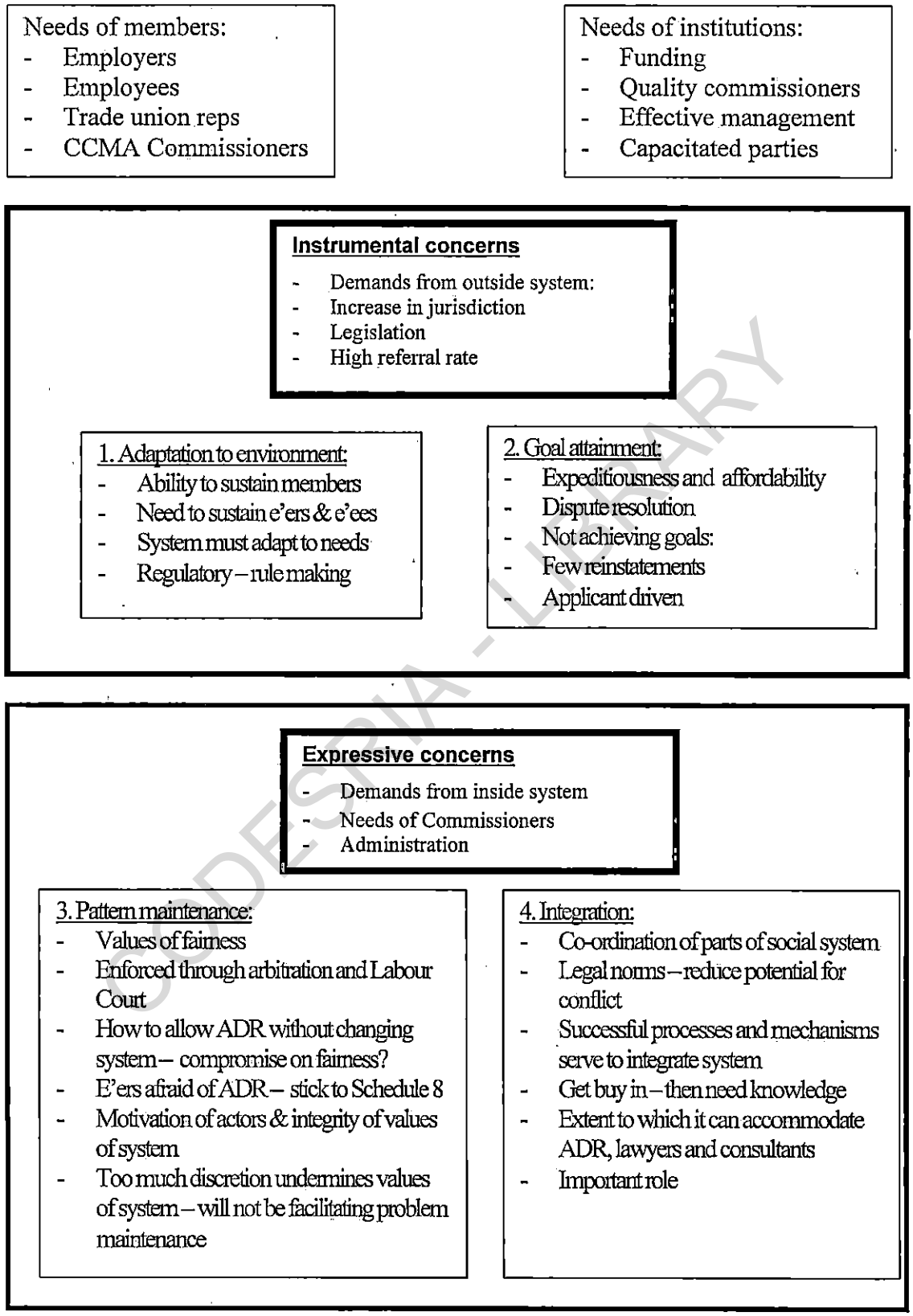
The findings of this study can be summarised by referring to Parsons' prerequisites for systems to operate effectively. Parsons' theoretical model can be applied not only to whole societies but it is also applicable in the analysis of institutions and even to two-person relationships.

It is possible to analyse the system of dispute resolution as it was reconstructed through the perceptions of the respondents in an attempt to explore and describe the structural strain that the system is experiencing. Also, this will help to speculate about whether and if so how, the system will change and adapt to the needs of the role players.

Parsons suggested that if any social system is to operate at all, four basic conditions have to be met or four problems have to be solved. These 'functional prerequisites' concern the needs of the institution as well as the needs of the members of a specific society. These four basic problems are: (1) Adaptation to the environment, (2) Goal attainment, (3) Pattern maintenance and (4) Integration. (Grusky and Miller, 1981:98).

Figure 8.4 gives an indication of the findings and the state of dispute resolution according to the perceptions of the commissioners, in terms of Parsons' model.

Figure 8.4: Pre-requisites for effective functioning of the dispute resolution system.



Source: Researcher, 2003

The needs and problems of the employers, employees, trade union representatives and commissioners were identified. The question to be answered is to what extent is the system able to provide in the needs of these parties. Should labour legislation be relaxed for the benefit of small employers and should there be a cost involved to refer a dispute? For the system to function properly, attention should be given to these needs.

- **Needs of the institution**

The needs of the **institution** refer to the needs of the CCMA as a dispute resolution institution. These could be adequate funding, well-trained commissioners as well as the fact that the system needs the parties to the conciliation process to be capacitated – to be trained in the guidelines provided in the LRA (66/95).

- **Instrumental requisites**

It was found that the demands from outside the system is due to the high referral rate, the broadening of the CCMA's jurisdiction and lack of funding and other resources.

- **Adaptation to the environment**

The system must meet the needs of the members of the society - in this instance the needs of the employers and employees. The mechanisms and processes of the labour relations system must adapt to the needs of the employer and employees in the labour market but it must also sustain economic development.

It was found that there is a need for the system to adapt to the needs of the employers and employees by making provision for more alternative dispute resolution methods and to relax procedures because the overemphasis on procedures has a detrimental effect on job creation. The recent changes to the LRA (66/95), the newly drafted Rules of the CCMA and the dispute prevention initiatives are examples of how the CCMA attempts to adapt to the needs of the parties.

- **Goal attainment**

Goal attainment refers to the need for a system to set goals, to which all activity is directed. It was found that the CCMA experiences problems regarding goal attainment. Respondents mentioned the long delays, the low settlement rate, the problems regarding reinstatement, the high incidence of review of arbitration awards and administrative problems. The respondents were of the opinion that the CCMA is experiencing difficulties in achieving its goals, as set out in the LRA (66/95).

- **Expressive concerns**

The expressive concerns deal with demands from inside the system. This refers to the demands from the commissioners in terms of what their needs are to perform their work effectively. The CCMA will have to consider the demands and needs from commissioners and deploy resources to cope with the high caseload, but also invest in the implementation of better systems and better management of the internal resources.

- **Pattern maintenance**

Pattern maintenance refers to the values of fairness that are well imbedded in all the procedures in the conflict management process. These values are enforced through juristic processes during arbitration and adjudication. However, this is not in line with the goals of the LRA (66/95), namely to have a less legalistic process of dealing with disputes. The CCMA has to consider if alternative methods of dispute resolution can be allowed without changing the structure and pattern of the system and also how much discretion can be allowed to employers, employees and commissioners before pattern maintenance is jeopardised.

- **Integration**

The law is the main institution in labour relations that co-ordinates the adjustment of the parts of the system. Legal norms standardise and legalise relations between individuals and institutions to reduce the potential for conflict. If conflict does arise,

it is settled by the judicial system and therefore does not lead to the disintegration of the system. Successful dispute resolution mechanisms and processes serve to integrate the system. The specialised output of this subsystem is solidarity in the labour community. For purposes of this study it could be argued that the system's survival depends on the extent to which it will be able to integrate alternative dispute resolution and labour lawyers and consultants into the system. In conciliation it is important to do whatever is necessary to resolve the dispute, but the general guidelines of Schedule eight of the LRA (66/95) should be followed.

The prerequisites for the system to function effectively and survive, is that the role players should be capacitated, labour lawyers and consultants' roles need to be defined and incorporated into the system, provision should be made for more forms of alternative dispute resolution and there should be investment in human resources and the administrative system. Failing to address these issues would, according to Parsons' framework, render the dispute resolution system ineffective.

CHAPTER 9

OVERVIEW, RECOMMENDATIONS AND CONCLUDING REMARKS

9.1 Overview

This study was done to explore the problems that have been identified in the dispute resolution system in South Africa. Interest in this specific topic arose from years of experience as a CCMA commissioner where it became clear during the conciliation process that a dispute could have been avoided if the parties to the dispute had dealt with the conflict in the relationship in the appropriate manner. The need arose to identify the extent of the inability of the parties to deal with conflict and to establish a link between their understanding of conflict dynamics and their utilisation of the internal mechanisms for conflict management. It was suggested that a better understanding of the problems of parties to resolve conflict would alleviate the consequential high referral rate of disputes to the CCMA. The problem statement, aims of the study and research questions were formulated in **Chapter one**. The **background** as contained in the first chapter explained that by the time a dispute was referred to the CCMA, irreversible damage might have been done because the correct internal procedures were not followed. In the **problem statement** it was explained that poor internal procedures - or not following any internal procedures - allowed conflict to escalate and transform from 'conflict' to a 'dispute' that had to be referred outside the organisation for resolution. The main aim of this study was to explore and describe the experiences and perceptions of CCMA commissioners regarding the ability of the parties involved in the dispute resolution process to effectively deal with labour conflict and disputes within the legal framework provided by the LRA (66/95). The aim was furthermore to also explore the reasons for the high referral rate and the influence of the case overload at the CCMA on the dispute resolution system.

The commissioners of the CCMA were identified as the representatives of the state in the dispute resolution process. These are individuals tasked with the function of resolving disputes within the statutory framework created by the LRA (66/95). These commissioners are caught up between the needs and problems of the employer and employee parties to disputes on the one hand, and the inherent problems of the relatively new system of dispute resolution on the other hand (Gon, 1997:23–26). This study thus explored the ability of employers and employees to function within the dispute resolution processes and mechanisms as provided by the labour relations system, from the perspectives of CCMA commissioners.

A multi-perspective approach was used to explore the problems and aims of this study. In **Chapter two**, some of the most well known sociological theories were utilised to assist in analysing the mechanisms and processes for conflict management and dispute resolution. The **functionalist perspective** was used to indicate that the various institutions and mechanisms in the labour relations system function as a whole, and if there is one institution that malfunctions it can have serious consequences for the functioning and the continued existence of the system. Parsons referred to this as pattern maintenance. The functionalist perspective was thus used to study the function of dispute resolution (a social practice) and the CCMA (an institution) and to analyse the contribution of this practice and institution to the continuation of the dispute resolution system (society). To study one institution or practice we need to know how it relates to other parts of the body (other institutions of the labour market). Some of the structural elements in the **conflict perspective** were used to analyse the current industrial relations system and dispute resolution practices. These theories were used to explore the ways in which the system copes with structural strain.

The **interactionist perspective** was used in the methodology of this study to focus on the empathic understanding of the life experiences of CCMA commissioners. Interactionism, which places the accent on attitudes and meanings, was used to focus on the commissioners' experiences of being caught up in the dispute resolution system. Commissioners have to give effect to the aims of the CCMA on the one hand, and are confronted with the problems inherent in the system on the other hand. The reconstruction of their worlds provided the background for a critical

analysis of the mechanisms and processes for managing conflict and the resolution of disputes.

Craig's adaptation of Dunlop's open **systems approach** formed the basis of the framework for analysis of the labour relations system in this study and was discussed in **Chapter three**. The intention with using this theory was to present a general theory of industrial relations that explains why particular rules are established and how and why they change in response to changes in the environment. A framework such as the systems theory allowed for the conceptualisation of the major dispute resolution components of the labour relations system so that each component, as well as the interconnection with the other parts of the system, could be examined in detail. It provided a mechanism to understand and interpret the actions of employers and employees inside and outside the workplace. The various institutions, mechanisms and processes for dealing with the labour relationship were identified. The collective, as well as the individual level of the relationship were indicated and the role players namely the state, employers and employees were discussed.

It was necessary to elaborate on the phenomenon of conflict because understanding conflict dynamic is of vital importance to be able to see how the dispute resolution system was designed to cater for the management of conflict and dealing with disputes. The relationship between conflict, grievances and disputes were spelled out in **Chapter four**, to enable the understanding of the relationship between the internal and the external processes and mechanisms. This was done to explain where disputes come from and what the difference is between conflict and a dispute. It was also necessary to explain how disputes originate in organisations and why the CCMA has to deal with disputes outside of the organisation. The reasons why parties in the workplace are unable to resolve their conflict effectively were explored in an attempt to begin to understand what the causes are for the high referral rate of disputes to the CCMA. The analysis of the transformation of conflict formed the basis for understanding the background, the problem statement, the aims and assumptions of this study.

A detailed analysis of the internal **(Chapters five)** and external mechanisms and procedures **(Chapter six)** within the dispute resolution system was undertaken in an attempt to establish a link between the internal management of conflict and the external handling of disputes. The point was made that it would take a paradigm shift in the workplace to have effective resolution of conflict. The parties should move away from viewing conflict as negative, and recognise the value of resolving such conflict as soon as possible. The grievance and disciplinary procedures should be seen as mechanisms for managing conflict effectively and not as something to be avoided at all cost. The assumption was made that if internal mechanisms and processes are understood and used effectively, fewer disputes will be referred outside of the organisation to specialised dispute resolution bodies such as the CCMA.

The whole issue of alternative dispute resolution was also dealt with in **Chapter six** and it was pointed out that what had been known to be alternative dispute resolution (ADR) had now been institutionalised in the CCMA processes. This study explored CCMA commissioners' perceptions of 'alternative dispute resolution' and to what extent such practices and processes could be accommodated within the dispute resolution system under the LRA (66/95).

A comparative study of dispute resolution systems in various countries was attempted in Chapter six. This, however, proved to be a daunting task and also assumed a very legalistic character. It soon became clear that the dispute resolution system in any country is a culmination of historical events, political processes, labour market conditions, cultural and population groupings in various stages of legislative developments. The result is that Chapter six now only contains a broad-brush description of the various option of dispute resolution found in other countries.

The integrated management strategy approach was offered in Chapter six as an alternative way of dealing with conflict and disputes. It was suggested that South African organisations are caught up in a rights an interest phase with regard to dispute resolution. It was emphasised that the parties should move away from viewing conflict as negative and recognise the value of resolving disputes as soon

as possible. The grievance and disciplinary procedures should not be viewed as the only mechanisms for managing conflict, but it should be viewed as forming part of an integrated conflict management strategy. Conflict should not be avoided at all costs but it should be prevented, contained, managed and resolved within the organisation.

Chapter seven contains a detailed explanation of the methodology that was followed in the execution of this research. Where the macro-theories of functionalism and conflict theory were used to describe the system of labour relations, the micro-theory of interactionism was used as the basis of the methodology in this study. Although the macro-sociologists have a tendency to do research from a positivistic approach and the micro-sociologist prefer using interpretive methods, it was decided to utilise both these methods in this study. Evidence was found to suggest that the strategy of mixing methods is becoming more widely used in contemporary sociological research, enriching the quality of the research (Marcus and Ducklin, 1998:52).

Questionnaires containing mostly open-ended questions were sent to all full-time Gauteng commissioners (and those part-time commissioners of whom e-mail addresses were available). Interviews were conducted with part-time commissioners who were included in the research by using the purposive and snowball-sampling techniques.

This study is predominantly of a qualitative nature and was conducted in an exploratory manner. In-depth interviews were held with eleven commissioners, guided by an interview schedule containing thirteen questions. This sample was supplemented by the e-mail questionnaires. It was mostly the full-time commissioners who responded to the questionnaires. Fifteen completed questionnaires were received.

Chapter eight dealt with the analysis of the data and findings. Data analysis was in the form of content analysis. Both deductive and inductive methods were used in the analysis of the responses to both the open-ended questions in the questionnaire

and the interview schedule questions. Full advantage was taken of the benefits of using the mixed methodology design model of triangulation.

The thirteen questions in the interview schedule - each of them dealing with a specific theme - were used to structure the chapter into various sections. Each section was divided into four parts. In the first part it was indicated that the specific question in the interview schedule refers to specific aims and research questions. The second part consisted of the analysis of the questionnaire responses. The third part was allocated to the analysis of the interview responses and the fourth part contained the integration of the responses and some conclusions.

The last section of Chapter eight is the most important section of the study. The nine aims of the study were used to structure this section. Each aim was discussed separately, starting by briefly referring back to the rationale behind each aim and then discussing and contextualising the aims, using the theoretical framework proposed in Chapters two and three.

9.2 Summary of the findings

A brief summary of the findings is presented below. Due to the qualitative nature of this study and the relative small number of respondents, it is acknowledged that the views presented might be subjective and generalisation of results could be problematic. The most important findings regarding each of the themes in the interview schedule will be presented.

9.2.1 Reasons for the high referral rate

The respondents' perceptions of the reasons for the high referral rate was divided into five categories. These were dealing with the ease of access to the CCMA, the high expectations of the applicants, poor advice from trade unions and consultants leading applicants to believe they have good cases, the economic climate forcing parties to take their chances at the CCMA and the fact that employers do not follow fair procedures due to a lack of knowledge of the LRA (66/95). The high referral rate was also attributed to the pathology of conflict and the adversarial nature of the

labour relationship in the workplace as well as the fact that various pieces of legislation have increased the jurisdiction of the CCMA without increasing the resources.

The suggestions regarding the solution to the problem of the high referral rate will be dealt with under the section dealing with recommendations.

9.2.2 Relationship between internal mechanisms, effective conflict resolution and the high rate of referrals of individual unfair dismissal cases

Commissioners were of the view that especially the **small employers** do not know the law and do not apply fair procedures in the workplace. The second view was that both employers and employees perceive **conflict as negative** and that these internal mechanisms should be avoided. The third view was that **employees** do not have knowledge of the law, that they are not aware of their rights and are poorly advised by their trade union representatives regarding how to deal with conflict. The fourth view was that these procedures are **complex** and that employers do not read the Act because they perceive it as being written in a **legalistic** manner. It was also found that employers still have a very paternalistic approach to internal procedures. They use the disciplinary and grievance procedures as a power play to re-establish their managerial prerogative. It was also found that it might not matter whether the employer has followed the correct internal procedures because, if these procedures are not perceived to be credible in the eyes of the employees, they will challenge them in any case.

In summary, therefore, it has been established that commissioners were of the opinion that there is a definite link between the internal mechanisms and procedures for handling conflict and the high referral rate.

9.2.3 Appropriateness of the system for small to medium sized employers

Most of the respondents were of the opinion that the system is appropriate for small employers but highlighted the fact that small employers do not have the time, the resources or the will to familiarise themselves with the rules and requirements for

fair labour practices. The employers have a very negative perception of the internal requirements for fairness, they do not have the ability to properly deal with conflict internally and they have a specific need for assistance. This assistance is currently obtained from consultants, labour lawyers and employer organisations.

It was also found that, by using consultants to deal with conflict and grievances, a distance is created between management and employees. This has lead to a renewed animosity and adversarialism in the workplace at the individual level, which is similar to that previously found in the collective labour relationship.

9.2.4 Appropriateness of the system for individual employees

Most of the respondents agreed that the system is appropriate for individual employees for reasons pertaining firstly to the fact it is **easily accessible**, low cost and the fact that they have nothing to lose. This is, however, at the same time the reason why the CCMA is so overburdened with cases. The **commissioners** are trained and skilled to assist individual employees, will inform them of their rights and will guide the parties through the process.

However, concern was raised about the position of the unrepresented individual in a disciplinary hearing. A legally trained, industrial relations practitioner usually assists the employer, whereas the employee is only allowed to be represented by a shop steward or a co-worker. Individuals should be allowed to use any representation in the internal processes.

It was therefore established that the respondents are of the opinion that the system is appropriate for individual employees and that capacity is not a requirement for their utilisation of the system. However, the system is being abused due to a lack of knowledge and high expectations.

9.2.5 Reasons for the low settlement rate

The main reason for the low settlement rate was the non-attendance of parties at conciliation for various reasons. The inability of the commissioners to resolve

disputes due to a lack of training in conciliation skills was emphasised. Employees have high expectations and think they can get more money at arbitration. They are also not aware of the possibility of cost orders for frivolous and vexatious cases. Employers do not want to settle at conciliation because there is a possibility that the applicant could lose interest or that there would be another opportunity to settle on the date of the arbitration. The respondents were of the opinion that conciliation as an isolated process has become obsolete.

It became clear that the dispute resolution system in Gauteng is under strain due to the high referral rate, the high caseload and not enough time for proper conciliation. Another important reason for the low settlement rate has to do with low levels of motivation of commissioners due to the high caseload, little support from management, poor administration and that there are no incentives from management for higher settlement rates. There was a perception that commissioners have not been properly trained for conciliation and that they do not try hard enough. It should be kept in mind that the Gauteng office of the CCMA is a huge operation that has all the characteristics of a bureaucracy with its associated problems.

9.2.6 The current and future role of labour consultants and labour lawyers

The perceptions were that both the lawyers and consultants parties have a specific role to play in the dispute resolution system and will continue to play an important role. Consultants will probably be focussing more on the internal processes and preparation of the cases, whereas labour lawyers are focussing more on the legal technicalities in arbitration and Labour Court. The respondents indicated that there is a significant need for the services of both these parties in the dispute resolution system, since most employers and employees do not have the capacity to deal with conflict and disputes in terms of the system as provided by the LRA (66/95).

There seem to be a lot of support for a change in the system to allow representation by these parties provided that the commissioner retains some discretion.

9.2.7 Needs and problems of employers and employees with regard to conflict management and dispute resolution

Both the employer and employee parties and trade union representatives need to have knowledge of the LRA (66/95) and other relevant labour legislation, and of the internal and external mechanisms available for managing conflict and dealing with disputes. Trade union representatives specifically need knowledge of the procedures prescribed in Schedule eight of the LRA (66/95) but also knowledge of procedures to be followed during disciplinary hearings and at CCMA processes. There is a need for training in arbitration proceedings and the law of evidence. Knowledge of jurisprudence is also important. The importance of knowledge regarding representation in disciplinary and grievance hearings, at conciliation and arbitration at the CCMA and the Labour Court, as well as the actual presentation of the case in these different forums was emphasised. The most important skill that was identified by the respondents for all three the parties to the dispute resolution process was negotiation skills. Human relations skills such as communication, listening, conflict resolution and presentation skills were also identified.

The main problem that the respondents had with the employers was that they are still very paternalistic and use outdated methods such as posturing and threats to deal with conflict. The most important problem that the respondents experienced with employees was their high and unrealistic expectations. They are unsophisticated, don't understand the procedures, cannot articulate their problems and are unable to argue the merits of their case.

The respondents also mentioned problems that the parties have with commissioners. The parties are sceptical about the competence of the new CCMA commissioners. They also feel aggrieved about the fact that arbitration awards are so late.

The system was criticised as being unfair towards employers who do follow proper internal procedures. The employer has no option but to go through an internal process, then through conciliation and then through arbitration or the Labour Court. This is very costly in terms of time and money.

Both parties are experiencing problems because they are not properly notified, resulting in a high non-attendance rate, low settlement rate, default awards, rescission applications and endless delays.

9.2.8 Should the dispute resolution system change and if so, how should it change?

It was found that the system is experiencing strain and the respondents foresaw that the system would have to change. Various possible solutions for the current problems were mentioned and suggestions were made for changes to the system.

The CCMA will still play an important role in the future because there is a need in South African labour relations for such a system, and the alternatives are costly and only available for bigger employers and bigger cases. The predominant perception was that the impact of private dispute resolution bodies on the CCMA would be marginal.

It was found that the respondents were not in favour of relaxing the legislation for small employers and for individual dismissal cases.

There was huge support for the pre-dismissal arbitration and the con-arb processes that have now been introduced by the recent changes to the LRA (66/95). There is, however, a call for less regulation of internal processes in the organisation.

It was found that processes are becoming more and more adversarial and technical and more and more points *in limine* are being taken. The current system of dispute resolution that places so much emphasis on procedural fairness in the internal processes, has created a generation of employers, consultants, labour lawyers and trade union representatives that turn internal processes into opportunities to show off their power. If the employee then takes the employer to the CCMA, the employer has to do everything possible to restore his or her power. Parties have become totally rights orientated and are focussing on their rights rather than looking for solutions.

The role of consultants and lawyers' role will increase, with the consultants more involved in the internal processes and the lawyers more involved in arbitration.

There was a perception that the CCMA is not passing the test for a system dealing with such a high incidence of unfair dismissal cases. The test would be to see if the system is able to reinstate workers who have been unfairly dismissed and how many of them remain in their jobs. The CCMA is not able to do this.

The respondents pointed out that the fact that the parties specifically want to get to arbitration is an indication of a shift in the aims and function of the dispute resolution system. Whereas the intention was to have a less legalistic, simple and expeditious system, there is a need for legal certainty and therefore a gradual move back to a judicial system.

9.2.9 A sophisticated system of dispute resolution in which most role players are not capacitated to operate effectively

Respondents stated that the intention was not to create such a sophisticated system. The commissioners failed to utilise Schedule eight as guidelines only. They had to take decisions in a newly established dispute resolution system and the jurisprudence developed by the Industrial and Labour Courts was the sources that were turned to for guidance. This led to the development of a whole new set of rules and case law that resulted in the system of dispute resolution evolving into a highly technical process.

The dispute resolution system was designed to bring justice to the majority of workers at the lowest level in the labour market. The system was also designed as an 'applicant driven' system. The irony, however, is that the largest part of the workforce often do not have the knowledge, skills and means to stand up to some employers who might be determined to frustrate the process by refusing to give effect to awards, taking commissioners on review, not attending processes etc.

It should also be remembered that it is a relative new system in a fast changing labour relations environment. Employers responded to the system after having been penalised for procedural or substantive fairness. They became aware of the

emphasis placed on internal procedures and the strict application of Schedule eight of the LRA (66/95) in awards. This made them very apprehensive and they started to involve labour lawyers more and more to assist them. The more the lawyers became involved, the more technical the system became. The more technical the system, the more the emphasis was placed on rights and obligations and less emphasis on conciliation. The CCMA recognised the fact that the system is complex and took measures to assist parties by simplifying forms, making it more informative, rewriting the CCMA Rules and making provision for pre-dismissal arbitration.

9.2.10 The technical requirements of dispute resolution prevent parties from seeking alternative dispute resolution methods

Two issues have been identified in these responses. The **first** is that employers do not know what alternatives are available (the alternatives proposed by the respondents will be discussed in the next section). The **second** issue deals with when and where in the conflict management process these alternatives are applicable. The employer can use any method to deal with conflict in the organisation before he or she decides to go the discipline route but once he or she has decided to do so, he or she must follow Schedule eight. The dispute resolution system is a system with high competence requirements to get the internal procedures right. Commissioners are at fault if they do not consider Schedule eight, but if they apply it too strictly to small employers, they are probably also not giving effect to the intentions of the drafters of the LRA (66/95).

It is clear that the respondents are of the view that employers are at risk of being found procedurally unfair if they use too much discretion in terms of alternative dispute resolution processes.

9.2.11 The alternative to Schedule eight of the LRA (66/95) - Alternative Dispute Resolution (ADR)

The internal mechanisms for the management of conflict have become very technical and problematic. This has happened to the extent that the legislator had to

intervene and provide an option where a CCMA commissioner could come to the assistance of employers to enable them to properly deal with internal processes (in the form of the pre-dismissal arbitration).

Another alternative might be that the current, rights based approach to internal conflict resolution be replaced with a conflict facilitation process. Dispute resolution based on processes such as facilitation and mediation is characteristic of the 'interest phase' in dispute resolution. The focus is placed on choices of methods, or 'appropriate' rather than 'alternative' dispute resolution.

Another ADR initiative can be referred to as the pre-dismissal initiative (which should not be confused with "pre-dismissal arbitration"). These 'before dismissal ADR' options include 'review committees', 'review panels' and the ombudsman system. If these processes are analysed, two conclusions can be drawn. On the one hand it could be seen as a move towards co-operation and building trust in organisations where employers and trade unions have better relationships and can work together, seeing that these alternatives will only bear fruit if the employees regard them as credible. However, on the other hand it could simply be a way of making doubly sure that proper legal procedures are followed. If the case does go to arbitration, the employer would be completely sure that he or she had been following the very technical prerequisites of the LRA (66/95). In the latter case, this alternative might simply be regarded as an attempt to deal with the shortcomings of the system, rather than moving towards an integrated conflict management approach.

The conciliation phase as implemented by the CCMA seems to have become obsolete and there is significant agreement among respondents that con-arb should replace the conciliation-then-arbitration system. However, the fact that the con-arb process is not popular in private processes could be an indication that con-arb is not necessarily a better process, but it is an alternative to address the problems that commissioners and parties currently experience.

Private dispute resolution is an alternative to statutory dispute resolution but its utilisation is limited to the bigger and more sophisticated role players only.

Not only was it clear from the responses that the internal procedures have become very technical, but it was also emphasised that there is a need for alternative methods of conflict handling and dispute resolution. There is however, uncertainty if these alternatives will be recognised by the formalised system (for instance the Labour Court in reviews).

9.2.12 The utilisation of private dispute resolution

Private dispute resolution is one of the answers to the problems experienced at the CCMA and for dispute resolution in future. This, however, only applies to big employers and sophisticated parties. The expectation is that the use of private dispute resolution would increase in future, provided that it would not be at the expense of the CCMA and workers who cannot afford it.

9.2.13 The rigid system prescribed in Schedule eight has changed the labour relationship

It was found that the dispute resolution system is not bringing the parties to the labour relationship closer together. People are much more aware of their rights and there was no support for the possibility that the employment relationship is becoming less adversarial. The high referral rate is seen as an indication of a "... pathology of conflict..." in the workplace. Parties do not focus on commonalities but on differences, and there is still a paternalistic management style in organisations.

It seems as if the adversarial nature of the labour relationship, which in the past was because of collective issues, now seem to have shifted to individual issues such as discipline and unfair dismissals. It is not the 20% mutual interest disputes that are putting the system of dispute resolution under strain, but rather the 80% individual unfair dismissal cases.

The findings certainly gave no indication of a growing emphasis on a more people centred and healthy work environment. The recent changes to the LRA (66/95) regarding the provision of the pre-dismissal arbitration process and the con-arb

process could be seen as treating only the symptoms and not the causes of organisational conflict and an overburdened dispute resolution system.

9.2.14 Problems of commissioners

The problems that were mentioned in this section dealt with low morale amongst commissioners due to the fact that they feel they are not being treated with respect and there is no regard for their efforts. There are no incentives and career prospects and their positions – especially those of the part-time commissioners, are uncertain. CCMA management is criticised for not managing the system properly and not maintaining their human resources, specifically the commissioners. Human resources maintenance, according to Gerber *et al* (1998:181) refers to performance appraisal, compensation management benefits and services, quality of work life and social responsibility, leadership and motivation of the work force.

9.3 Recommendations

The respondents made various recommendations, either in response to a request, or on own initiative. Their remarks are supplemented where appropriate with my own experiences and views about how the system can be improved.

9.3.1 Referral fee

The possibility of a small referral fee could be considered. This fee could cover some of the CCMA's administration costs but most importantly, it is intended to serve as a deterrent for the referral of frivolous and vexatious cases and also to ensure that the applicant has considered the merits of his/her case. Various options were mentioned, ranging from requiring a revenue stamp of R20,00 on the referral form, to the payment of a percentage of the applicant's salary. The intention with this amount is that it will be repaid if there is a settlement at conciliation. This could also create an incentive for the employee to settle during conciliation. It furthermore gives the commissioner more options around which a settlement could be negotiated. The obvious disadvantage is that low-income employees, who are

dismissed, might literally not be able to afford the fee, however small it might be. Another option is thus to allow for exemptions to be given, or to make this referral fee applicable only to employees earning more than (for instance) R 8000,00 per month. Alternatively, more cost orders should be made and enforced more strictly for frivolous and vexatious referrals.

9.3.2 Training and education

More emphasis should be placed on training and education of employers, employees and trade union representatives. It was suggested that the CCMA compile a small booklet with basic information about what can be expected at the CCMA and how to evaluate the merits of a case. The applicants should sign that they have scrutinised the booklet, understand the content and are aware of the possibility of cost orders if they pursue a case that have no merits.

9.3.3 Advisory forums

More use should be made of advisory forums such as Legal Aid Centres. These advisory forums, including the CCMA help desk, should provide qualified reports on the merits of a case before it is referred. If the report states that the employee was informed of the fact that the case has no merits and the employee chooses to pursue the matter in any case, and the arbitration award is against the employee, this fact could be used as aggravating circumstances in the decision to award costs. The one condition for such forums to operate successfully, is that they should have the necessary credibility with the applicant party.

9.3.4 Special tribunal for individual dismissals and retrenchments

In an attempt to deal with the caseload, the establishment of a special tribunal by the Department of Labour or the Department of Justice could be explored, to deal specifically with domestic workers' cases and individual retrenchments. This tribunal could be outsourced to a private dispute resolution body or various accredited individuals could become involved in this process. The procedures and rules must be tailor-made for these types of cases.

9.3.5 Pre-CCMA telephone conciliations

Telephone conciliations should form part of the pre-mediation screening process, in an attempt to reduce the high referral rate. When the domestic worker, for instance, refers her case, the employer should be phoned and there should be an attempt to conciliate. Although this practice is to some extent already in existence, it seems as if the commissioner or case management staff, who have to do these telephone conciliations, have not been trained properly to do justice to this process. These pre-CCMA telephone conciliations could be done at Legal Aid Centres, NGO's, Community Centres and academic institutions.

9.3.6 Raising public awareness

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

9.3.7 Offer of compensation

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

The rationale behind the three months' compensation can be explained by using the formula set out in section 194(1) of the LRA (66/95) regarding procedural unfairness, before the recent amendments were effected. If the case had been

referred to the CCMA within 30 days, and the conciliation had taken place within 30 days, and an arbitration had taken place within 30 days, the employee would not have been entitled to more than three months compensation for procedural unfairness on the side of the employer. The CCMA would not have been able to award less than what was stipulated in this formula either (Basson *et al,* 2000:245). By giving the employee three months' remuneration, the employer saves on the costs of going through lengthy internal procedures that would otherwise have been challenged at the CCMA. He or she also saves on the costs for a consultant or labour lawyer and saves on time spent in attending conciliation and arbitration hearings. The employee, on the other hand, immediately gets the compensation that he or she would otherwise not have received in less than three months and he or she can focus on finding other employment. This option would create certainty for both the employer and the employee. This measure would reduce the CCMA caseload and the outcome in many, if not most cases, would be the same - compensation to the employee (re-instatement happens seldom, especially with the long time lags leading up to arbitration) and cost to the employer. If the employer chooses not to pay the compensation, the employee would be able to challenge the dismissal at the CCMA.

9.3.8 Small Claims Labour Court

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

9.3.9 Conciliation and arbitration case rolls

More use should be made of the conciliation and arbitration 'case rolls' to deal with the high referral rate. Commissioners found that these processes work well and could be used to deal with the bulk of the cases referred to the CCMA, namely the individual unfair dismissal cases. At the moment case rolls are used specifically to deal with a big backlog of cases, but before it becomes the norm, the perceptions of the employer and employee parties in this regard should be investigated.

9.3.10 Representation in disciplinary and grievance procedures

The constitutionality of denying an employee representation by a lawyer or consultant in the internal grievance and disciplinary processes should be considered. Legally trained industrial relations practitioners usually assist bigger employers, whereas small employers involve consultants or labour lawyers in these internal processes. The individual employee is, however, only allowed representation by a shop steward or a co-worker. It is proposed that individual employees should have the right to be represented by lawyers if they are not union members, even in internal procedures.

9.3.11 Prominence of the employers' offer to settle

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

9.3.12 Serving of documents and ensuring higher attendance rates

One of the reasons for the high rate of non-attendance is that parties claim that they have not been properly notified. The whole process of serving documents and filing papers should be revisited. Documents should be served on a party, who would be required to acknowledge receipt and confirm that their contact details are correct. It was suggested that the possibility of utilising the services of the sheriff should be investigated to assist in this matter. Internal administrative procedures could be

improved and streamlined and attention should be given to install a corporate culture of diligence in CCMA administration.

Another suggestion to increase the attendance rate was that case management staff should phone the parties a day or two before the process, to establish whether they are going to attend or not. An alternative could be that commissioners be given the details of their cases beforehand so that they can – provided they have access to telephones – make these calls themselves.

9.3.13 Labour consultants and lawyers

Labour consultants should be enabled to play a bigger role in dispute settlement. They should be given credibility and legitimacy in the eyes of the employers, employees and commissioners. It was found that they have a definite and much needed role to play, specifically in the internal processes in organisations. A panel of consultants could be established that works with the CCMA or is accredited by the CCMA, in order to ensure that fly-by-nights and poor quality consultants are weeded out. Their existence and the role that they are playing in the labour relations system should be recognised, instead of them being vilified and kept out of the process through legislation.

9.3.14 Registration at the Department of Labour

The system could be changed to require employers to register as such at the Department of Labour, possibly as part of their registration with the Unemployment Insurance Fund, and the Compensation Fund. This registration should set in motion a process to ensure that they are aware of their obligations and have proper internal mechanisms to deal with conflict, such as disciplinary procedures. The Department could ensure that all employers are equipped with a basic set of documents informing them of basic principles of fairness, workplace conduct and their rights and obligations.

9.3.15 Private dispute resolution

Bigger and more sophisticated parties (this would include big employers, well established trade unions and professional and high earning employees) should be encouraged to use private dispute resolution. Employers should include provisions for private dispute resolution in contracts of employment for more senior employees such as those in management and professionals. The statutory system should exclude senior managers and high-level employees, as they would be able to look after themselves.

9.3.16 Re-drafting the system

The social partners have been exposed to the operation of the CCMA and it's inadequacies for more than seven years. Consideration could be given to re-evaluate and redraft the system according to the needs and problems of the parties – and the commissioners – and the changing environment.

9.4 Suggestions for further research

One possibility for further research might be to determine the perceptions of the parties, namely employer and employee parties, regarding the dispute resolution system, so that this information can supplement the views of the commissioners obtained through this study. However, as indicated in Chapter seven, this approach has serious shortcomings, and dependable results might not be forthcoming. In particular, if these perceptions are obtained once a dispute has been referred to be resolved at the CCMA, the results might be biased depending on the outcome of the process. On the other hand, if parties are approached before a dispute is referred, the results might be similarly biased, because parties might not have first-hand knowledge about the CCMA.

The one area of research that might be usefully explored, is that each of the above-mentioned recommendations be thoroughly investigated to establish their

applicability and possible contribution to the better and more effective functioning of the current dispute resolution system.

9.5 Concluding remarks

The labour relationship in South Africa is still adversarial, not only due to the divergent goals of the employer and employee parties, but also because of the fact that the dispute resolution system has created an environment where the nature of the relationship is determined by rights, rules and procedures. The adversarialism that has characterised the collective labour relationship in the past now seems to have shifted to the individual labour relationship.

The labour relationship in South Africa still has a long way to go before a point is reached where employers and employees are united through some common goal providing an incentive for co-operation. The drafters of the LRA (66/95) attempted to create and institutionalise a set of values, whereby the behaviour of employers and employees could be structured, in an attempt to ensure a stable system of labour relations. However, it could take a lengthy period or time for both parties to reach a point where their behaviour in the workplace is regulated by a generally accepted set of norms based on the principles of fairness as required by the LRA (66/95). It would take some employers at least one costly visit to the CCMA to prompt them to change their behaviour and get their house in order.

The drafters of the new LRA (66/95) saw the need for proper dispute resolution mechanisms as one of the prerequisites for a successful labour relations system. However, instead of emphasising the prevention of disputes, they focussed on rules and regulations for dealing with internal conflict, albeit in the form of guidelines. Because these guidelines have become the norm according to those implementing the Act, complex and technical processes of dealing with disputes have developed. This has led to a new type of adversarialism in the individual employment relationship, which is based on rights, rules and power.

The labour relations system is gradually changing according to the needs of the employers and employees. This study has indicated that the system will adapt in

unintended ways to compensate for the strains experienced by the system, and to accommodate the needs of the parties. The legislature should take heed of the needs of the parties, including the commissioners, when effecting legislative changes to the system.

Each of the parties to the labour relationship is in his or her own particular manner reacting to the system that was created through legislation. Employees, for instance, are referring cases to the CCMA, often whether the case has merit or not. This is an indication of the fact that they do not trust the employer and that they do not perceive the internal procedures of the employer as credible. They are taking their chances at the CCMA partly due to this lack of credibility of the internal procedures and partly because they have nothing to lose – there is not cost involved in challenging a dismissal by referring a dispute to the CCMA. This behaviour leads to a high referral rate and the consequential case overload at the CCMA. This case overload places strain on the system and renders it less effective.

Employers, on the other hand, are showing their discontent with the system by not attending the conciliation phase. They are compelled to invest significant resources in ensuring that the internal requirements for procedural fairness have been met and consequently refuse to settle disputes at conciliation. They show their disregard for the conciliation process, and the dispute resolution process is forced back into a legalistic, litigious process where the employer has the upper hand. This can also be seen as an attempt to restore the power balance that has been artificially disrupted by the LRA (66/95) dispute resolution processes.

The problem does not lie so much with the merits of the dispute resolution processes, the institutions, or the principles on which the system of dispute resolution has been based. It lies in the fact that a system has been imposed on the parties for which they were not prepared and for which they were not ready. Allowances should have been made and cognisance taken of the fact that the South African employees are in general relatively unsophisticated and that most of the employers are small to medium sized employers. Legislative changes should be preceded with even wider social dialogue than was the case with the current legislation, involving task teams and setting up best practice benchmarks, and

critiquing the difficulties in the current system. The final product would only work effectively if it has taken cognisance of the needs and the problems of the parties to dispute resolution.

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TRANSCRIPTION OF INTERVIEWS

Interview Participant 1: Part-time Commissioner, Labour Consultant, CCMA Trainer, female, in age group 35 - 45, no legal qualifications, six years experience

25 July 2003

Wat is die verwantskap tussen interne meganismes, hoë verwysingskoers en effektiewe geskilbeslegting?

Natuurlik is daar die verwantskap, ook tussen case management (Die eskalasie van konflik moet verduidelik word.) Want die probleem is dat daar 'n baie bepaalde manier is warop konflik opgelos moet word. Maatskappye se prosedures is redelik goed gevestig in terme van dissipline. Daar is 'n baie goeie top-down prosedure. As ek 'n toesighouer is en ek het 'n probleem met jou gedrag, gaan ek stappe neem en die proses is daar. Die uitkoms van die proses is ook baie duidelik want dit gaan oor reprimand?, watter tipe aksie geneem moet word. Die dissiplinêre prosedure is goed gevestig. Griewe is weer die bottom-up proses, maar die uitkoms van 'n grief is nie so duidelik nie. Mense verwar die prosess maar die stappe is duidelik. 'n Grief, 'n klagte ens is stap een en twee, en dit gaan tot in die dispuut. Die problem kom in – hoe gaan ek die grief oplos. As ek die werknemr is en ek sit 'n grief in – hoe gaan ons dit oplos? Maar mens kan nie dissipline binne die griewe prosedure neem nie.

Is dissipline in orde in klein ondernemings? Mense is nog verward tussen eerste waarskuwing ens, wat is 'n dissiplinêre ondersoek en wat is 'n verhoor.

Dus klein ondernemings het nie prosedures in plek nie - daar waar dit in plek is, verstaan hulle dit nie heeltemal nie. Mense verstaan nie die doel van die waarskuwing – in die eerste plek is dit vir die korrekteer van gedrag – dis makliker om dissipline toe te pas en om uitkoms van die aksie te beheer, maar dis nie so maklik om ...Griewe is nie ter sprake – mense is bang om 'n grief in te sit in die eerste plek. Wanneer hulle dit doen, voel hulle die grief moet aangespreek word – uitkoms is egter dat dit dalk dissipline sal ontlok – nou is dit 'n aparte proses. Omdat dit twee aparte prosesse is, sien die werkers nie dat reg geskied nie. Griewe prosesse in in groot maatskappye is duidelik geskryf - die vraag is tot watter mate gebruik hulle die prosedure.

Wat van vrees vir viktimisasie?
Ja dit lei tot harassment sake.
Die sisteem wat ons het – mens moet konflik vinniger hanteer. Jy gaan nie dit vir mense geleer kry nie, want dis 'n teoretiese benadering. Maar wat op die shop floor gebeur, werk nie so nie. Dit gaan oor mag en die meeste van die bestuurders gebruik posisionele mag. En daar is 'n geweldige wanbalans in mag so daar is konflik. Want ons sê konflik moet manifesteer en dit gaan gebeur waar die twee partye op gelyke voet kan kommunikeer omdat hulle "equally empowered" (gelykbemagtig) voel. Maar as die werker nie bemagting voel om eers te praat in 'n vergadering nie, hoeveel temeer gaan hy wegskram van konflik.

Hantering van interaksie is belangrik - komunikasie is belangrik. Meeste bestuurders is 'achievers' en het 'n 'telling' styl. Dit skep nie 'n omgewing waar iemand jou gaan sê van 'n probleem nie.

Wat is die redes vir die hoë verwysingskoers?

Mense het 'n geweldige idee van hulle reg om arbeidsreg te gebruik. Hulle weet miskien nie wat en hoe nie, maar hulle weet hulle word beskerm. Hulle weet hulle kan iewers heen gaan.

Wat kan gedoen word hieraan? Hoe moet CCMA hiedie probleem aanspreek?
Die CCMA se beleid is om nie konsultasie te doen nie. Hulle hoor 'n saak aan en hulle moet die saak probeer reg op die rol plaas. Dis nie hulle rol om vir iemand te sê hulle kan nie gehelp word nie. Dis 'n dilemma. Dis 'n opvoedingsrol. Niemand vra vir hulle om daar op die oomblik 'n besluit te neem nie - dis meer 'n konsultasie rol in 'n adviserende hoedanigheid. Vra dan vir hom of hy nog steeds dink dat hy 'n goeie saak het. Maar hoeveel van sulke sake is daar? Ek dink nie dis so 'n groot faktor nie Ek kan nie se in versoening hoeveel sake ek regtig gekry het wat frivolous is nie – so een uit elke vyf. Tot watter mate is die verwysing frivolous? Maar dit word nie gemeet nie. Die verwysingskoers rate kan hoog wees omdat daar werklik soveel dispute is of 'n vewysing kan frivolous wees. Die persepsie is dat mense enigiets verwys. Maar ek is nie so seker die persepsie is reg nie.

Waarom is daar so baie verwysings?
Dis as gevolg van 'n paternalistiese bestuursbenadering. As jy kyk na McGregor – dis kontrollering, daarom gebruik ons die griewe en dissiplinêre prosedures. Wat van opleiding, verander houdings van die samelewing en lei werkgewers op? Mens moet by die organisasie begin. Vra vir enige organisasie hoe werk hulle prestasie

evaluering. En hoe meer hulle kla hoe meer sit hulle gesofistikeerde sisteme in. Die beginsel is hier doen jy goed en hier doen jy nie goed nie, hiervan hou ek en hiervan hou ek nie. Organisasies het nie tyd vir ontwikkeling nie en dan maak die ou hulle kwaad en op die ou end stap jy. Wie se fout is dit – geen ontwikkelingsrol rol nie. Hule is slegs onder prestasie druk en gee nie aandag aan evaluering nie. Die rol van die bestuurder moet wees om sulke goed te hanteer. Almal is spesialiste wat net CCMA goed doen en dit gaan vir hulle daarom om prosedureel korrek – een honderd persent korrek - op te tree. Hulle laat die probleem so ver ontwikkel dat hulle by 'n dispuut uitkom hulle hanteer nie die probleme nie. Hoeveel keer kry mens dit dat 'n persoon vir 15 jaar daar is, maar hulle het hom nog nooit gesê wat die probleem is nie. Teen die tyd dat dit by die CCMA uitkom is dit te laat en dan kry hulle ouens wat die saak vir hulle moet paneelklop en hulle moet "damage control" doen.

Hoe geskik is die stelsel vir klein en medium grootte ondernemings?

Die interne dispuut prosedure wat in die kode voorgestel word, moet die klein werkgewer insluit. Dispuut beslegting buite die organisasie dink ek is geskik, en veral met die nuwe wysigings aan die WAV wat die con-arb proses insluit as jy dit kan doen. Die interne prosedures ...Wat gedoen moet word is om die klein en medium sake te akkomodeer. Die CCMA is nie oorlaai omdat hulle die sakelas nie kan hanteeer nie. Hulle is oorlaai omdat hulle nie hulle sakebestuur (case management) kan hanteer nie, omdat hulle sisteme oneffectief is omdat hulle bestuur oneffektief is. Hulle sisteem is in plek maar daar is nie prestasie bestuur nie – daar is nie basiese besigheidsbeginsels nie - 'n telefoon kan lui tot hy ophou lui; daar is geen interne dissipline nie. Daardie organisasie word nie bestuur nie. Daar is Edwin nou - hy is 'n operasionele ou en hy is nie strategies nie. Hy is so in – hy is besig om die plek self te bedryf – probeer alles self te doen. Hy raak betrokke in goed wat hy nie moet nie. Hy het mense wat baie bekwaam is maar hy raak betrokke in absoluut alles.

Die alternatief – ek sê ons het 'n gesofistikeerde sisteem.... Die beginsel is baie eenvoudig : as die werkgewer die reg het om te sê wat sy standaard is en as die werknemer dit nie doen nie, dan gaan ek dit vir jou sê hierdie is die reël en as jy dit nie onthou nie moet ek dit neerskryf. Die eenvoudigste beginsel en die verskil tussen 'n mondelinge, skriftelike en finale waarskuwing.

Elke kommissaris benader konsiliasies anders. Die rol van die kommissaris is baie belangrik. Die met 'n regsagtergrond hanteer versoening baie anders.

The problem lê niemet die meganismes nie maar met die bestuur van die CCMA. Die internel bestuur van die CCMA is die probleem.

Watter rol vervul arbeidsprokureurs en arbeidskonsultante?

Beide partye het 'n baie besliste rol. Die CCMA is absoluut paranoies oor die arbeidsprokureurs. Hulle het egter 'n rol om te speel. Konsultante speel baie meer 'n voorbereidende rol. Wat maak jy met die konsultante? Vind jy die teenwoordigheid van die arbeidsprokureurs en arbeidskonsultante is 'n hindernis? En jaag jy hulle uit? Ek jaag hulle nie uit nie – ek moet dit doen volgens die CCMA se reëls. Hulle mag nie daar wees nie. As jy sien daar is duidelik 'n wanbalans in mag tussen die partye, dan moet jy. Maar jy moet gaan volgens die CCMA se reëls. Kommissarisse het nie die jurisdiksie om die reëls te verander nie. Die wet laat jou nie toe om die konsultant toe te laat – jy moet die wet volg in terme van wanneer jy die arbeidsprokureurs toelaat aldan nie. Baie duidelik dat konsultant nie toegalaat word nie. Ek sal 'n konsultant nie in 'n konsiliasie toelaat nie – nee. En 'n prokureur? Nee. Ek het geen ander diskresie as om die wet te volg en om die reels van die CCMA te volg nie, en die reels van die CCMA is baie duidelik. Wat van aan die begin? My benadering is as hulle my kan help om versoenng te bring – dan beslis. Hulle help want daar is klaar 'n vertrouensverhouding tussen daardie ouens, en die konsultant is gewoonlik baie meer "clued up" as wat sy kliënt is.

Wat is die behoeftes en probleme van werkgewers en werknemers?

Konsultasie organisasies hoor wat jou kliënte vir jou sê. Die rol van die kommissaris, die kompetensie van die kommissaris. Mense het nie vertroue in baie van die nuwe kommissarisse nie en die feit dat hulle arbitrasie toekennings so laat is. Die houding van kommissarisse is baie anders as die privaat instellings – hulle is arrogant – waaruit spruit dit voort – die hele houding van die CCMA. " I am the commissioner and you listen to me". Privaat kommissarisse is daar uit eie keuse. By die ou IMMSA en Tokiso kan jy duidelik die verskil sien tussen die twee soorte kommissarisse. Die IMMSA kommissarisse is baie meer fasiliterend en korrek waar by die CCMA is daar 'n geweldige va.....

Behoefte van werknemers: Ek weet nie of ek heeltemal die.... Beide partye voel dit is onbillik – maak nie saak watter kant toe die saak loop nie – individuele werknemer – hulle het geen idee van wat hulle reg is nie. Dit kos daardie persoon geld. Alhoewel almal sê dis verniet – dit is nie, want die meeste van die ouens moet hulp kry. As dit witboordjie is moet hulle 'n konsultant gaan sien, hulle gaan sien gewoonlik 'n arbeidsprokureur wat

hulle in elk geval geld kos en wat hulle nie later kan gebruik nie. 'n Vakbondlid self – dis nie totaal kosteloos – dis vir hulle goedkoper maar die middelvlak persoon wat gewoonlik nie aan 'n vakbond behoort nie, vir so 'n ou is dit duur.

Dink jy oor die algemeen is die vakbond verteenwoordigers voorberied vir hulle sake by die CCMA?

Nee. 100% nee. Hulle het self 'n "case overload". Daar is van hulle wat erger is as ander. Met individuele sake het hulle nie tyd om voor te berei nie. Hulle staan in vir 'n kollega en hulle het self nie 'n idee waaroor die saak gaan nie. Hulle het nie eens die lêer by hulle nie.

Dink jy die sisteem moet verander? Voorstelle: bv interne versus eksterne
Ek dink ek is nie ongelukkig met die proses soos wat dit gekonseptualiseer is nie. Die grootste verandering wat ek wou gehad het, was die con-arb proses - die mate waartoe dit gebruik word weet ek nie.

Die CCMA het 'n baie gesofistikeerde stelsel geskep

Die proses was nie veronderstel om so geweldig regstegnies te wees nie. Dit hang af van die bevoegdheid van die geskilbeslegtingspraktisyn. As die rolspelers nie kompetent of 'capacitated' is nie dan is die persoon, die kommissaris veronderstel om daardie probleem te hanteer, bv as daar 'n groot verskil is tussen 'n huisvrou en huiswerker. Kommissarisse is veronderstel om 'n versoenende proses te volg en is nie veronderstel om so 'n geweldige adversariële benadering te volg nie. Die kommissarisse moet ook kan wissel in hule benadering. Watter riglyne volg jy in arbitrasie? Die hoeksteen van die wet is regstelling en die vraag is net eenvoudig was daar regstelling. Om regverdigheid te bepaal dit gaan nie soseer oor die prosedure nie, dis hoekom dit 'n skedule is en nie deel van die wet nie. Die hoeksteen is "corrective action".

Dink jy daar word te veel klem geplaas op proseduriële billikheid?
Ek weet nie, ek kan nie so 'n stelling maak nie. Want 'n ou sal moet gaan kyk wat die algemene bevindinge van kommissarisse is. Substantiewe billikheid kan nooit proseduriële billikheid "override" nie – dit was die benadering van die howe gewees. As jy nie 'n billike proses gevolg het nie, hoe het jy dan by 'n billike besluit uitgekom. Daar is twee aspekte van billikheid en 'n bevoegde kommissaris moet in staat wees om na albei te kyk. Die rede waarom die klein tot medium werkgewer nie die beginsels van substantiewe en proseduriële billikheid volg nie, is omdat hulle nie die wet lees nie. Hulle hoor met die een oor van die wet, is oor die algemeen negatief daaroor - hulle neem aan die wet is negatief en die persepsie is vandag kan jy nie meer 'n werknemer afdank nie. Maar as mens vir mense sê dis vandag eintlik makliker – al wat jy moet doen is om prosedure te volg. Die verskil is net dat hulle nie meer mense onregverdig kan afdank nie - as jy 'n goeie rede het dan sou jy in elk geval billik opgetree het.
Mens kan dit egter nie sê nie want dit is nie polities korrek nie. Die benadering moet wees dat "by the time I dismissed you I had no alternative". Ons sê wel afdanking is die laaste opsie. Ek moet alles anders probeer voor ek jou afdank.

"The CCMA didn't create the sophisticated system - the LRA created the system. The problem may lie in how the CCMA handles the system". Die CCMA se administratiewe stelsel is die probleem. Die agterstand is ook die probleem. Hulle gebruik nie deeltydse kommissarisse nie omdat hulle nie die begroting het nie. Wat is die produksie van die voltydse teenoor die deeltydse persone? Die deeltydse persoon is meer produktief. Hulle moet na daardie statistiek begin kyk.

As kommissarisse probleme het met die stelsel, wat van die mense daar buite?
Ja maar die werkgewer is die gebruiker van die stelsel en nie die besluitnemer nie. Die tegniese detail is dieselfde as in enige ander IAO land. En ons het 'n verpligte versoeningsproses. Die kommissaris kan enige iets doen om die saak te skik. Die land se sisteem sê jy moet eers poog om dit intern te skik. Die vraag bly wat moet jy as kommissaris doen as jy 'n geskil kry wat hule nie probeer het om intern te skik nie - moet jy hulle terugstuur of moet jy hulle probeer help? Suiwer tegnies behoort jy hulle terug te stuur en hulle te vra om die self te probeer oplos.

Interne strukture hoef nie presies te wees soos dit in die wet uitgespel is nie – ja maar die onderskeid is dat mens moet kyk wat die tipe saak dit is. Miskonduct or performance . En dan toets mens dit daaraan.

Daar is alyd net vyf vrae. Het jy geweet? Het ek jou gehelp? Dis nie so tegnies nie. Hoe kry mens die kommissarisse sover om ten minste konsekwent te wees.

Wat word gesien as ADR?

Om na private geskilbeslegting te gaan, dit wil sê om nie die CCMA roete te gaan nie. Ek stem nie saam met die stelling nie. Ons stelsel is dieselfde as in die Verenigde Koninkryk.

Interview Participant 2: Senior commissioner (Initially full-time, and now part time), labour consultant, age group 35 - 45, no legal qualifications, comes from a union background, seven years experience as commissioner, male

1 August 2003

What do you think is the reason for the low settlement rate?

For me, every case must be seen as important and it should be approached with passion. The problem, however is that some cases are complex. Many parties only come to the CCMA to get a certificate because they only want to go to arbitration. Maybe it has to do with the attitudes of the parties and the relationship between the parties back at the workplace. But the attitudes of the commissioners…one needs to look at that. It is important to get to the underlying factors …causing the problems in the relationship. Commissioners need to be able to break the attitudes of the parties. One might find that the company says that we will not settle the case, give us the certificate, but if you dig for underlying factors you will find that it is not as if they are bullshitting…so once you separate the parties you discover issues – they come up with that information. It has got to do with the level of expertise of the commissioner. Lots of commissioners can be well trained and it is not as if they are not well-trained. They can adhere to their training but they need to get to the underlying factors. Another thing is that you get an hour (for a conciliation) if it is an unfair dismissal. Thus, the time allocation is too little.

The screening of cases …there needs to be a strategy. The case management should look at the type of dispute. If it is a mutual interest case then more time should be allowed. If the parties are ..You can also not blame the CCMA. If they see mutual interest, they automatically allocate two cases per day. But take the Chamber….(referring to the recent wage negotiations between the Chamber of Mines and the NUM) very easily they could have allocated two cases (these negotiations went on for more than five days before a certificate was issued). It says to me you need very special people to deal with the screening. From my side I can very easily see that if the parties are big employers and trade unions, one needs more time. If I see it is …(refers to a small employer) and one indivicuall, I can give it one hour. When I was full time I used to do that in my teams. Also on the other instance …your allocation if there is a big role, then you cannot afford the luxury of only dealing with two cases (per day).

Why do you think there is such a high rate of referral of individual unfair dismissal cases?

Well my view on that – and it is the level of understanding of the commissioners - that the employer employing 20 people has no HR or IR person. It is the director who is dealing with all these issues. And that director is not necessarily an HR person. He is there to make money and has no interest at all (in industrial relations and labour legislation).

What can be done to get employers interested in their duties?

The CCMA is on the right track through their dispute prevention. I don't know how far they are now, but I know that for instance with their workshops they go to employers and I think that helps a lot. They start referring cases very properly, they …. So I think the dispute prevention played a very important role.

Training for trade union representatives?

Trade union representatives negotiate -- so they need negotiation training.
Do you think the union reps are well prepared when they come to CCMA conciliations?
Coming from a trade union background, I know that there was pressure of workload. And it does have an impact on preparation of cases and if your time management is not up to scratch then you prepare you case on your way to the CCMA. Or if you are waiting for a lift you quickly look at the file. There are those unions which have a legal unit and when the case comes, it is referred to the legal department. The bigger trade unions…..

Is the system too sophisticated for parties having to operate within the system?

One has to look at the system -- for me the LRA was drafted in particular for the lay person, for members of the public. Because the procedures …… are simple if somebody has done wrong, he should be told. It is human

nature - like a child - do this nicely. So granted, it is not any person that can go in there... unions are training..... it is not easy, but once you are on to it, then you realise how simple it is. The only time when people do read schedule 8 of the LRA – also employees - is when there is a problem. Then they see the mistakes they have made.

What about the CCMA management and administration?

It is little bit difficult for me having been on the outside now for so long. But there are problems at times where you find that there are certain things like notice of set down that are not faxed to the company – the union's faxes are not working. They don't act at that time. You then find that ..... When you open the file you see that one party has not been notified. When the fax did not go through to either of the parties then two or three days later they post it and it doesn't reach the party in time. By the time it reaches the employer, the union has already been there. Lately it is much, much better.

How often do you work at the CCMA? Lately about three days per month.

What is the relationship between the internal conflict management in the workplace and the referral rate?

Going back to dispute prevention, it also looks at the disciplinary mechanisms. You might want to say here is a breach of whatever, but before you actually start taking action there should be a smaller committee to look at the actions taken, investigate and come back to say lets proceed or not proceed. There is one company where the employer has established a committee. Before the worker is dismissed, it (the case) is referred to the committee. They discuss it and at times the committee will say please give him a final hearing. Once they find that there is acknowledgement ....to me, that is needed to bring management and the union closer together. Number two, it instills discipline in the workplace - in that committee there will be those unions who will say it is not their place to represent that person (in other words if the committee has taken a decision, then the union will abide by that decision and inform the member that they will not represent him). But one will have to point out to the employers how this committee will benefit the employer. It is only a deterrent. One cannot force the employee not to go to the CCMA.

Why do you think more employers do not follow this route?
I think it has to do with the relationship between the parties. Where there is a lot of mistrust people will not want to go that route. It is the impression that is created. The union wants to ....run to the CCMA and just follow the procedure.....It takes a lot of persuasion to get employers to look at this. But if you then look at the benefits for the employers, then it softens their attitude towards the act.

How do you view the role of labour lawyers and labour consultants?

My approach is, I did it yesterday, at the office. I should have said that I do mostly conciliation and that I focus on mutual interest cases. Not many dismissals. But where I do dismissal cases I do not have a problem. Lawyers are welcome from my side and I tell them that from my side. Lawyers are welcome. But if I see that your contribution is negative I chase you out. The reason why I do that is that you have these people here (the parties to the dispute) and the next thing they want to caucus with their lawyers or consultants which are just sitting outside here. At times it is good to do reality testing with their clients ....it makes it easier. And the other thing I would like to highlight is that lawyers like to come with many point in limine and I have my own way to deal with them. From my side there is a whole lot of issues I take into consideration in my approach to a case.

Arbitration.....its another three months down the road...and there are people who do not even want to go and look for a job because they are waiting for this arbitration, which causes a problem. I put in that extra effort ...and if all commissioners should put in that extra effort it can make a very, very big difference.

There are people out there acting as unions but we know they are not unions.....they have little knowledge of the act... but who come there for their own reasons ... I don't think.... Then there are those employers organisations .....getting.... Those are a problem to me. They have no knowledge of the act... they are there for their own benefit....you have to take into account that some employers do not have IR and HR people.

Interview Participant 3: Previously a full-time commissioner; now part-time and continuing with studies in psychology, no legal qualifications, age group 30 - 40, seven years experience as commissioner

What are the reasons for the high referral rate?

There are a number of reasons. A lot of unsophisticated users who are not aware of their rights in terms of labour law, see the CCMA as a one stop shop for everything. It is more user friendly than the courts or than in a criminal case. Two: people are taking their chances. They see the CCMA is something like the lotto – go and see what you can get – sometimes – and I don't think they will be able to charge – there could be something like a revenue stamp on the referral form – it is very hard because not everyone has the same resources. If you are going to do that it would have to be on a sliding scale – otherwise how does one determine what to charge. It doesn't make sense. I think the users are very unsophisticated and they are standing on their rights. They might not have good cases but they know their rights and they therefore are going to push the case as far as they can – maybe abuse the system a bit.

If you do try to do pre-mediation screening – sit and do the phoning, it does work but to a very limited extent. You have to be a very sophisticated dispute resolver and mediator and have phone skills. You don't have the person in front of you so you don't have the cues, the visual cues. You have to be very polite, professional you can't be robust. You have to phone both parties. Usually the applicant is there when they come to refer the case and you have to phone the respondent. It does work You have to have a lot more skills. You don't really senior commissioners but people with good skills with people on the phone. Have you ever phoned the CCMA and got a "What" response? Its not like "Good day, hi, can I help you?" I've been on the phone and the party on the other side of the line would say: "Who are you? You are the first one to speak to me like I am a person. The first one not ignoring or threatening me."

What would I do? One important thing is to market the CCMA – to let people find out what it is that they do. Very clearly through video or newspapers publicly educating the public. One still finds – eight years down the line - that people still don't know what the CCMA is doing. It is not just the employees who need to know, it is also the employers - they need to know that they can also call on the CCMA. How many employers know that during wage negotiations they can call in the CCMA? They have no clue that it runs both ways. Some of them are brilliant. There is a definite change in the unions – they are much more clued up. But that is organised labour. One needs to go the domestic workers and their madams – it needs to get to the public. Something like Yiso Yiso or even Isidingo to do with labour. Get it into their awareness – this is what the LRA says, this is what you can or cannot do. With a good medium one can get a lot across. That would be the biggest thing.

Also more capacity – the CCMA is always stretched - kind of like a never ending story; always a problem and issues. It could be budget or non-performance, no it is probably a mixture. CCMA is taking a lot of interest in training, so its probably not the skills anymore but probably lack of staff – positions not being filled – there is a gap – but there seems to be a lack of accountability. Not really management but when people phone in they would say: "You are the fourth person I spoke to and nobody wants to take responsibility". Even as a part-time commissioner you get sent from pillar to post. For three different things, three different people – maybe it has to do with policy. But I don't know.

I also think that the work of settling disputes is tremendously stressful. The staff are emotionally drained and stretched and by the time you get to complainant no 59 the last thing you want to do is to listen. You get to the point where you just don't want to hear another Madam and Eve dispute. Or what happened when, and that is a problem that never gets addressed. Management need to do something to assist the commissioners to do something to deal with their stress and then be able to go on and do another eight hours of conciliations. I was a full time commissioner and I experienced the stress – I know the CCMA has an Employee Assistance Programme there seems to be a need to assist people to relief that stress – there needs to be some compassion. Just so that you can let it all out and come back and face another day. We need something like a room that they use in therapy – its is specifically for the senses – lined with carpets and furnished with furry stuff so when you are in – its sound proof – and you can just let go. Its used for Altsheimers clients - take them back to their earliest memories – childlike memories – tangible, sense oriented. That would be nice. Have a good scream and kick and feel better when you get back.

What is the relationship between internal mechanisms and dispute referrals

I think the internal mechanisms – seen from the employee's side is a total farce. So even though they might have a hearing and even an appeal hearing – also depending on the size of the business. The bigger the business the more it appears that people are willing to allow the actual opportunity to actually allow the employee to take part. And address the allegations quickly and in a fair manner. The bigger the organisation – my line manager may be the prosecutor or the instigator but the person chairing it I might not know. In a smaller business where you might have 15 to 20 employees it is bit of a farce. He might be an outside consultant but he is paid by my

boss. So I just go through the motions. There is a going perception that these hearing are farcical and starting basically making your career a dead end. In grievances but also in discipline. You are on the way out. The internal hearing as well. When you get a referral they are going to say the chair was biased - par for the course - it always comes up.

What is going to happen?

I think people are going to get their procedures right, but it is still going to be a farce. Because the employee will still go to the CCMA. Because there is no credibility built into that system. I think you have got to have it. But the internal hearings are not credible for the employee and it should get to a point where the employee feels that management is not completely ganging up on me, and that I can actually present my case in a fair way and not being sabotaged by witnesses not coming and people not given time off. So the internal structures are not working. Why are they not working? Because there is an imbalance in power. How do you give the employer and employee equal power? It is either through a consultant and someone has to pay for that consultant. You want it to be a neutral body but I don't know if you want to decentralise it (chairing the hearing). One can bring in consultants but they are treated with suspicion by both the employers and the employees. If they are being paid by the employer they will recommend that the employee be dismissed if it is what the employer wants – otherwise the employer will not use the consultant's services. Most employers would say to the consultant listen, I want to get rid of this guy. Consultants can be very important but I also think... Looking at small businesses they do not have many staff and might not have people who can sit as a chairperson. That is why there is a huge referral – The employees ask the question: How can I get a fair deal – if not at the workplace then at the CCMA. I want to go where I can get a fair deal.

Thus two issues: Get the employers to follow internal procedures and the other issue is that no matter what the employers do their processes would not have credibility.

I think if the procedures are great it will help to screen some of it down but it doesn't mean it is going to stop the people to come to the CCMA. For me the biggest thing is that the employees will buy into a process they regard as legitimate - that they will have a voice. Will I be able to put my case across – will I have a fair hearing?

There is a lot of pressure on the employers to apply schedule eight of the LRA, which I think is wrong. Schedule eight is a guide. Its not a .... There is some .... Its not you MUST do this and this, but it's a guide. Some employers haven't followed all the procedures but that doesn't mean that they have been unfair. Just because it is defective in certain things doesn't mean it makes the entire process unfair.
And if I have to stick to the letter of the law it is definitely social justice and its hardly
fair or equitable. In arbitration I use schedule eight because it is very important. It has some very important tests for misconduct, capacity, probation, but it is a good guideline to follow. These are valid tests but what I'm saying is that sticking to the letter of the text doesn't make it right. It is not always as black and white as that.

I think maybe a little defective procedure, but am I going to overturn the dismissal? Misconduct most times are being upheld. Its fairly clear cut. Incapacity is not always as clear cut. There is a lot more that the company must do.

Disputes are generally handled poorly internally. It is not a pro-active thing, it is reactive. And sometimes people will skip steps and that will create more disputes. At the CCMA they will explain the context in a bit more objective fashion. As a Commissioner you get a better idea of what went on. Sometimes the parties are both wrong and it makes it very difficult for the commissioner but you have to weigh the evidence.

People can't deal with conflict. They avoid it, they are afraid of it, they don't have the tools. Its a very scary thing and you need life skills training for it. There is another way of dealing with conflict. There can be another arm to it. People can if they skilled enough meet at another forum on neutral ground where you have a facilitator as opposed to a commissioner. Somebody who is really not aware of the business or the content of the problem, but who would make sure that both voices are heard and the both parties believe they are right which.... Employers and employees need each other. Many companies have employee assistance programmes - it definitely lies in that area but it is not developed enough - it is not developed to the point where it can be seen as dispute resolution mechanisms in a company. If the HR person has these skills and we go into the room as equals we need for the good of the business and for production we need to hear the both sides to move forward. Its a very sophisticated process because each party think they are right and the process is going to take much longer. It requires commitment and dedication and it requires more time. It's a good two to three hour as opposed to 20 minutes. Its very important to build into the process the opportunity to tell the person to take the case up with his/her shopsteward.

There is a need for conflict resolution facilitators in businesses. At the CCMA the commissioners do not have time to deal with the emotions….parties come half an hour late…..another half an hour to hear the various stories etc – not enough time. Get to the essence and convince them its better than arbitration.

3. What is the appropriateness of the system for small to medium sized employers.

I think it is definitely geared towards them. From both the employer and employee point of view. Employers and employees are willing and able to be educated. They tend to listen to what the commissioner is saying. I think more education is needed but ….

What about individual employees?

They make up the most of the cases. Do we need to divide the CCMA more? Do we need to say that there is a section just for sectoral disputes, one only for wage disputes and one just for individual unfair dismissal cases? This could be a long-term strategy. I know that in Australia they have commissioners for certain sectors all education, banking etc go to a specific panel of commissioners. Some disputes get very specialised large businesses. Certain disputes should be outsourced – low level disputes – church groups – more outreach and educate community. Its complicated because its money that we don't have.

What is the role of labour consultants and labour lawyers?

I'd rather have the terrors inside than outside. If they are going to sabotage you I want to see it and I want to be able to stop that as a commissioner. I'd rather have them on board where I can see them rather than on the other side of the telephone where I cannot see them - it causes problems. They can sabotage your process and undermine your process. That is not the experience when they are in the room with you. When they have been in the room for whatever reason. In the room they were quite helpful. They help to settle the dispute rather than not to settle. In the past I did not chase them out, now I have to. If they need to consult, one needs to allow the party a few minutes. It would be better to allow more discretion to the commissioner. One need not to be bullied by them and it is good to know that one can send them out of the room, but most of the time I felt them to be quite useful. Not the consultants so much as the labour lawyers. The labour lawyers know if their clients have good cases or not. Most of them are ethical. Most of them. Consultants sometimes are not maybe so well informed about the legal developments and what it costs to go to arbitration. Some of them are quite exploitative of their clients. I'm not saying labour lawyers are not but at least they have a board that one can go to – one can lay a complaint against them and lawyers take that quite seriously if you lay a charge against them, they can get struck off the role So there is an ethic and a professionalism. It also protect the person bringing the case. If one does not have that one can charge R 500,00 for filling out a 7.11 (referral form).

Their role in future? Labour lawyers will still be involved. Processes are becoming more adversarial and more and more points in limine are being taken. Highly technical stuff. The consultants will not be phased out but they will be playing more of role in the internal processes. And maybe consult in terms of the internal procedures. They will be more internal …

Needs and problems?

Employees find it very difficult to stand up for themselves. And once again it might be the power balance. And there is always a problem of taking responsibility for one's actions. Sense of give me second chance, even if it is fraud or leave, it happens. It's maybe a sense of not being sure of the procedure to be followed. Employers react very emotionally – it's their business, they want production. They say that it is my business and now its costing me more. They don't see the benefit of the internal procedure. They see it as they just want to fire the person get it over and done with and get him out of the business. They need to be educated about how the LRA can benefit them. About the fact that unions are not always a bad thing, how a labour force that knows its rights can be more productive. That would be utopia.

7. Should the system change and if so How?

If the labour consultants are going to become part of the internal mechanisms then maybe they should be brought on board. Kind of make it a lower level of CCMA. Do we have maybe the consultants who will always be there. Give them some sort of legitimacy, credibility in the eyes of the employers and the employees. And let them do the disciplinary hearing and appeals. Thus work together with the CCMA. One will never get rid of them so rather get them on board. There is a definite perception problem with the internal processes or hearings, so if one can say give them a certain credibility then there might not be such a lot of referrals. Maybe a panel should be established that works with the CCMA. Maybe an accredited panel not a private one but affiliated a bit like a bargaining council I don't see why that can't be done.

8. Is the CCMA too sophisticated for most players?

Yes it is a sophisticated organisation. Yes and no. It depends on the level of industry that you are dealing with. The big companies, the Nestles, the national companies with large workforces are sophisticated users. I have no problems with them in my arbitrations. They know what it is to mediate, to arbitrate. They know the processes and they know how to work it. And they are wonderful to have in mediation and arbitration. It's a good system but it is overloaded. And more sophisticated not in a good way. Well they are becoming overly technical so they have learned how to use the system but also where they can stall the system by some technical irregularity or a technical point in law. So they will bring up points in law that are not very good but just to stall and that is sabotage in another way, and for another reason. You get the labour lawyers that will pull very technical stuff, which is completely contrary to the aims of the act.

9. Has it become too technical, and is it preventing parties from seeking alternatives?

To a certain extent it has become very technical but that is because we have interpreted it in that way. People are also not educated with regard to what else is out there. What else is there? A lot. Most people will come to the CCMA because they don't know what else is out there.

10. What is alternative dispute resolution?

One thinks it is only mediation, conciliation, facilitation. But they are all very broad umbrellas. You leave out two professions that I can see. You leave out the social workers and the psychologists They have skills to facilitate large groups They have these skills and they have softer skills such as listening skills. These people can deal with conflict resolution and there are pastors and we do not look at cultural and cultural perspectives for dispute resolution. We live in such a diverse country. One case where young man - the families involved asked him whether he had a counselling session with the elders of the tribe. He had not considered that and he was ashamed that he did not do that. After having been allowed to do so he withdrew his case. He apologised for what he had done. But that is rare. We have contexts that we can use but one needs to do research into areas where this can be doe. Do we need a team of commissioners to go into communities? Psychologists can work with communities.

It could be done through the CCMA but it needs to be given structure. Psychologists and social workers have their own boards and councils so it needs to be done in a fairly structured way but if you are looking at domestic workers. How many social work students are on campus. How many B Psych students are on campus. They have to do practicals. Last year they did their practicals in prisons or among cancer patients. So they learn a skill that has the potential to lessen conflict. So I'm assuming it can be done on two levels having the professional bodies to start talking to each other and subsequent strategies – educate the society through these students in particular skills. Possibly an internship and those who have these skills do the internal procedures in companies. Family therapy.... Serious stuff.

11. What about private dispute resolution?

It supports the CCMA. It is interrelated. If the CCMA isn't doing well, the private dispute resolution is doing well. It undermines .....I think the CCMA is very important and private dispute resolution can assist the CCMA. They are not exclusive of each other they are supportive of each other. Yes the one is more into money but that also has to do with business and market orientation. The CCMA is always going to be strong because here is a huge population and the population is not educated and even when they do become more sophisticated the CCMA is always going to play a role. Private dispute resolution is also always going to be there but I think in a supportive capacity. It doesn't undermine the CCMA in any way. It does the same work, uses the same processes, same commissioners. I have also been on the panel of a private dispute resolution body and I do the same work and use the same processes. The commissioners in private bodies are more experienced and they might be more flexible – being more aware of strategic long term planning and need for labour peace in the workplace.

They are more flexibility possibly because its an operational thing. They have more time to resolve the disputes.

12. Is there no place for loyalty?

People get scared if they do not follow schedule eight. Scared that they will get nailed in arbitration – and they do. Of course I have to follow the law – I don't always agree with it but I have to apply it.

Interview Participant 4: Part-time commissioner for three years, union background, female, age group 30-40, no legal qualifications, journalism and training background

1 Augustus 2003

What are the reasons for the low settlement rate?

I think it's a number of things. The first of which - a lot of employers don't bother to attend. Non attendance by respondents. Or the respondents will tell you from the outset they do not have a mandate to settle. The influence of bogus consultants and bogus unions is a problem because they will tell the guy you have to get R 15 000,00 out of this and if not they must go to arbitration. Often when you are on the verge of settling, the applicant will ask to go outside to talk to his representative/consultant and then the consultant tells him no, you must not settle you must go to arbitration. And I can even advise the applicant of his prospects of success, but there have been many cases where I have said that I can tell you now that you will not win at arbitration but the labour consultants pushes them forward because obviously the more hours they can spend on the case, the more money they can get. My frustration is that you can have somebody and you can tell them this is the law, this is what the law says, and this is the reasons why you are not going to succeed, but they just go ahead. It is a perception that was created I think, in the early days of the CCMA that you just go there (to the CCMA) and you get money. And people now feel that they 'must' get money. They don't see conciliation as a serious process and if we had a proper con-arb process where it wasn't just for probation but for, lets say all misconduct cases, one would get a much higher settlement rate.

I manage to settle more cases at arbitration than what I settle at conciliation. They often call each other's bluff. They don't believe the other party will go to arbitration.

I also think we have some pretty unsophisticated parties. So you'll have some people saying I want my money for long service. If you ask them what it is, they will say: "No, I have worked for all those years". I will then say yes but you were paid for the work you have done. They will insist on the long service money. Even if they have been dismissed for misconduct they still think they must be paid out.

What do you think of the capacity of the employers?

I would really like to make a distinction between the large and the smaller employers. If you get a company like Pick and Pay, Clover, Woolworths etc, they know exactly what they are doing. They come to the CCMA and they have really dotted the i's and crossed the t's. They really know what they are doing. They have very sophisticated in-house procedures so when you have them coming to the CCMA they are not prepared to settle because it is their policy not to settle when somebody is charged with theft. I feel one should not push them into settling because it is their prerogative. The smaller employers in a way when the matters come to the CCMA – they didn't know what they were doing, they just said: Oh you are fired from tomorrow. The bigger employers I find very well versed in the law. I am surprised by how many of the employers do come to the CCMA even though they do not have a mandate to settle. The big retail companies, they never fail to come to conciliations. They generally come – I don't know why but they do come to state their case that they are not going to settle. They will come and say that they do that to show respect for the CCMA but we don't settle with people who steal or are charged with theft.

What are the reasons for the high referral rate of individual unfair dismissal cases? How should it be dealt with?

Part of the system that we have, is that it is very open to every one. If you get fired, and even if you know you are wrong, there are some people who will even admit it to me in caucus "I've done it, I stole it but I am going to arbitration and take a chance". So its free, it costs you nothing, you have nothing to lose why not refer a dispute and take your chance. Because some strange decisions have come up at the CCMA in the past (referring to arbitration awards) so people just think well what have I got to lose. I am unemployed, I don't have anything, I have lost my job, let me go and take a chance it costs me nothing. In some instances some people do need to get legal representation and then also people who don't need it, do. I get very cross if people sit in the arbitration and say they couldn't refer the case because they did not have money. I then ask them why did you need money. No, they charge R 500,00 to fill in the forms. Then I get very angry and say to them but there are signs all over the place saying the CCMA is for free. I am here to assist you, the interpreters are here to assist you, so it's a

very divided picture. And I think many people take unnecessary legal advice and engage these people unnecessarily. I don't think they need to do that.

Do you have the problem of not having the real opportunity to settle a case?

No I don't have that problem. When we started out we were supposed to do five conciliations per day but having said that, many of those set-downs are no-shows in any case. But often when I'm close to reaching a settlement, I'll just tell the other party to wait, I'm going to reach a settlement here, I'll be with you in half an hour. I've never had that problem.

It can be a problem if one of the parties arrive late and there is not enough time to deal with the emotions, etc but I think because of the low attendance rate if we do it the other way it will also become a problem where you will have to sit and wait for them for half an hour then after.... If you have a day where they cases are all opposed and all the parties do arrive it can be quite stressful. Out of ten conciliations maybe three of them will attend.

The other day it was half past and I was going to dismiss the matter when this guy comes strolling past and I said to him "you are cutting it a bit fine aren't you?" - without an apology.....He said: "No I have half an hour". So I said to him: "Let me remind you that it is an half an hour grace period. There is nothing in the rules that says I have to give you half an hour. So please don't think that you will come to my process half an hour late without so much as an excuse or an apology". You know? Its also the problem that they just feel that they can do whatever they want. Or they come half an hour late – this is my worst – it happened to me – and then they say they want to caucus, then I say no you should have done that on your time, not the CCMA's time. But I think the biggest problem that I have is that there is a lack of respect for the commissioner and that comes particularly from the lack of support that we get from the senior commissioners. I've had parties trying to assault me. When I reported it and written reports about it, I've had nothing come back – nothing! They don't seem to think it is a very serious thing. I've never heard of a commissioner who has actually made a complaint and that the CCMA has supported them and held the parties in contempt. We are subjected to huge amounts of abuse – fine, that is part of the territory – but it is important to know that you will get some back up. Women in particular get quite a lot of abuse from parties and when it happens you could go down to them (the senior commissioner) and say look this guy punched me or he swore at me but they don't do anything. They don't call the police – they don't do anything. I just feel that we are expected to do quite a dangerous job – I mean when a taxi owner starts pulling out his gun – it is not fun. But we are expected to do a dangerous job with no back up, no support. Very often there are only one – maybe two people you can go to for advice, very often I find that they don't understand what the senior commissioners do. They cannot answer my question if it is a question of law. Or you cannot find them. If you do find them they are either rude or disinterested. There are literally one or two people who will help you. And I understand that they are stressed or whatever. That is my problem – a lack of support. The parties know that the CCMA doesn't even respect us, then why should they respect us. They know that they can swear at you and make racist comments to you, they can threaten you with violence and there will be no consequences.

Capacity of commissioners, employees and employers. When they see that I am a commissioner and they have to take me seriously but I have to ask them to wait for me while I climb from floor to floor looking for a copy machine. When I come to an arbitration and say sorry but there are no tape recorders, what impression does that give of me? Or if I drag parties around and around looking for a room? What does that say? How serious should they take me? One of the things I hate is these commissioners sitting in the reception area hanna, hanna, hanna all the time. They all sit there because they have no-where else to sit – there aren't enough rooms. They sit and wait for their parties – so they sit and they laugh and they joke and carry on – I don't think that is good. It doesn't give a good impression and I don't think it should be that informal. They should have an area where they sit and wait and not be hanging around. Need a specific room, access to telephones, lock up their books, sit and write their awards and do whatever they need to do. Now there are venue administrators. If you ask them whether you can use their telephones they are not very happy.

Faxes never get to the commissioners on time – if ever. The documents just get lost within the CCMA, so I think it is also about administration. By the time the parties get to the CCMA they think we are a bunch of monkeys. I had a case where the party showed me 38 proofs of service of a document and we have not responded to one. It was a condonation application. The condonation was granted without taking the respondent's point into consideration.

Did the LRA create too sophisticated a system? Are the parties too unsophisticated and should we get rid of unfair dismissal cases?

No I think that is the power of the CCMA. People who are reasonably powerless can access the CCMA. Notwithstanding all the bad things they say about it I still think that is one of the good things about the CCMA.

And people who don't have money for attorneys or are not members of a union or the non-unionised sectors actually can take on their bosses whereas in the past it would have taken them a lot of time and money and expertise. Now, I've had many matters where unrepresented parties have come before me who have succeeded in their matters. So I think the good thing for me about the CCMA is it does bring justice to the ordinary people.

What is the relationship between internal mechanisms and disputes?

It is very difficult because I have seen companies that are very sophisticated with their dispute resolution mechanisms – internal disciplinary procedures – where they have had independent chairpersons, they had Tokiso panellists to come in and chair their hearings, they've had an appeal, the guy has bee represented by a union, and still they refer the matter to the CCMA. So I don't think that is an indicator as such. I definitely feel that with the smaller companies the need is there. They will often say: "I didn't know". Then I would say yes but it is your duty as an employer to find out - if you are going to employ people – to find out what the LRA and the BCEA says.

From security companies, retail companies – very sophisticated companies - where they have or use human resources managers – even when the guy is on tape (being video taped) stealing (they show you at conciliation). What they have before they go to arbitration – the guy will see himself on tape – stealing – and he will still insist on going to arbitration. That baffles me. And I cannot do anything. Well, I can strongly advise him but there is a tendency amongst some commissioners – and that is something that concerns me – to bully parties into conciliation – and that concerns me - I don't like that. I think it has to be a choice. I understand their frustration, but it is not for me to decide the rights and wrongs in the matter. And there are commissioners who are telling parties that they are going to lose at arbitration and you will get costs against you.

What can the CCMA do to get rid of the case load?

I'd screen a lot more carefully. But again, you wouldn't want a situation where someone who is doing screening are putting people off referring their matters. I really don't think there is that much that can be done – to be honest – I empathise with their problem because I don't know what they should do. But our law says that everyone should have the right to come and state their case. I think the only thing that could expedite matters would be if we had a con-arb process. I think we should have con-arb for all misconduct matters. Forcing people – as a matter of course. I think the CCMA is wasting a huge amount of money on resources on setting matters down for conciliation, wasting time, people don't attend. I think all conciliations – if they do not want to do this (i.e. con-arbs for all misconduct cases) - must be done on a con-roll. This thing of setting down matters individually is a waste of time. They should have a conciliation roll and off they go. They will save so much money that way. We had one recently and we had an arb-roll. There is no sitting around, there is no wasting time – I am certainly not one of those commissioners that like to sit around – I am there to work. And it was wonderful. There are three sessions nine, 12 and three o' clock. They send out a notice to the parties which said they must attend – if parties are not there they take the next one. They should really do much more case rolls. The arb roll also works very well. They should have more arb rolls. There is a big backlog on arbs because they have stopped all the part-time commissioners from working for the past three months so. Now we have a backlog. But if for three months you don't have any arbitrations, you get a backlog.

Who are the most effective, part timers or full timers?

I cannot tell. I think it pisses me off when I see fulltime commissioners who don't arbitrate. And I think we as part timers gets told that if your matter gets dismissed or there is a no show, we are supposed to go upstairs and we are supposed to help out with the files and certificates etc. I've seen many of them just sitting around between matters doing nothing. But then again I think that is a generalisation. When we claim and they see that your matter has been dismissed you must explain what you did between that one and your next matter. That doesn't apply to the full timers.

What are the problems of commissioners?

I think the full timers should do more arbitrations and there is a level of disrespect for the part timers. The management is also making these generalisations about the part timers - I've heard "part timers are all useless" which is an obvious nonsense. If it was we would not have been there. There are a couple of people who are abusing the system. The problem is that CCMA management does not know how to deal with difficult people. It amazes me that they, being in the business that they are in do not know how to discipline people. So for example, these days where we have to justify how much we charge for our awards now we have to say what we have been doing from the one minute to the next; it is not because of the majority – it is because of the few abusing the system. There are those few who will always be late with their awards, those claiming a full award

fee for writing a one page award. Instead of using a sharp instrument in dealing with these people they prefer to use a blunt instrument to abuse us all. Because they lack the capacity to deal with those individuals.

And the management of the CCMA?.

I don't know how it works at the top. I only deal with management at sort of senior commissioner level, so that is all I can talk about.

Case management?

There are some people who are great and there are others who are terrible. I worked in one region where it was shocking and another region where it was better. They would book me for some days that I had not given them - I'd be in Zambia and my phone would ring and they would say your parties are waiting. That sort of thing – and I never got paid – whereas in the other region I'm doing much better – so it just depends on who you get. I think those case management officers are also quite overloaded as well. They've got huge amounts of work to do. One of the biggest things about the CCMA is that there is no customer service at all. When I'm sitting in a case manager's office and I see an elderly man come in and they look at him and they raise an eyebrow. That irritates me. There is no; Good morning sir, how may I help you. How are you today – none of that. There is a lot of sending people from pillar to post. There is no sense of let me help you – let me find out for you. No, its: 'That's not my problem go to room 404 etc'; 'O no, not me, go to room 305'.... 'O no go there'. There is no ownership of the problem where they say let me find out or let me help you. It is not a service- oriented place. Like the senior commissioner. You would knock on her door – because you need a decision now about whether you postpone or not - and she would look at you and keep on talking on her private phone call and keep on talking. She sees you standing there – and not say I'll be with you in a minute, she just ignores you. Or you come to their office – you knock on their door and they look at you without greeting. They do it to us, they do it to the parties – there is just a lack of mutual respect in that. That must be part of the management culture – I don't know where it comes from - because it was very well entrenched by the time I got there. But they don't respect us and they don't respect the parties and I don't even know if they respect each other. There is also a level of unprofessionalism. The parties will be sitting there waiting and they wil be going: "Hey, where have you been last night!!!! What did you have for lunch. Blah,blah, Blah...". It is just a certain lack of professionalism.

What about the level of preparedness of the trade unions?

I think it is quite bad. I used to be a trade unionist. But I am horrified at the low skills level that you get. Obviously there are still one or two of the big unions like NUM, when they come to the hearings, they come well prepared. No jokes about that. But particularly in the security sector – very poor. Then there is also these bizarre unions that have sprung up with very little capacity at all. They don't understand the simplest thing – a proliferation of these small unions who don't have a constituency – who I think are labour consultants in disguise. There is also something that I have picked up that disturbs me – it is people coming to arbitration, members of good standing with registered unions affiliated to some of the federations – you ask them where is your union representative and they would say "I couldn't get hold of him on the phone, I kept telling him, he didn't come". The unions seem to be servicing its members very badly. Because the unions have become incapacitated all their best players have gone to government, people who are now working for the unions are not all that sharp, it's a kind of a vicious circle, the lower the membership figures the lower the calibre of the people who work in the union, the lower the calibre, the less capacity to attract new members and it's a downward spiral. It has to do with the decline in union membership. I now have people in front of me saying; What is a form 7.11? What do you mean when you say this matter should go to the labour court? I want to go to arbitration. They don't know how it works. There are a lot of unions out there who have no skills whatsoever and HR managers are running rings around them. And they are actually not doing them a service. You are paying your subscription every month in the hope that one day when you need the union they will represent you. They tell their members they will meet them at the CCMA but they don't come. They are very disrespectful of their own members. The don't give them a good service and that really upsets me.

What do you think about labour lawyers and consultants?

I don't have that much of a problem with the attorneys because sometimes specifically at arbitrations they can really expedite the process. My problem is the labour consultants who are for some reason 400 times more aggressive than the attorneys. I don't know what their problem is because they are not as qualified as the attorneys. They are trying to impress their clients and it is all bravado and we are going to do this and I am going to do that. And I often have to say do you mind just taking down your aggression about 5 notches, I don't have to hear this nonsense. But he insists that: "We are going to win and he is going to be ruined." I also find the employer organisations quite destructive. I prefer a guy that can demolish the other party but in a cool and calm manner. I don't like all this drama and attempts to intimidate the other party. The employer organisations

– consultants can really weigh down the process because they want to quibble about everything. Consultants and employer organisations are trying to show their members/clients that we are not going to take this etc. They try to intimidate the commissioner because they know the client is going to tell the other employers: You must join this organisation because he is sharp. Specifically in the security industry it is as if the white bosses are trying to show the black workers that the whites are still in control. It has been interesting for me coming from a union/labour background – I find that the black employers are no different than the white ones. They are just as rude and just as aggressive as the white employers. There is no difference between the black and the white capitalists.

Emotion?

I have no problem dealing with emotion. I have had people crying, I can handle that. What I don't want is this aggression. I have no problem if one of the parties to the dispute is aggressive or shows emotion but these consultants or representatives who had no part in the dispute for them to become all aggressive is unacceptable. They are putting on this aggressive act just to impress the client.

What alternatives are there – ADR?

I don't know – I have thought about this in the past. I think a part of human nature is that people will try to get away with as much as they can. People won't do anything unless they are forced to. Just as they don't attend conciliations because they are not forced to. Just as they are attending arbitrations because they know they will get a default against them if they don't.

Private dispute resolution?

I think it is a good idea but again as it is with anything that is private – it is just as much justice as people can afford. It is great for those who can afford it but I think it is vital that we have something like the CCMA which says that even if you are the poorest of the poor and you have a case against a rich guy that he will not be able to hold up the process because he can afford a lawyer. That is the cornerstone of our democracy. Justice must be available to all. The CCMA is an equaliser of the power dynamic. It doesn't matter about levels of education, or money, a weak person without social standing can also succeed at the CCMA. It's a vital instrument of our democracy.

Change in the system?

I don't think we should move away from the system that we have. Everybody should have the right to resolve their dispute. We should speed up the process. We should have more con rolls and arb roles. We should move away from the system of setting down matters as it is at the moment. Con-arb – the commissioner must have the power to say to a party that he hasn't got a good case. If the party takes the dispute further – and he loses – he should then have to pay a fee. Specifically in cases where the Commissioner has made a note on the file indicating that he thinks the case is frivolous and that he has advised the parties to this effect. If they then go forward with the case one should order costs against them. The cost should go to the CCMA and not to the respondent. I don't think we should change the underpinning right that leads to the CCMA. More rights to the commissioner, such as costs. There should be some costs.

I though they should look at their own internal HR issues. Their staff are all miserable and demotivated. I don't know what their problems are, but it is not a happy organisation, it is not a healthy organisation. Everybody wants to get out and there needs to be a lot more leadership from management - those people in middle management level, are the ones creating the problems. They are locking the lower level's voices from going up and they are blocking the good intentions of the senior managemnt from going down. Someone like Edwin he has no idea of what is going on – it's a capacity problem. There are a lot of commissioners who are underskilled who allow ourselves to be run rings around by the lawyers - who make silly awards and that is often because we have questions that no-one can help us with. And it also amazes me how many matters are being taken on review and I wonder why are the people scrutinising the awards not picking up on these faulty awards.

Capacity?

Knowledge and skills – We have people with knowledge but no skills because they do not treat people with respect, to be kind to them, to be professional. The interpersonal skills are lacking. You can have all the legal knowledge but if you do not know how to apply these in the conciliation. It happens that wonderful procedures are drawn up for the workplace by lawyers but it is not working , not practical - or they write up awards or settrlement agreements that cannot work in practice. Technically perfect but not workable.

Gender issues?

I had a couple of cases where a union official or an employer repressentative have been extremely rude and aggressive and refusing to behave themselves. The interpreters indicated that parties do not take these chances with men but there is a tendency to treat women commissioners with disrespect. I make sure that I don't take a hard line from the beginning. I had gender and race insults I have been called a bitch but I try not to let it bug me but obviously sometimes it does. It goes with the territory. If you look at our history it is possibly hard for very patriarchal men to accept that a women could be in a position of power. It could be difficult. But they are taking a chance.

Interview Participant 5: Advocate, senior commissioner, 7 years with CCMA, male, age group 35 – 45, legal training, labour lawyer, private arbitrator

28 August 2003

Low settlement rate.

The main problem is the non-appearance of the respondents at conciliations. If the applicant is not there, obviously the matter will be dismissed, but the non-appearance of the respondents is the problem. There is nothing to gain for the respondent if he doesn't have a good case. Even if he has got a good case why should he come to conciliation. He knows that the delay between conciliation and arbitration is approximately 5-6 months, which gives him time to see if the applicant will pursue the matter or if he will lose interest in the matter. I think the main issue is the non appearance. The commissioner cannot do anything, but if there is something in the CCMA rules to penalise the employers if they do not appear or any party for failing to appear. Such as a fine. Or it should be a factor to be taken into consideration when the award is made and if the employer is not there and there is a decision against the employer then an additional amount should be made to a max of R 1000 just because he wasn't there. There must be some sort of penalty. I don't think its about disregard for the CCMA, it is just that the employer look at his own interests. Why should he pay now if he can pay it six months down the line at arbitration. It would be nice to settle now but....

The con-arb system is better but then there should be enough commissioners to deal with this properly. As soon as the conciliation is completed it cannot be the same commissioner, if it was a proper conciliation. Con-arb at the state bargaining council works well. In 90% of the cases the employer doesn't have a mandate to settle and then they skip the conciliation and move right to arbitration. I limit myself not to go into too much detail in the conciliation because there is seldom another commissioner available and then I have to limit the conciliation to enable you to go into arbitration. It's a main problem. One can compromise oneself. Skills also play a role but obviously there are differently skilled people but there must be a willingness between the parties. The conciliator could be brilliant but if the parties are not willing to settle then you cannot achieve anything. Once an employer pitches at the conciliation then it indicates that there is a willingness but if he is not there he doesn't want to settle. If he is there he wants to get it over and done with.

Reason for high referral rate.

Termination of service gives rise to a dispute. But then the employee gets advised that he hasn't got anything to lose so lets go for it. The employee knows that he doesn't have a case but he knows that the employer just wants to get rid of the matter and then he will take a chance. The screening programme is not to lessen the referrals, just to determine the type of case. If you let the parties pay for a referral even if it is only R 50 it will make a difference. It could make a difference of 5 to 10%. The fact that the process is totally for free is a reason for the high referral rate. Just a small amount – the CCMA is giving a good service – at conciliation as well as arbitration.

Relationship between internal mechanisms and high referral rate.

My experience is that it doesn't matter how good the employer has dealt with the case – if the employee gets dismissed he is going to refer a dispute. Just to take a chance to see what he gets out of it. It is a reflection on the CCMA rulings – depending on the commissioner that you get. One can get away with one commissioner and not with another.

Another thing is the time that employer must spend on a matter. First the internal procedures then the CCMA conciliation arbitration, preparation for a case, having to wait for the CCMA etc. Sometimes when the employer

gets to arbitration he has no clue what the employees' case is all about. The employee raises other matters at the CCMA and the employers is unaware of the fact that this issue is also in dispute. There must be a compulsory process of pre-arbitration where the issues are put on the table and the parties must be compelled to stick to the issues on the table. There must be a pre-arbitration meeting - a compulsory process - and only short: what is the applicant's case and what is the respondent's case and that must be filed. The matter can be revisited if there is an agreement between the parties and only those issues should be revisited. You cannot put any other issues on the table. People do not hold pre-arb meetings If they do have pre-arb meeting they go the CCMA and on the arbitration date they ask for a postponement. For a pre-arb there must be a compelling pre-arb form where the... That is what the arbitrator must stick to. It is not compelling at the moment.

Appropriateness of the system for small and medium employers.

No I don't think so. Especially those that have followed procedures. They go through the whole process internally, they get an external person and then they come to the CCMA and have to go through the whole process again and if the employee is not satisfied then it goes to Labour Court and for the employer to go through that process so many time it is not fair. It is not effective. Obviously the employee must have some kind of a remedy against a decision internally. I don't think the process is fair towards the employer at all. If they have got an internal proper process to go through it again and again and again. They do not have the people and money. The thing is that the employee doesn't have anything to lose. The employer has everything to lose. He must spend the time out of his job and if there is an award against him, even if costs is awarded against the employee – what are the chances to get that money. The main difference between this process and normal civil court cases: There it is a matter of both parties stand to loose. At the CCMA there is no risk for employee. How are you going to get you r money out of the employee?

Appropriateness of system for individual employee

Yes absolutely. If one can do away with individual unfair dismissal cases... Maybe if they can make provision for an independent pre-dismissal intervention but that is expensive for the employer. It costs about R 1000,00. If there is a pre dismissal arbitration it is final and you cannot take it to the CCMA then. There are cost structures about R 3000,00 a day for providing that system. They should encourage employers to take place in such a system but not only through the CCMA. A presiding officer from any recognised panel is chosen and he has done the pre -dismissal hearing, it should be final like AMMSA and Tokiso or a panallist of a bargaining council. Employers should not be limited to the intervention by the CCMA – all panels that are recognised.

Labour consultants and labour lawyers

Obviously being a lawyer I prefer the lawyers to be present. 60% of people lose their cases because of bad representations. Not asking the right questions and that is why I prefer the lawyers to be involved. It is more difficult if there is not representation.. It is difficult for the arbitrator and he could be accused of being biased etc. So I prefer representation. Obviously its better and that is where the consultants came in - I don't think they have got he skills. The majority doesn't have the skills and knowledge. In conciliation I don't allow them in conciliation. If the parties don't have a problem then I'll allow it but if a party objects then I cannot allow that.

(Tape not working – used field notes)

Problems and needs of employers and employees

The main problem as perceived by this commissioner is that the parties do not know the procedures to be followed.

Change in the system

The employers should be made aware of the correct procedures to be followed. It was mentioned that the employers should be required to register at the Department of Labour and that a system should be in place where these employers are required to send copies of their internal procedures such as disciplinary codes and grievance procedures to the Department.

Sophisticated system

He agreed that it is a very sophisticated system but there should be a shift to internal.... The department could provide for a proper prescribed form for internal processes. Employers should make sure that they use independent presiding officers internally before dismissing an employee.

Alternatives

Yes there is room for alternatives.

ADR: Private dispute resolution

There is growing use of this. It is costly, but there is more certainty, more control over time, arbitration more user friendly, more skilled commissioners.

Impact on workplace relationship

Attitude of unions is a problem. They are more emotionally charged in rural areas and in urban areas. Less adversarial in urban areas. Urban/rural division. In urban areas there is a trend that unions are assisting the employers in resolving disputes.

Some are good. The employer organisations do not have the years of experience that the unions have. A specific problem with employer representatives. They need more training.

Interview Participant 6: Initially full-time and after a period of absence became a part-time senior CCMA Commissioner, advocate, legal training, 40-50 age group, private arbitrator, female

13 October 2003

What is your background?

I joined CCMA in June 1996, I was a full time commissioner in Gauteng and I left the CCMA.....So I came back after a year, and I rejoined the CCMA in January 2001, I went straight into the backlog project that they had... I never was a convening commissioner, I was a senior commissioner, my portfolio was that I dealt largely with the reviews and with the part-time commissioners and backlog projects and things....that was before I left, when I came back I was just part-time, I was fulltime until I left and I, when I came back and rejoined in January 2001...I was just a part time senior commissioner.

What were the changes when you left and when you came back? What were your impressions?

One of the most significant problems in my opinion was the appalling administration .... and case management, that was when I left. And when I came back there was appalling administration and case management, ..., what has become increasingly worrying to me, and which I picked up in that back log project is that in the period I've been away a lot of new commissioners have been appointed and either their training has been very inadequate, I've got a strong sense especially with a lot of the arbitrations I was dealing with that they haven't been trained in conciliation properly, I was settling, I would say more than 50% of the arbitrations, which shows me conciliation has been ineffective first time round.....

Do you think that could be either because they did not have the training or, that the parties might have reached a saturation point, were they said listen we are not going to settle at conciliation...

There will certainly be an element of that, ..

Do you think you've got specific doubts about the training of these new commissioners.....

: ..well it was a bunch of newish commissioners, who were conciliating and arbitrating and doing the most bizarre things, for example one arbitrator, and I heard a lot of this during the back log project and it was not isolated, an arbitrator would tell parties to carry on with their evidence because he had to take a phone call or that he was leaving the court and would walk out of the arbitration room and just bizarre things, and I also did a lot of, I dealt with a lot of rescission applications and, you know the things that would happen, indicated to me that the arbitrators weren't very well trained and as a consequence, it may have been co-incidental, I was invited to get involve in re-drafting all the training material, because the training material had still been the original material that had been developed before the CCMA officially opened its doors. All that training material have been predicated on what industries' experiences had been and how they thought the new labour relations act would pan out in reality, what they assumed the case load would be and the make up of the cases, the nature of the parties and so on, and they made a lot of mistakes in how the legislation would be interpreted, so that

training had become hopelessly inadequate and wasn't in keeping with labour court interpretation of the law, it did not recognise, or it couldn't have..., trends, policies, guidelines issuing from the labour court, because it was designed at a time when nobody really knew how things were going to work out, so I think I was very fortunate in being inimitably involved in developing new training material, I would like to think that the results of the new training material and much stronger standardisation and much stronger competence. Testing of candidates to be commissioners will bear fruits not necessarily right now but in a year or two's time in more competent commissioners coming through the system, but of course training material is as good as the trainer and it is as good as it can be kept up to date and adapted to new case law, to further legislative amendments etc. .. and I don't know if that is going to happen...to what extent, I am already aware that the training material in some areas aren't huge - not crucial - but certainly in some areas the material is not reflecting the true state of affairs...so it is something that one has to monitor on a continual basis and update that material all the time to reflect challenges to the CCMA's rules on representation ...rules will probably have to be rewritten because they were published ahead of the legislation coming out, and if you think of things like that, and current CCMA thinking, that was the policy and that had to be before going into training, in fact that has been successfully challenged now and should really change....I am not really sure now, because I am out of the loop. Training was initially controlled by Sue Albertyn and she and I worked very closely on keeping the training fully up to date, then she handled that whole portfolio.....there may be a vacuum there in keeping the training real and I would like to think that it will bear fruit.....

I think much more use should be made of mentoring and structuring of mentoring programs where the trainee commissioners are involved in process, that they practise skills of evaluating evidence, making determinations, justifying their determinations, being able to intelligently put that into writing so that people would be able to understand..... this is all in a safe environment, they are not at the coal face where they are in fact arbitrators and giving final award, they are together with a mentor, who will oversee the whole process and help them see where they are going wrong.....it would be less costly than arbitrators making shocking mistakes, taken on review. The labour court is hitting the CCMA with cost orders, when stupid things are happening and these things can be avoided if people ..... training must be there, but I think a more practical candidate attorney apprenticeship, should be there before they are left loose .... they must learn on the job in a practical way, but without being thrown to the wolves.

Your experience in America at the World Bank would you say it was the same kind of thing...was it labour related or what?

It was labour related....The World Bank operates in 74 countries and because it was being brought into being in 1948, by international charter it is not liable under the law of any specific country, and therefore in dealing with its own labour disputes with a staff of approximately 13 000 people world wide, it had to develop a set of tools to dissolve labour disputes and in this basket of tools was one of them they call the appeals committee, which is an appeal review and it is a tri-party committee in the sense, when I was there, there was a committee 30 people, 10 of whom is drawn from management... proposed by management, 10 proposed by the staff association representing employee interests and then 10 agreed by both management and staff association to chair this three man committee, that person had to be from director level ....this three person committee were generally lay people, occasionally they would have somebody with a legal background, they weren't legally trained and an appeal would be the employees claim that the recipient of unfair labour practises or dismissal or demotion or suspension or the usual sort of thing, that we would deal with, it was done internally, this was an internal formal and binding outcome in the same way as arbitration. It was the last stop within the World Bank and what was interesting is that a lot of the cases were done not necessarily in Washington DC itself, which is the head office, but is done via satellite and telecom systems, camera and screen and so on, it was a really interesting process... I wrote an article on this, which was published in the Andrew Levy publication....on what South Africa could learn from any of the processes, the World Bank. The appeals committee was its formal arbitration equivalent, but it had apart from that had a newly introduced mediation system, it had an ombudsman, it had an ethics committee, it had a gender specialist, a race specialist, there were a whole lot of other things, they all come together in a .....committee, there was a bunch of things they tried

What is the reason for the high referral rate?

I think the high referral rate is partly that people have unrealistic expectations that they have nothing to lose by taking disputes to the CCMA, they know for a fact that they will cause inconvenience at the very least and more likely costs for the employer with whom they are angry. Rightly or wrongly. So I think a lot of the case load is not necessarily reasonable - it could well be frivolous or fictitious. I think that arbitrators are looking for solutions for that is part of the problem. Arbitrators should certainly be encouraged to order employers who don't follow proper procedures to pay an arbitration fee, and I have a strong sense that there should be not necessarily heavy costs, some sort of incentive not to bring silly cases to the CCMA or to the council – sort of a financial penalty. If you are litigating in any court and your litigation has no merit you end up paying the cost of

the other party. And I am wondering if there should not be a daily fee if it is found that the case has absolutely no merit and I think that was the intention when they deleted section 1(38)(10), the cost order. And instead of making it based on frivolous or fictitious pursuing of a dispute they just made it open ended where it was up to the discretion of the arbitrator. That was the intention to make some sort of costs, to dissuade people from bringing cases unnecessary, but of course in the final analysis it fell by the waste side as we see that the CCMA rules where they were enacted, it didn't changed the status quo at all and went straight back to the original wording of section 1(38)(10)

Are there enough good intentions, but it doesn't realise or reflect.....

The same thing happens to legal representation that also fell by the way side at the very, very last minute which also put the CCMA in a really sticky place. By putting the reference to the old section 1(40) and 1(38) into a footnote which was hardly adequate, but it was never their intention, their intention all along was to change and relax - the originality of people - representation regulations. But it was a last minute digging in of the heels of I believe by labour.

Reason for the low settlement rate in Gauteng?

I would say to some extent Commissioners conciliating, are just not clear on the skills that they need to use; they require quite complex skills to conciliate successfully. And I don't think that they've been through sufficient mentoring, it seems, I get the impression there seems to be a sense that anybody can conciliate or arbitrate. It is much more difficult, and that practise is bit of a myth. Arbitration - as long as you follow fairly clear framework and rules you could probably do it more easily than good conciliation, because that takes all sorts of inherent skills, problem solving skills, interpersonal skills, the ability to understand and see peoples' true positions to exploit the real needs of parties to bring about some kind of solution. I think it is a highly underrated skill. I think a lot of commissioners who don't necessarily have that skill are let loose....that is one of the reasons for the low settlement rate in Gauteng.

Some of the best conciliators would not have a legal background.....they should let the non-legally trained commissioners do the conciliations, ...they should maybe pay the non-legal commissioners who only do conciliations...it is undermining the value of good conciliation... you are not going to need arbitration if your conciliations are successful, if that settlement rate can be pushed up...I also think Gauteng needs to really work on consistently applying the con-arb because I think parties are far more likely to resolve a dispute at conciliation knowing that arbitration follows in the next half an hour...so I also think it forces parties, in particular employers, to evaluate their case and the merit for their case...the employee's case, because by getting their ducks in a row to face arbitration they are in a better position to evaluate where the settlement makes sense, to do a cost analysis and I think that would push up settlement possibility at conciliation. Con-arb should be imposed more... more regularly.

What do you think, if you could now make a suggestion, what should be done?

Well, I think the settlement rate should be very carefully investigated and I am sure that one could extract the latest trends and then address them. Another very important factor I have been speaking about for years, and it is never properly addressed to my opinion - and that is getting parties physically there and notifications go out to wrong addresses, that don't go out on time, they reach the parties far too late and they can then ignore them because it is not within the prescribed time frame - just having somebody who phones the parties the day before. Our arbitrations in a bargaining council, and this is their practise, and it makes an enormous difference because if I schedule to arbitrate for a day the parties in all three cases will be there, I know all the parties will be there because they have be contacted and reminded....and that is what's been happening again and again and again at the CCMA - that parties are not properly notified and nobody has taken the trouble to alert them and they don't pitch for the conciliation, the commissioner thinks this is great...go and read the newspaper and half an hour later, dismisses the case and if the applicant is not there he issues a certificate. There has been no real opportunity for a conciliation to even take place.

What would you say is the CCMA's argument, would they say: listen, we don't have the resources?

If I am arbitrating Pick 'n Pay vs Pitch, C.N.A I am not going to do a default, because I know there is a good reason they are not there, they are not going to miss an arbitration and risk a default judgement and the cost involve in a rescission application and these rescission applications sit in boxes in some of these offices for months and months and months... Don't tell me that a dedicated person on each floor, can't make phone calls ahead of time, to ensure that parties are aware that they are appearing and what the time and venue is and so on. Should it not if you weigh it up, cost far less than what the reality is that an arbitrator or a conciliator sits with nothing to do? They are either paid a full time salary to sit and do nothing or part time ...plus the cost of

rescission applications, review of the Labour Court, all of those things will be well avoided if parties could physically be there, because I believe any conciliator worth their salt will get the parties there, then the potential to settle their dispute rockets by 100% what it would have been and .... I think they should proceed with what they already initiated in Gauteng, which is telephonic conciliation for domestic worker cases and so on

Is that now official?

Yes it is in their rules..... It will either be done in a very small percentage of matters where it very much looks like it is one employer, its one employee – it's going to be their word against each other if it comes to arbitration, and it probably results...Where it is a question of the employer did not understand the procedure or did not understand the requirements of the law around ...fairness and once that is explained to them they are quite happy to give a couple of months salary, the applicants are very happy to accept that ...and the matter can be resolved. So pre-conciliation attempts have been brought into the CCMA's rules and that is typically done to... But not necessarily, it is very often the applicant who's sitting in the CCMA Office that brought the dispute in, they're referring the dispute, it is a bad point that there is an intervention and they take that individuals side and say lets phone the employer and talk about this case that you want to refer and explain to the employer what's going on and often you get a settlement that way. They draw up an agreement, they fax it to the employer, he signs it, applicant and officer signs it, dispute goes away.....

Is it necessary for the CCMA commissioners to do that?

No, I don't think commissioners necessarily do that. I think case management people are doing that

Can one not involve NGO's and Church groups, who are more than willing to help...get the CCMA to accredit them?

Well, they have to get around the provisions of the LRA that dispute resolution is mandated only to the CCMA, but leave it to the CCMA to obviously outsource. Probably to accredited organisations but I know that the rules have been very carefully drafted to say that a commission may intervene prior to conciliation scheduled so that it does fall to case management officers who very often do that. I in principle don't think there is anything wrong with outsourcing that to people as long as they meet the basic requirements of their understanding of the operation of the CCMA and the applicable legislation is put in place, whether it is BCEA or Skills Development Act .....

If a request like that came say from the University of Pretoria, the Law Department and they would like to do something by involving Honours students?

Where would that physically be located, because you are going to be dealing with documentation?

At the University itself.

Referrals can be faxed from the screening and allocation department ....

The university could provide a venue, a legal aid centre where domestic servants know they can go to. It could even be interventions before it becomes a dispute and even before it goes to the CCMA?

I think it is brilliant, absolutely brilliant... The students should be encouraged, it is similar to the legal aid clinic at Wits and RAU and so on, I am sure they do a lot of the disputes that we never found out about and don't come to CCMA, are resolved at that point. Before they become a dispute.

Anything else on the low settlement rate?

It is a more sophisticated winch – a labour professional winch, there are lot more labour consultancies, so called employer organisations, so called trade unions, which are out to make money and if you look in the newspapers dozens of adverts saying bring your labour problems to us and we will resolve them. Some of these places are wonderful and do good jobs and lots of them are fly-by-nights and are nonsense and they will encourage these people to take silly disputes to the CCMA because of the easy access and the chance that the employer settles the matter because of its nuisance value. For no other reason and they take a cut, a sizeable cut....and I think that will happen in the Gauteng area more than any other area, there is a lot more of these cases here

What is the relationship between internal procedures and use of CCMA

I think that is still surprisingly and disappointedly a big factor, the big employers generally got their act together but the medium to small size employers remain fairly ignorant of applicable law or there are a strong resistance

from white employers who feel that everything is stacked against them, the government of the day, the government satellite like CCMA, which they see as part of ANC larger picture, so they resist that. Sometime it is deliberate, sometimes it is pure ignorance, bit there still is a surprising lack of informed employers out there

Why is that?

I think that you will find employers are very used to, impossible to understand legislation which has been a typical pattern in our legislative past. Statutes that have been worded in 1938 never changed, the language, the tone, the legal jargon makes comprehension even for lawyers difficult and this perception has remained. I think very often they don't even try to read the act, they rather pay the money to phone a lawyer or possibly a labour consultant. Then pick up a piece of legislation and try and come to terms with this. The LRA is also a deceptive piece of paper and on the surface it does seem quite straight forward with simple language, things are explained, definition section etc, but we all know that on dealing with the LRA it has all kinds of twists and turns that are a little bit unexpected, so I would say there is certainly some truth, people not wanting to read legislation, because they just assume that it is going to be difficult, but even those who do read it, even if they all grasp the fundamentals, it does not necessarily mean that they are going to be in a position to answer all the questions. I think there needs to be more accessible, more inexpensive awareness programmes and training on aspects of the LRA for employers specifically.

What would you say is the right form or the right mechanism? I think it is very difficult to reach the small and medium size enterprises

That's where bargaining councils play a valuable role. There are lot of employers that fall outside of any kind of bargaining council and are obligee to either ... or to make time and money available to send the relevant managers on some sort of training. I do think some of these training programmes are overpriced.

Should you register small and medium size enterprises with the Department of Labour, and thereby ensure that they have basic stuff like a contract of employment?

Certainly I don't see any harm in that. Companies have to abide by the Companies Act and it could be built in the registration of a company. I don't know how it would be policed if you were dealing with Sole Proprietors, partnerships, which don't necessarily get registered. So any kind of business vehicle outside of a company or close corporation, its going to be difficult to police that. So obviously its going to have to be some sort of a legislative imposition that employers have to do, but I would say it could be encouraged, all employers are supposed to register employees for UIF and maybe it could be built into that process - because that is handled by the Department of Labour - to their insurance fund. That they could say that you have to complete this questionnaire and supply copies of XY and Z and ..... I think it is certainly something that could be investigated. I feel particularly with the small employers - it was again one of the many failed intentions of the amendments to create a special exemption if you like in terms of operational dismissals for small employers. Here I think specifically in terms of the domestic worker, individual employer situation, that they don't have to bear the owners' requirements of section 189. That hasn't come to pass unfortunately - that amendment also fell by the way side, and I think that is a pity, that is, while trying to create fair procedures around operational requirements which are not for dismissals, you specifically do need to be fair, there has not been enough flexibility build in for small employers. It is really designed for the big employers, there is a little bit of flexibility if an individual is retrenched and opt to go to arbitration...

Do you think it is appropriate for individual employees

On the whole this system is far more user friendly than the industrial court was and I think for a reasonably intelligent lay man in the street they can use the statutory process quite successful to pursue a case of unfair labour practice or unfair dismissal. Yes I think there are going to be employees who are not going to cope... they wouldn't have coped with any system...I don't think you can ...the system any further without losing its integrity

Do you think the employers and the employees have specific needs / problems?

I do a lot of training for employers in particular, and their biggest desire/need is to have a reliable case management system running, their biggest complaints are files going missing, documents not getting into the files, not getting notifications, those kinds of administrative problems, that is their biggest area of complaint. They want the CCMA to be a 1000 times more efficient. The employee also have the same kind of difficulty and they phone and the same person that gave them advice or spoke to them the last time is not there and get send from pillar to post and it turns out the file has gone missing, they never find out when their case is being

scheduled. There isn't enough control and supervision over case administration and management, and I think that has a very negative impact on the parties.

Where do you think the problem lies?

There isn't enough accountability. There needs to be closer supervision. I think however they need to be supervised and need to report to someone and to be held accountable for major errors. It seems to me again and again when there are problems that nobody takes responsibility and everybody puts the blame on somebody else. There is never any follow-up, there is insufficient follow up, reporting system or.... I think the computer system should be better used - better used to highlight irregularities, cases not progressing at a specific rate. That is my impression.

I don't think the system should be written in concrete, I don't think it should be static, I think it should be dynamic, and they should have the courage to experiment with it in different ways. They would acknowledge it is one of their major problem areas. Certainly a lot of people who go to private arbitration, their number 1 reason, if they're asked to furnish reasons why they have gone that route, is statutory inefficiency around management of cases. There are lots of other reasons but that is often number 1.

How should the system change, I am not only referring to administration, also the body of the CCMA?

Well I think there should be positive encouragement to large parties, big employers, big trade unions to go outside the statutory system for dispute resolution. I also think senior employees, CEO's ...There is currently a jurisdiction ruling for the CEO of the Central Energy Fund who gets dismissed and has referred the matter to the CCMA. The company is arguing that the CCMA doesn't have the jurisdiction because in the employment contact there is a clause saying that if a dispute arises in relation to the contract, determination of the dispute will go to private arbitration in terms of the arbitration act and I think that should be positively encouraged. There are a lot of the advantages for the parties, but it will reduce the enormous strain on CCMA resources. And I think the CCMA has to get its act together and accredit outside dispute resolution bodies in terms of what it was charged with by the LRA of 1996, it still has not be done. I feel very strong about that.

Why do you think it was not done? What are their arguments?

I think, I must be careful what I am saying here.... There may be legitimate fears that outside bodies will not maintain an acceptable standard of dispute resolution and that it will reflect badly on the CCMA. I think it is more a matter of, I think there is an unwillingness by labour that makes up a third component of the CCMA governing body and government generally goes along with labour. It tries to be neutral, but when the push comes to shove it will probably go along with labour, because of political reasons and labour of course is anti-private dispute resolution because it perceives it as justice for the rich and it wants a bigger playing field, it wants the goal posts to remain fixed, it does not want to create a dual system of private labour justice vs statutory labour justice. I think that is one of the obstacles. Well the CCMA chooses not to accredit, has chosen not to accredit. I have to question the sophisticated adjective, its not hugely complex, conciliation and arbitration are fairly straightforward processes. The laws and the procedures around them do have a little bit of a...quite a lot of legal twists and I think that should be reduced and I think it should be more straightforward. I wouldn't say it is a particularly sophisticated system there are no pleadings for example ...so a person with no legal background or without legal representation should be able to grasp the principles of a conciliation, the principles of arbitration to be able to present a case in both forums> And the new CCMA forms have quite nicely adapted the side of the form to give fairly clear instructions of what is expected of the party filling in the form and so on, and I also think the notification letters that's going out got a whole page of guidelines around issues, that parties who don't know the LRA would be able to appreciate and accommodate.

There needs to be better cohesion and consistency in the approach...

Are the technical requirements for dispute resolution as spelled out in schedule 8 of the LRA, preventing parties from seeking alternative dispute resolution methods?

They don't prevent parties, they provide a set of guidelines once the party has already made a decision to go the disciplinary route regarding conduct or non-confirmation of a probationer or incapacity or poor performance or injury or poor health. Prior to that parties should be encouraged – going ahead with RBO's, going ahead with sensible grievance procedures follow sort of....problem-solving exercises. I think there is a lot parties could do before they ...once they have taken that course of action then this is going to have to guide them, but I don't think just being there prevents them from other initiatives....

What about employers who do everything except what the act requires when they wanted to retrench somebody, for instance they've even spoken to the church...everything was very informal and then in the end time has run out and they still haven't complied with the procedural requirements. These days people would say don't be supportive of your employee, just make sure you follow the law.

I think there is only one way to ensure a general participation and recognition of the process and that is by legislating. I would say to employers: do all the nice stuff but make sure that you do it within the framework of the law, don't open yourself or put yourself at risk....

What is the new definition of ADR? I think that it is interesting that you mentioned an appeals committee, but that is not something that is in the system

They could certainly introduce it. Peer review is in internal finalisation of dispute by employers and there are possibilities in the industry. The industry can appoint an ombudsman, who may not have decision making powers, but can make recommendations to the employers. Lets take the mining industry where there are no council, I think it may be well their worth while to develop either internally or bring in outsiders to mediate and we can call it conciliate if you like. They mediate large scale wage disputes and individual grievance of disputes, disciplinary types disputes. I would like to put the obligation much more firmly on the shoulders of the employers to develop dispute resolution mechanisms that the trade union parties and all the employees have bought into and it can possibly be a joint sitting and this way they can avoid the statutory process all together, the need to use it will just fall away dramatically. People must have confidence and they might have more confidence in some sort of a peer review or mediation or arbitration ombudsman, or whatever the company or industry ..., than they would in some unknown statutory appointed commissioner who come in and sort the dispute out with very little knowledge of the industry.

What is going to happen now that you may get a commissioner in before arbitration?

It hasn't taken off, the reason is that large employers spend a lot of resources on empowering their internal HR departments to do competent disciplinary enquiries to train their line managers to do disciplinary processes. To get negotiating teams well schooled in how to negotiate in a fairly legal manner, so they aren't going to, well in particular with individual disputes, they aren't going to throw that out of the window and then pay all over again to have a CCMA appointed arbitrator come and step in, what they see is their prerogatives, their duty of managing their own employees, they regard as exclusive territory.

What is the cost?

It is about R3500.00 – I am speaking under correction for the first day of a pre-dismissal arbitration and in fact it is the same cost for every subsequent day. I know the CCMA is wanting to create a better policy - there are subsequent days at a lower rate.

I think it could be a lot for a small to medium size business

Yes, for a big employer it will be a duplication of cost, they have gone to these private training seminars and workshops with their people. It is a cost for the big employer, it complicates their payroll as well, no they have to distinguish between employers and employees that earn above the threshold and those who earn below. It gives them an extra, additional administrative work ...and sophisticated employees at the higher levels are going to be very cautious about only given one bite of the apple, to stand by the outcome of the pre-dismissal arbitration especially as the parties have no say in who will come and arbitrate...and I would not like an internal disciplinary enquiry where the entire working environment has to be explained. For instance where theft of an inexpensive small item may not be a major issue in one industry but may be an enormous issue in the retail industry, where it is crucial. Both parties, in particular, the employer may well fear that the arbitrator appointed doesn't have the knowledge of that industry, will make decisions that is not in keeping / fly in the faces of the company's internal policies.

Do you think something like a facilitator, not just a pre-dismissal arbitrator, someone you can pay much less I suppose and then have somebody to come in and facilitate while it not a dispute yet. Don't you think that is an option?

For the CCMA to provide that?

Yes, because if it is the CCMA, at the moment they do it with consultants and lawyers, but obviously there is a problem with trust. If you can say we have a CCMA commissioner here to facilitate - don't you think that could maybe solve cases and prevent them from going to the CCMA?

Yes, except that it is using a CCMA resources just in another format and there is no finality or legal certainty of the process, it may mean that all the other CCMA processes are all going to be invoked in any case. Resources are going to have to be duplicated. I don't know...the idea is nice, parties would trust this neutral third party body to send in somebody to objectively advise the parties. Well I think an advisory arbitration award is one the tools of the conciliator's kits and maybe that should be encouraged to be used more frequently, yes there's a better chance of settlement prior to arbitration or strike action.

Last one....I think we touched on that also.....

Yes that would be sad way of interpreting it you absent the rules. For every reasonable employer there are eight exploiters and when they are not bound by rules their exploitation I think will know no bounds. We mustn't underestimate human greed.

Number 9 - ...how does the system cope with an adjusted strain caused by high referral rates? 9.1 – do you think the CCMA will play an important role in dispute resolution in the future - I think yes, it always will, however I hope that this role will decrease as private dispute resolution becomes a more appropriate way in many industries. How do you think the new private dispute resolution bodies impact the work of the CCMA – it has little impact as yet, but I think that will increase, especially as accreditation gets going. What should be done to alleviate the strain on the system caused by high rates of referrals - well we said it all. Do you think that labour legislation in regards to individual cases should be relaxed..... in some ways yes, they spent vast amounts of time and money on individual disputes, in fact there may be much greater need in industry related and joint industries.....

Just something about the specific needs and problems of commissioners....do you think they are in a difficult position?

JL : I think there are a couple of issues - there is a perception that if you are unsure about process or about a technical issue, and you go and ask somebody else, you are showing yourself to be weak and jeopardising your performance appraisal or your re-appointment as a commissioner. I think it is a very unfortunate. I think that the commissioner should encourage very, very strongly to share personal problems and I think these experiences that you see in Canada, Australia and so on, where there is a lot of group, not determination, but a lot of discussions around cases – is extremely valuable and I really think that it should be accessible, there should always be people who ...commissioners could adjourn briefly and they could go to them and speak or get advice, they don't need to use it.....at least they should be encouraged to be open to do that.

There are a lot of problems around that, commissioners are saying there is nobody around to talk to

It is those perceptions that are wrong, the facility of having someone available should just be made very much ...I think. I don't think arbitrators should be rushed so much to write out awards in the sense that the 14 day time limit is a good thing, but I see that they are now saying where parties are handing in written heads of argument the 14 days does not start running from the date that the final arguments arrive, they still run the 14 days from the last date of ..... and that you have to apply for extension, I don 't know... and I think for part-timers, having been both part-time and fulltime, you are definitely more in the peripheral things and you are not kept in the e-mail loop of sending out the CCMA policy on a specific issue or the CCMA's view on a particular labour court decision. I think that there should be more effort to include part-timers into the swing of things, there should be more time for commissioners to have get-togethers. I know it is difficult sometimes, time is always a problem, I think there should be more openness in communication and pure discussions around dispute resolutions.

Interview Participant 7: Labour Lawyer, 40 - 50 age group, male, more than two years experience

5 September 2003

Ek het by die "Wipe Out" Projek begin so 2 en 'n half jaar gelede

Wat is die Wipe Out projek?

Dis 'n projek toe ek net begin het - so in die begin van 2001 was daar blykbaar 'n agterstand van so 7000 lêers, toe het hulle oor 'n periode van so 2 tot 3 maande sake eenvoudig geplaas en dan vir 'n hele span van Kommissarisse gegee om dan voor te sit by die projek. Dan het hulle die lêers in die oggende net uitgedeel en jy het dit maar gedoen soos jy die lêer ontvang het..

Soos 'n rol...?

Ja, soos 'n hofrol.

Wat is die rede vir die hoë "referral rate" - wat is jou persepsie dat daar so verskriklik baie sake na die CCMA verwys word?

Ek sal maar soos hulle sê dit van die heup af skiet - nommer 1 is dat daar 'n hoë werkloosheidsyfer is en dit is dan ook die hoofrede en as mense afgelê of ontslaan word, dan wat bly dan vir hulle oor as om die saak na die CCMA te neem en te kyk of daar nie 'n laaste moontlike paar rand of sent kan wees nie, selfs al is hulle bewus daarvan dat hulle vrywillig ontslaan is, dink ek tog dat elke ou...Ek het al daar sake gehad wat baie meer as "frivolous" was en tog neem die applikant die kans omdat hulle ook weet daar is nie regtig koste teen die applikant wat "frivolous' gebly het nie.....dit is een van die groot redes, dit is geweldig toeganklik, te toeganklik en dat mense wat nie eintlik sake behoort te verwys nie...

As 'n kommissaris sit jy eenkant en jy kyk soort van bo af daarop, dink jy mense is bewus daarvan dat daar nie koste bevele gemaak word nie?

Ja, ek sou tog sê as 'n mens kyk - daar is mos 'n helpdesk op die tweede vloer en die meeste vakbonde en dan ook jou praktisyns...ek dink daar is eintlik baie min van hulle wat iets weet van die Arbeidswet. En dan vat ons dit CCMA toe en kyk dan wat gebeur, al is dit dan ook maar net die eerste ronde van versoening, kyk of daar nie 'n paar rand is om te maak nie, maar nou dink ek, ek wil nie verder gaan as jou vraag nie...dit is soos ek dit sien, ek het al mense daar gehad wat die CCMA sien as 'n ATM masjien - 'n bank masjien waaruit hulle 'n paar rand kan kry. Baie, baie applikante was al verwys waar hulle nie 'n saak het nie. En dan is daar ook werkgewers wat uit beginsel nie sal skik nie, net om werknemers te weerhou daarvan om in daardie gewoonte te kom, maar ten spyte daarvan weet ek bestuurders ervaar frustrasie om heeldag daar te sit en te arbitreer, hulle sal outomaties vir alles betaal.

So die ongerief van arbitrasie sal 'n werkgewer dwing om te skik en ek dink die werknemer sal misbruik maak daarvan

En dan selfs kom ons vat daai koste element, baie werkgewers, al kry 'n werkgewer koste teen 'n applikant wat niks het nie, gaan hy in elk geval in die praktyk niks kry daaruit nie.....dit is 'n onpraktiese koste. Behalwe as jy vakbond toe gaan.

Die lae skikkingskoers, wat sal jy sê is die grootste rede dat so min sake geskik word? Miskien moet ek vra, het jy die probleem dat jy agterkom dat dit moeiliker is om skake te skik deesdae?

Nee dit is so... ek sou sê my skikkingskoers is meer net voor arbitrasie en die rekonsiliasie proses word half geïsoleer. Ek dink die blote punt dat meeste werkgewers besef dat hulle nie vir konsiliasie hoef op te daag nie, daar sal jy glad nie skikking hê nie en is duidelik maar net die eerste fase, en as 'n kommissaris dan nie die risiko's uitwys nie, dan net voor arbitrasie, dan is dit moeilik om 'n datum daar te stel en 'n skikking te bereken, dit kan miskien 12 maande of 6 maande - so dit is maar my gevoel

Ek kry dit maar by ander kommissarisse ook dat hulle reken dat hulle meer sake skik by arbitrasie....as dit dan die geval is, is dit dan eintlik so onnodig?

Ja, ...want daar is niks minder moeite daaraan verbonde nie. As ek byvoorbeeld 6 konsiliasies skryf 'n dag dan betaal hulle my 'n dag fooi, ek kry nie vir dit wat ek doen nie, maar per dag, so as ek nou...hoe kan ek dit stel...as ek daar was vir 2 arbitrasies of sê dan 3 con-arbs dan dink ek dit sou beter gewees het. So ek bevraagteken eintlik die versoeningsproses, ek kan verstaan die rasionaal daar agter, maar ek dink dit het duur geword

Weet jy dis vir my interessant dat jy dit sê, want ek kyk eintlik meer vanuit 'n akademiese perspektief , so dit hang af van al die sake wat hy inkry, en wat jy nou vir my sê, miskien raak die konsiliasie proses oorbodig?

Ek dink so, Ja

In die begin was dit 'n goeie ding, maar dit raak nou so half oorbodig, hoekom dink jy raak dit nou oorbodig? Wat het verander in die partye dat hulle nou nie meer gebruik maak van die geleentheid nie?

Dis 'n moeilike vraag. Ek sou sê dis maar soos 'n gewone siviele saak, as iemand sê maar goed ek gaan jou dagvaar, dan sê jy dagvaar my maar en dan kyk jy maar of hy jou gaan dagvaar...en dan doen hy dalk niks nie, maar as jy nou ewe skielik gekonfronteer word en nou stap jy - en jy weet jy is skuldig, of jy het aandeel daarin, of jou hande is nie heeltemal skoon nie. Met ander woorde die tydsverloop in die hele proses. Ek wil nou aanvaar die wet is geskryf destyds met die doel om effektief en so vinnig moontlik sake te skik. Daar is applikante wat regtig soos in langer as 6 maande wag vir arbitrasie na versoening so hoekom wil ek nou so persoon betaal, hoekom wil ek aanbied om R10000 te betaal vir twee maande en ek wen die saak na die eerste proses. So ek sal sê, ja, dit is die tydsverloop wat negatief is vir skikking. Dit is hoekom ek sê dat my tendens vir skikking is baie beter by arbitrasie.

Dwing daardie reëls en regulasies die partye maar weer na die ou wetlike proses?

Ek dink so...ja ek dink so.

Wat is die verwantskap tussen interne prosedures wat die partye volg en die hoë verwysingskoers?

As die werkgewer beter sou werk...My gevoel is, ek dink, as ek vir iemand moet opnoem die aantal gevalle wat voor my kom, waar die persone regtig nie die prosedure gevolg het nie, is baie min. Ek gebruik altyd die prosedure van winkels - ek het nou die 1st September 'n saak gehad waar 'n persoon hom vererg het in die kantoor en hy het opgespring en gesê as julle weer met my rekenaar inmeng, gaan ek julle dik tik, hy het die man voor die bors gegryp en die bestuurder het hom ingroep en gesê daar is die deur – weg is jy - daai tipe ontslag kom een uit tien gevalle voor. So ek dink jou opvoedingsvlak van werkgewers is baie goed en al was daar 'n bepaalde prosedure gevolg, meeste of laat ek dit so stel - regtig baie min arbitrasie gevalle - in een of ander vorm is prosedure gevolg, al was dit dan nie die letter van die wet van die skedule gevolg nie. Die applikant het op 'n manier 'n billike geleentheid gekry om sy saak te stel.

As Kommissaris wat weeg vir jou die sterkste - dat een of ander prosedure gevolg was, of moet dit volgens skedule 8 van die wet wees. Wat is vir jou die belangrikste?

Ek dink die oorwegende vir my is dat die applikant 'n billike geleentheid sal kry om sy/haar kant te stel. As dit nou 'n huishouding is wat 'n bediende ontslaan het, wat die persoon nou self die geleentheid geskep het dat die applikant haar saak moet stel. Standard Bank het 'n prosedure gevolg waar hulle nie behoorlik kennis gegee het van 'n verhoor nie, wat hulle miskien die persoon wat op die punt deel van die geding was of deel van die mense wat voorheen betrokke was. In die omgewing waar dit plaasgevind het, die praktyke, daai organisasie wat my aanbetref 'n belangriker. Jy sal nie dieselfde maatstawwe aan die dag lê vir Standard Bank nie, as vir die privaat huishouding nie, dis seker nie reg nie maar dis soos ek voel daaroor. Ek voel as 'n persoon 'n billike geleentheid gekry het om sy saak te stel, min of meer in lyn met die riglyne van skedule 8 en daar is 'n billike rede vir ontslag dan is dit vir my OK

Wat is die toepaslikheid van die sisteem vir die klein en medium ondernemings?

Ja, ek dink dit is baie moeilik, dis hoekom ek so 'n bietjie van 'n nie heeltemal suiwer maatstaf het nie in al twee gevalle. Die kleiner besigheid - sê nou byvoorbeeld ek het 'n klein ...en ons is so klein groepie en ek het die persoon gekonfronteer, en as ek 'n buite persoon moet aanstel gaan dit my 'n goeie R3800+ kos om hom te laat voorsit en dit is buite my beheer wat hy besluit so ek gaan dit dalk self hou, ek sal hom eerder dalk dwing om te bedank as wat ek nou spesifiek gaan en hoë kostes aangaan

Weet jy, dis interessant wat ... vir my gesê het, hy sê die werkgewers moet eintlik maar gewoond raak daaraan om buite persone te gebruik, jy weet voor jy 'n persoon afdank. Sy gevoel is dat dit dalk 'n oplossing kan wees, daar is kostes aan verbonde, so ek dink jou perspektief is bietjie anders.

Ek dink, dis maar my persoonlike opinie die klein man wat regtig nie geld in sy firma of organisasie het nie, wat regtig van maand tot maand lewe, om skielik R3000 te moet voorsit, dan vat hy maar self die risiko. Of hy sit nou maar met die personeellid en hy...en miskien, so wat ek probeer sê is ja, dit is redelik 'n moeilike proses. Jy kan nou versekering uitneem teen sulke beslissings

Dit is nou vir jou interessante verskynsels, dan kan nou vir die ou sê, man ek het versekering, so nou kan hulle soort van roekeloos wees.

As ek nou terugdink aan aan my eerste antwoord, ek dink ook dat die werkgewers is nie meer so geredelik gewillig om te skik nie. Ek kom agter as hulle 'n beslissing kry teen hulle, dan vat hulle dit vir hersiening. Dan frusteer hulle die applikant en dan betaal hulle absoluut niks nie. So dis 'n heel frustrerende proses om... veral as 'n werkgewer 'n bietjie rug styf maak, dis 'n geweldige frustrerende proses...dis nog steeds 'n baie tegniese proses.

Dan dieselfde vraag, die toepaslikheid van die sisteem vir individuele werknemers?

Ek dink vir 'n werknemer is die baie maklik, baie toeganklik, daar is nie veel wat jy nie hoef te doen nie. ek staan nie fisies by die verhoor nie, maar wel by die papierwerk. Jjy kry nou 'n "do it yourself kit" – hoe jy 'n saak moet skik, hoe jy 'n saak nie moet skik nie.

Daar is 'n argument wat nou sê dat baie individuele werknemers kan nie na die CCMA toe gaan nie. Baie ouens voel hulle moet 'n prokureur gaan sien voor hulle CCMA toe gaan en daar is baie ouens wat sê jy moet by 'n vakbond begin. So jou algemene standpunt is dat dit is baie toeganklik vir die individu - jy kan letterlik by die CCMA se deur gaan klop en sê ek het 'n probleem?

Ek dink so. Ek dink dit is toeweldig toeganklik.

Die rol van die arbeidskonsultant en arbeidsprokureurs. Wat is jou persepsie van hulle?

Nee ek verkies dit dat daar 'n prokureur of 'n vakbond persoon is, eerder as wat die applikante self hulle sake hanteer, in die algemeen is dit eintlik net 'n frustrasie en baie keer het hy/sy nie eers 'n saak nie. Ek persoonlik verkies die teenwoordigheid (van hierdie persone). Baie firmas en groter organisasies sal 'n saak appeleer, dan maak hulle beswaar...Ek verseker vir hulle 'n gelyke speelveld, ek wil net die feite op die tafel hê. As 'n advokaat, of'n prokureur, of 'n konsultant of 'n vakbond persoon my kan help, dan help dit my in konsiliasie. Ek laat die prokureur toe in sy hoedanigheid as adviseur.

Dink jy daar is verskil in die rol van die konsultante en die arbeidsprokureurs?'

Ek dink daar is, ek het al prokureurs gehad wat glad nie die proses ken nie en daar is regtig konsultante wat beter is. En daar is konsultante wat regtig goed is en sinvolle skikkings kry, en weet dit is beter om die saak terug te trek voor die tyd.

Is konsultante net daar om geld te maak?

Nee.

W sal jy sê is die behoeftes en probleme van die partye, die werkgewer en die werknemer in die konsultasie proses?

Ek dink die hele proses van "serving en filing" van papers is 'n groot frustrasie, hierdie hele proses van default awards. Die vorms word maar deur die applikant voltooi en as hy dit nou verkeerd voltooi ... Daai hele proses is ontoereikend, daar dink ek het die applikant regtig hulp nodig, veral die applikant, maar die werkgewers ook, albei partye. Daar moet regtig meer siviel geregtelike beginsels soos persoonlike ondertekening, met ander woorde as my werkgewer my ontslaan dan moet ek per hand vir hom die dokumente gaan aflewer. Veral as hulle dit nie wil doen by aanvanklike verwysings, dan moet hulle dit doen by arbitrasie. Die arbitrasie sal meer spesifiek wees, ter volle plasing prosedure meer van die applikant sal afhang. Ek sê nou die ter volle plasing, maar meer die kennisgewing. Die applikant....ek weet baie keer, is dit nie eers op rekord geplaas, ek gaan my leêrs vooraf na, die kennisgewing, dan bel ek hom en sê ek is nie seker nie, dan faks ek dit vir hom. Dit is so 'n papier oefening, maar die tyd wat dit vat. Dit gebeur telkens dat die CCMA adresse sal inpons, dan is dit verkeerde adres, dan sê die werkgewer hy het nie kennis gekry nie, dan is daar 'n rescission application. Met ander woorde hulle stuur hom al die tyd na die verkeerde adres toe. Party keer help dit nie eers om 'n saak te herskeduleer nie. Ek aanvaar dat hulle werk op die adres wat die applikante verskaf - dis hoekom ek dink dat iets soos persoonlike betekening kan werk – waar die applikant na die werkgewer toe gaan en sy handtekening kry. Dit sal ook help as 'n balju betrek word en iets betaal word daarvoor. Daai hele proses veroorsaak net administrasie. Soos jou versoening, jou eerste proses van arbitrasie, baie werkgewers ignoreer dit of kry nie kennis nie. Dis twee prosesse wat eintlik een kon word.

Gaan die hele sisteem van geskilsbeslegtiging verander? Met ander woorde nuwe wetgewing vir bepaalde probleme. Dink jy die sisteem gaan verander en indien wel, hoe gaan dit verander?

Ek praat altyd met groot entoesiasme hieroor, as hulle my gevra het. Die proses moet definitief vereenvoudig word, en dit help nie, daar moet eintlik 'n con-arb wees van die begin af. Maar met voorbehoud, ek sal nog nooit 'n con-arb dat... 'n default award gegee word...net om die werkgewer 'n laaste geleentheid te gee om ...Ek sal amper sê net soos met siviele howe is daar baie min mense wat eenvoudig net nie opdaag nie, omdat jou betekenigs vereistes so streng is en daar is omtrent nie 'n party wat nie weet hy moet in die hof wees nie, hy weet dit by wyse van 'n balju. Dat die werkgewer moet weet hy moet in die hof wees. Die applikant sal altyd van sy kant af weet, maar die applikant is in beheer van sy saak. En dan met die kommissaris wil ek half sê die arbitrasie rol idee werk beter. As jy van die begin af seker maak dat dat beide partye kennis gekry het.

Wat van die invloed van die privaat geskilsbeslegtigingorganisasie, wat dink jy gaan die impak wees daarvan op die statutêre stelsel?

Ek dink baie min, want jou privaat inisiatief is vrywillig, ek sê nou baie min, maar ek praat nou meer spesifiek oor jou individu, soos as daar nie 'n ooreenkoms is nie, dan moet jou privaat persoon 'n klomp geld betaal.

Dan het ek nou 'n ander vraag, 'n stelling: "What would your response be to the statement that the CCMA is part of sophisticated system of dispute resolution created by the LRA and in which most role players are not capacitated to operate in it"

Ja, ek dink die stelsel is te gesofisitikeerd en dit nie 'n rasse antwoord nie. Die bedryfstelsel, die ou apartheidstelsel is ...ek dink dit is nog steeds 'n CCMA gedrewe stelsel. En ek dink as ons by die hooggeregshof en die landdroshof dieselfde ...het as wat die CCMA het, wat eintlik die partye, ek praat nou meer siviel se plig is om ...dit sal meer party gedrewe wees ...

Kan dit wees dat al hierdie tegniese vereistes 'n impak het op die mense verhoudinge, daai menslike "human quality", bv die werkgewer wat werklik die werknemer help met sy persoonlike omstandighede?

In 'n kleiner opset word jou menslike verhoudinge belangrik. So dit is meer jou Checkers of Pick 'n Pay, in jou groter organisasies, is daar nie wedersydse gevoel nie. Die vraag wat maar altyd opkom - is billike sanksies toegepas, dis waar dit stop. Ek het nou 'n geval gehad waar 'n persoon weggeroep is van haar werkstasie, sy het toe gaan werk en opdrag gegee vir 'n sekuriteitswag om haar "till" op te pas, toe sy terug kom is daar kontant gesteel, daai tipe van ding. Sy het vinnig uitgespring om iemand te help, dis nie dat sy sommer net nalatig was en gaan tee drink het nie. Die werkgewer het haar ontslaan omdat sy 'n reël gebreek het. So ek dink in die groter opset, jou menslike verhoudinge nie bestaan nie. Ek weet dis 'n baie oorbeklemtoonde stelling.

Wat kan gesien word as alternatiewe maniere van geskilsbeslegtiging (ADR), wat is alternatiewe manier behalwe die CCMA?

Ek sou sê as werkgewer nie gedwing word om deel te word van 'n bepaalde stelsel nie, dan sal hy dit nie noodwendig kies nie, vrywilliglik nie. Dis maar amper die applikant wat die speelveld bepaal, deur sy dispute te verwys na die CCMA toe, die werkgewer het nie 'n keuse nie, tensy hy in 'n groter opset beding dat al sy dispute/ arbeidsverhoudinge...As dit van die werknemer afhang, hy bepaal die speelveld, binne die riglyne van die wet.....dink ek daar is min applikante wat sal toestem.

Wat is jou ervaring met vakbond verteenwoordigers - hoe voorbereid is hulle, hoe is kennis, hoe is hulle "skills"?

Dit varieer verskriklik, jy kry die ou wat goed is, en dan kry jy nou weer die amptenare wat net "going through the emotions". Maar jy kan nie 'n algemene reël maak nie, jy kry regtig die ou wat goed is en dan kry jy 'n ander ou wat werk by die vakbond en nie regtig ernstig is nie. Ek dink dis waar mense verkeerd gaan - ek kan nog my pad oop sien om 'n persoon te verwys na die CCMA toe, ...

Interview Participant 8: Initially full-time, now part-time Commissioner, Lecturer, more than six years experience, legally qualified, female, 30 – 40 age group

25 Augustus 2003

What is the reason for the high referral rate?

There is more than one reason. It is a very accessible system, and that is the problem, when a matter is referred, there is no a proper screening of the merits of the case. But it is difficult to screen a matter on merits. Need to improve the screening initiative. But it is also due to high unemployment. People will do anything to get money, and that is the reason why people take on their employers. Representatives will tell people to pursue a matter, because they also need to make a living. The other problem is that the screening process is being done by case management and it should actually only be commissioners who are doing it.

What should be done to reduce the unfair dismissal cases for the small to medium size business?

It cannot be stopped, unless you make the system less accessible.

What is the relationship between the internal and external mechanisms?

There is always a link between what happens internally and externally. Where an employer has done everything in his power to effectively resolve this matter internally, there is a chance the applicant would not take him on externally – definitely a link between what happens internally and externally – but no guarantee. Medium and small size employers feel they have to reaffirm their power. Employers make their power visual during the process – this in turn aggravates the situation. If the applicant brought him to the forum, it means that he hands over the power and that is unacceptable to them. The system has created a generation of labour relation practitioners, employers organizations and union officials to get the employer that by showing off your power at a disciplinary hearing is detrimental – you pay up afterwards. IR consultants and officials are also in the business of making money

What is the appropriateness of the system for small to medium sized organizations?

It is very accessible and I think it is appropriate.

What role do you think the labour consultants and labour lawyers are playing?

They will always play a role. What kind of role will they be playing – lawyers: focus on the hard issues – they can tell an employer, party or individual that according to the law you can or you cannot, they cannot tell the party that according to the law you may or may not... The soft issues involved – you should or you should not.

The employment relationship in the past was in essence a relationship in human nature, but this has become a legal arrangement – a different nature in this relationship – a legalistic one.

The consultants are bad for the system. There are many fly-by-night consultants who are just in it for the money – although there are some of them who are very good. Representatives who understand the law, makes the processes easier, because they understand the risks involved and advise their clients. Lay people only see the emotional side of people, cannot see the legal risks. Need to be educated.

Needs and problems of employers and employees?

People in the workplace do not know how to handle the employment relationship any more. Simply because they do not want to handle it any more. People needed each other in the past and they were happy to work with each other and there was a burning desire to dissolve conflict. People do not have that desire any more. There is a changed frame of mind when going into a grievance procedure. People prefer to focus on differences and not on what they have in common.

Should the system change?

The system is not going to change, and if so, its not going to change soon. Not after last years' changes to the LRA. They were significant changes. This generation cannot change it drastically– maybe a next generation will be able to effect more changes to it. There is no reason for parties to use private dispute resolution. The new system that was created after (1996). More people used ADR before 1995, but there is a move back to statutory dispute resolution – CCMA mediation and arbitration.

What would your response be the statement that the CCMA is part of a sophisticated system …?

No, the system is not too sophisticated. The parties are incapacitated but the CCMA gets lots of publicity and there are no excuses not to have the capacity. Specifically in the more organized sectors. The bigger employers need to get their act together. Specifically in the motor industry it is the case.

The technical requirements for dispute resolution prevents people from seeking ADR…..

The Commissioner usually asks 'have you followed schedule 8?' and must be guided by those guidelines. People will rather opt for ADR – but because of the technical requirements, the system prevents parties from seeking ADR. This prevents people from seeking that human orientated relationship to the solutions to the problem. The commissioner is at fault if he/she does not consider Schedule eight, but the commissioner is also at fault if he applies it too strictly to small employers.

What would you say is alternatives or better solutions in the new context? ADR?

There is another problem with ADR. The Courts nowadays are not certain if they can recognize ADR, especially if it is contained in collective agreements. Strike Procedures – think twice before opting for the traditional ADR. A lot of statutory changes took place from a judicial to an arbitration point of view. One has more control over the process, for example the appointment of commissioner. From a constitutional point of view its much better.

Reason for the low settlement rate?

People are threatened to settle. The statistics are not published and the reason for low settlement rate is that there is not enough time allocated to settle the dispute - only 1 hour to resolve disputes. The employer's internal procedures are not in order. If they have good internal procedures, they do not want to settle at conciliation. But, commissioners must make it work. They must be trained in the skills to resolve conflict and disputes and they are not trained.

Interview Participant 9: Part-time Senior Commissioner, private conciliator, mediator, labour consultant; CCMA trainer, male, 40-50 age group

10 September 2003

Wat is die rede vir die hoë verwysingskoers?

Die rede vir die hoë "refferal rate" is omrede daar 'n swak vertrouensverhouding tussen die partye is, intern in die maatskappy, met ander woorde aksies wat werkgewer neem om, byvoorbeeld dissipline daar te stel wat bevraagteken word deur die werknemer en sy werknemersorganisasie.

Hoekom?

- Omdat daar 'n swak vertrouensverhouding is en dissipline nie regverdig toegepas word nie.
- Daar is nie konsekwentheid aan die werkgewer se kant nie.
- Dissiplinêre kodes en prosedures word nie billik weerspieël nie.
- Vakbond is nie betrokke by opstelling.
- Billikheid word ook bevraagteken omdat daar rassisme, en 'n geskiedenis van konflik en opponering in die organisasie is – 'n geskiedenis van konfrontasie – in verlede het vakbonde en werkgewer mekaar as vyande gesien. Spoel oor in toepassing van dissipline. Maak nie saak wat jy doen nie, dit word negatief ervaar.

Jy moet onthou ons is nou maar eers tien jaar in die proses van transformasie en transformasie begin nou eers plaasvind in meeste organisasies. In groter en middelklas ganisasies. Hulle het reeds begin in hulle top vlakke.

Dan is dit ook 'n kultuur probleem aan die kant van die werknemer en vakbond (historiese konflikbenadering). Werkgewer se toleransie vir ondergeskikking….. In klein en medium organisasies het transformasie nog nie plaasgevind nie. Ek praat nie eers van hulle nie. Meeste het nog nie geraak aan transformasie nie. Nog ou paternalisties verhouding.

Kommunikasie sisteem in maatskappy werk nie effektief nie...waar die doelstelling van dissiplinêre aksies nie duidelik oorgedra word nie, die beginsel waarop dissiplinêre aksie berus word, nie oorgedra nie en ook nie goed gekommunikeer oor hoekom sekere goed onkonsekwent toegepas word nie. Nie goeie kommunikasie nie. Mense verstaan nie die beginsels agter die prosedures nie.

Verhouding tussen interne en eksterne meganismes.

Natuurlik gaan sake verwys word as jy dit nie goed hanteer intern nie. Waar daar 'n hoë vlak van konsultasie is en waar partye mekaar erken en gesamentlik beplanning doen, is daar beslis 'n laer vlak van verwysing.

Nog punte wat in organisasies aanwesig moet wees om laer verwysingskoers te hê is hierdie goed:

- Deursigtigheid (besluitneming in maatskappy). Moet mekaar respekteer en gesamentlik beplanning doen vir die toekoms.
- Ook werking van appèl sisteem – as dit goed werk sodat werknemers vertroue daarin het in die sisteem - dit sal ook keer dat alles na CCMA gaan.
- Vertoue dat die voorsitter in staat is om saak te hanteer en nie net 'n "ritueel" nie. Werknemer het groter vertroue in die werkgewer. Dit is 'n billike vangnet dat sake nie na CCMA gaan nie. Hoe beter appel werk hoe minder sake. As hulle verstaan waaroor appelle gaan.
- Baie organisasies het nog 'n "review system" – 'n paneel bestaande uit lede van die vakbond en bestuur. En hulle kyk selfs na die appel na die saak. Dis mense wat nie by die saak betrokke was nie. As hulle seker is dan bevestig hulle die ontslag. Daar is meer vertroue in die organisasie se prosedures. Dis meer die reël by groter organisasies.

"Accessibility", geen koste aan verbonde nie.. Ek dink nie daaar moet 'n "penalty" wees vir verwysing. In ons tipe samelewing met baie ongeskoolde en laevlak werknemers met lae lone en baie armoede moet dit so toeganklik as moontlik gemaak word.

Ek dink nie die verwysing van geskille is frivolous nie – ja, van die werkgewer se kant af ja maar nie van die kant van die werknemer wat 'n bus of taxi moet neem oor honderde kilometers om sy hartseer verhaal te gaan vertel nie. Vir sy lewe is dit baie belangrik. Sisteem moet toeganklik wees.

Klein en medium werkgewers?

Vlak van kundigheid van die vakbondverteenwoordigers. Hoe hoër hulle vlak van kundigheid, hoe beter die kans dat hulle net sake met meriete na die CCMA sal verwys. As hulle ordentlik kan adviseer oor meriete van sake sal dit ook help om verwysings te verminder.

Vlak van kundigheid? - Soos die reënboog – dit wissel. Ja daar is altyd ruimte vir verbetering maar daar is net soveel ruimte vir verbetering in die kundigheid van werkgewers, van die middelvlak toesighouer tot senior bestuur. Die senior ouens is nie veel beter ingelig oor ontlag nie.

Nog rede vir hoe verwysing – Die "national footprint" van CCMA- die CCMA het kantore regoor die hele land (provinsiale verspreiding). Die CCMA is maklik toeganklik vir almal en daar is geen koste faktore nie.

Die hoë verwysingskoers is 'n aanduiding van vertroue in die sisteem. Werknemer glo dat die sisteem wat die staat daargestel het, iets is wat hulle kan gebruik.

Verhouding tussen die interne meganismes en effektiewe geskilsbeslegtiging.

Geskilresolusie sisteem werk baie goed vir die belangegeskille maar daar is geen interne sisteem wat werk vir individuele geskille nie – onbillike ontslag. Want daar is "dispute resolution meetings" vir die groter sake. Kollektiewe ooreenkoms reël hierdie sake goed. Maar 70% van sake is onbillike ontslag. Is daar enigiets wat dit hanteer? Baie organisasies het nie interne meganismes nie. Wet sê nie jy hoef 'n appel prosedure te hê nie – dit hang af van die ooreenkoms. Baie maatskappye sê as jy nie gelukkig is met my interne prosedure nie dan kan jy maar CCMA toe gaan. Ek dink nie daar is 'n behoorlike dispuut resolusie sisteem in organisasies wat werklik 'n impak het nie. Baie organisasies het geen interne procedures vir individue nie.

Vlak van kundigheid van vakbondverteenwoordigers?

Hoe hoër die vlak van kundigheid van die vakbond verteenwoordiger, hoe beter word werknemer geadviseer. Hoe laer die vlak van kundigheid, hoe minder vertroue deur die werknemer. Die vlakke van kudigheid varieer baie. Daar is 'n groot leemte by die vakbonde, bestuur en toesighouers.

Toepaslikheid van sisteem vir klein tot medium werkgewers?

Ek stem glad nie saam nie. Skedule 8 is baie eenvoudig, en kan deur klein en groot werkgewers verstaan en toegepas word – dis nie gekompliseerd nie.- dis niete gesofistikeerd nie. As hy 'n manual kan lees om sy diesel enjin te diens dan kan hy die wet oplees. Meeste werkgewers se "mind set" is dat finansies goed bestuur moet word, produksie metodiek moet goed wees, maar mense is net dinge – en hulle het lae prioriteit. Die houding

teenoor die werkers moet verander – bestuurstyl moet verander – mense moet na mense kyk soos jy na jou masjiene kyk. Werkgewers se houding moet verander.
Werknemers se houding moet ook verander en groter begrip ontwikkel vir die sisteem. In groot organisasies is mense bereid om op te staan vir hulle regte. Die basiese stappe van billike dissiplinêre verhore is elementêr. En as hy dit nog nie verstaan nie, dan is daar mos 'n Attie van der Merwe en Hanneli Bendeman wat jy kan vra? Daar is mense wat kan help. Die dom dame by DOL is glad nie so sleg nie. DOL het "firstline consultants" en hulle fasiliteer oor die foon. In die 10 jaar het die manier waarop arbeidsverhoudinge gedoen word, baie verander. Kultuur en bestuurstyl moet verander.
Daar is areas waar die CCMA baie goed doen – en baie sukses behaal. Hulle werklas is enorm en hulle doen goeie werk. Daar is nie genoeg geld nie, daar is baie dom uitsprake ens maar ons sit in Afrika. Maar sisteem moet nie meer ongesofistikeerd wees nie. Ja ons moet gaan kyk na "expedited" prosedures en meer aandag gee aan "dispute prevention" en bemagting van bedingngsrade.

Expedited dispute resolution system?

– meer aandag gee aan "dispute prevention"
- bemagtiging van jou bedingingsrade
- "Dispute prevention" - meer opleiding gee aan klein en medium maatskappye. Baie meer gekonsentreer word op opleiding in organisasies.

Bestuur en administrasie – kan nie sê nie.

Toepaslikheid van die sisteem vir die individuele werknemer?

Die vorms wat ingevul moet word is redelik eenvoudig. Persoon kan homself gaan verteenwoordig by die CCMA sonder enige koste. "Footprint" is goed – hoef nie ver te reis nie. Wat mens na kan kyk is 'n Mobiele CCMA om na maatskappye toe te gaan op platteland/kleiner dorpies. Daar was al so 'n inisiatief. Publiek moet beter ingelig word oor "dispute prevention". Daar is 'n persepsie dat wanneer jy na die CCMA toe gaan, dat jy 'n arbeidsprokureur / konsultant nodig het, maar dis omdat die publiek swak ingelig is en daar is 'n opvoedingstaak nodig. Nie nodig om verteenwoordig te word in konsiliasie nie. Miskien word konsiliasie misverstaan. CCMA moet verduideliking gee rondom wat konsiliasie is. Publiek moet ingelig word oor hoe die sisteme werk. Kommissarisse moet ook maar baie opvoedingswerk doen. Die werkslading speel ook 'n rol.

Watter rol speel arbeidskonsultante en arbeidsprokureurs?

Parasiete, hulle vra R650,00 om 'n verwysingsvorm in te vul. Veral op die mense wat laer lone verdien. Advice centers by universiteite, by nie winsgewinde organisasies – "Non-profit advice centres" kan baie, baie goeie werk doen. Studente kan so betrokke raak en goeie ondervinding kry. Mens hoef nie by CCMA toestemming te kry om dit te doen nie.

By arbritrasie is dit goed om die arbeidsprokureurs toe te laat. Selfs in konsiliasie word hulle toegelaat as die kommissaris dit goed dink.

Arbeidskonsultante doen goeie werk.

Needs and problems?

- Meeste erkenningsooreenkomste is redelik duidelik is dit kom rondom dispuut resolusies. Of hulle die nodige kundigheid het om dit binne organisaise behoorlik te doen is 'n vraag. Meer opleiding kan aandag geniet.
- Moet die nodige vaardighede hê soos:
  - "problem solving skills"
  - "job-decision making skills"
  - "listening skills"
  - "communication skills"
  - "onderhoudsvaardighede"
- dispuut resolusie meganismes moet goed verwoord en op skrif wees – moet duidelik wees – sodat duidelik verstaanbaar is deur almal
- Opleiding – nie net induksie – dit gee net 'n oorsig.
- Seker maak daar is 'n dissiplinêre kode – het meer diepte opleiding nodig

Moet stelsels verander, en indien wel, hoe?

Gaan sisteem verander om konsultante toe te laat. KONSULTANTE – kan saamgaan konsiliasie toe, maar nie prokureurs nie. PROKUREURS – kom in by arbitrasie. Die wet is baie duidelik daaroor maar daar is buigsaamheid in die toepassing daarvan. Ek dink dit is reg dat dit buigbaar toegepas word. Met komplekse sake is dit noodsaaklik en hulle kan realiteitstoetsing doen. Die sisteem is 'n goeie sisteem.

Is die CCMA nie deel van 'n te gesofistikeerde stelsel nie?

Nonsens

Tegniese vereistes?

Nog groter nonsens. Departement van Arbeid het skitterende "flyers" en boekies en riglyne. Daar is ook 'n mentaliteit van rassisme ingebou – ons moet neerkyk op die wat tans die diens lewer – omdat hulle nou swart is. Dit kan wees dat daar 'n kommunikasie probleem is. Hulle moet meer doen om dit wat die CCMA goed doen aan publiek te vertel. Deels rassisme. Onkundigheid omrede ons nie altyd weet wat hulle doen nie. Public relations oor wat hulle goed en reg doen, kan baie verbeter

Daar is negatiwiteit rondom die CCMA, onderskat die omvang van die operasie wat plaasvind. Kyk na persentasie van swak en onlogiese uitsprake, maar daar is baie goeie uitsprake ook. Mens moet ook praat oor die goeie uitsprake. Wel, die wiele het nog steeds nie afgeval nie.

Wat alternatiewe dispuut resolusie (adr)?

ADR = CCMA
ADR – nie deur middel van ander metodes bv "judicial processes" nie. Dispute hanteer deur ander velde, alternatiewe proses om te kyk of mens kan skik; as nie kan gebeur nie, gaan dan na CCMA. In verlede is arbeidsgeskille deur middel van die howe hanteer. Doen dit buite howe, vinniger, en goedkoper.
ADR - Wat is "alternatief" – dit is alternatief tot die "judicial system"- kyk eers of mens kan kommunikeer, skik ens.
ADR = geinstitusionaliseerd
ADR = kan ook deur statutêre organisasies gedoen word
CCMA = statutêre geinstitusionaliseerde ADR

Ook ander ADR (buite CCMA) wat gedoen kan word deur private organisasies.

- ADR is nie net formele mediasie en arbutrasie nie
- ADR is ook "facilitation" in al sy fasette
- Alle impakte wat gaan oorloop in labour issues – voorsitter moet onderhandel
- Derde partye wat beide bestuur en vakbond help met onderhandeling en probleem oplossing – word betaal deur werkgewer
- ADR gaan om die oplossing van dispute - nie net formeel, maar ook informele dispute en probleme, areas van verskille, van spanning tussen werkgewer en werknemer, buite die formele regstelsel
- ADR sluit in mense soos arbitrasie, formele arbitrasie en bemiddeling wat twee grootste bene daarvan is, maar kan ook gesien word as fasilitering van verskeie situasies, soos byvoorbeeld herstrukturering, daarstelling van "performance management systems" en werksgradering ens.

ADR is in ander lande baie meer geinstitusionaliseer. Dus ADR is OOK geinstitusionaliseer. Is daar enige ander ADR? Ja, soos buite CCMA soos bedingingsrade en privaat geskilbeslegtigingsorganisasies wat ook ADR doen.

ADR is nie net formele konsiliasie en mediasie nie. ADR is meer as net konsiliasie en mediasie. Derde party intervensie wat beide partye sien as "credible" individuals. Werkgewers betaal maar hulle gebruik jou omdat die vakbonde en werkgewer jou ken en vertrou.

Wat is jou siening oor private geskilbeslegting?

Great stuff – hulle vul die CCMA aan – Daar moet meer daarvan wees – Daar moet beter saamgewerk word met CCMA – nie gesien word as opponenente nie.

Belangrikheid van "dispute prevention"?

Belangrikheid van "dispute prevention" – "partnerships for capacity building" - daarstel met organisasies wat "capacity building" doen tussen CCMA en ander organisasies. CCMA benodig 'n beter "dispute prevention

strategy". Beter kwaliteitskontrole oor arbitrasie uitsprake en versoening – word dit ordentlik gedoen? Kliëntediens moet aandag kry . Meer samewerking van adminisatrasie been en kommissarisse.

Die CCMA moet meer kwaliteit kommissarisse kry en ontwikkel. Kwaliteitskontrole sisteem, meer aandag aan kliënte diens, regte kwaliteit mense aanstel.

Dink jy mense is bang vir konflik?

Nie in die groter organisasies nie. Miskien in kleiner oganisasies.

Interview Participant 10: Labour lawyer and formerly a director of a private dispute resolution body, CCMA trainer, male, 45-55 age group

19 September 2003

The core content of our representations, … and myself, was …that the Bill as it was at that stage was … what they had in mind was far too ambitious for anything physical and the resources that they had. It was just far too ambitious for the physical, financial and economic and, very important, human resources.

If they went forward with the system as envisaged, it would run the risk of collapsing, of discrediting itself by being overwhelmed by the number of disputes. And the inability to address the…. And I think those concerns have proved true. And I don't think there is something drastic that … to .. over the years that has been done to address all types of problems.. The fundamental problem has not been eradicated is the lack of resources, the number of disputes referred to the CCMA, and the jurisdiction that has been expanded by the legislation. But the allocation of financial resources, if I am not mistaken, has declined over the years. And so it is physically impossible for that organisation to do what it is supposed to do. Because it does not have enough commissioners, enough courts, enough money to act appropriately, and so that is what I said and I still stand by it.

The other thing is that …. We first put in actual representations. So we said that in the beginning, and there were two articles. There is one important one… It is in the journal of what is called the South Africa Association of HR Practitioners… There was one smaller journal and one in the ILJ. The earlier one in the smaller publication. We refer in them to our representation and if you have them you have most of what we said.

Question 1: What about the high referral rate?

First and most obvious is the enormous jurisdiction that they have given the CCMA, not just unfair dismissals but all the other jurisdictions. So it is not surprising… What they did not take into account is that the consolidation of South Africa, all the previous homelands etc into one, and the extension of labour law into the public service and the increase in the scope of the LRA, it was enormous for a start. So the extension of jurisdiction was a problem.

Furthermore, what is very praiseworthy is that is very accessible to the average worker to get there. It was intended and I think it was a good thing. But the downside of the situation is that it is encouraging even hopeless cases to take a shot at the CCMA. Because they expect to get money out of the CCMA. Or that because the standard of commissioners is so poor, that they take a chance in getting something anyway. There is absolutely no real risk of a cost order against them. They have nothing to lose. There is no disincentive for bad cases. So that is in essence what happens with the high referral rate.

How to deal with it? One idea that I've got is very radical in the context. It goes back to another issue, and that is that if you look at the statistics of the CCMA, there is a very low incidence of awards of reinstatement. The vast majority, the overwhelming majority of awards, are for compensation, and if you were able to get the statistics (but nobody is able to get the stats because it will show what a failure the system is) it will actually illustrate the point. I ask audiences to identify one single reinstatement order of the CCMA and who is still in the job now, and no one is able to do it. I would suggest in practical terms that there are very, very few cases of reinstatement orders by the CCMA, of persons getting their jobs back.

There are a couple of factors. Let me just go back and tell you the story about an employer who I was trying to convince to go to private arbitration instead of the CCMA. However, according to him the CCMA was the most wonderful thing for employers. It works wonderfully for us, he said, because this is how it works. We fire whomever we like. We just get rid of them. We have an internal enquiry. They then refer the matter to the CCMA. However, the referral time is a couple of time before it gets to conciliation. It takes a minimum of a

couple of months. Remember it's a poor employee with no resources and a fair percentage do not pitch for the conciliation mostly because they find alternative work. They have to survive somehow, so they disappear. If they do come to conciliation, you have a deadlock there, then its referred to arbitration, and that takes another couple of months. So it take 6-9 months to get to arbitration. The CCMA commissioners are so overworked or so 'undiligent' that it takes another 2-3 months to get an award, so we already have a year and a half. Show me how many workers will go on fighting a year without pay. Most of them disappear either by the time of the conciliation or the arbitration, or the arbitration award. If the award is against us we take it on review, and that takes 6-12 months. Then it takes another 2-3 months waiting for a judgements, and if its against us, we take it to the Appeal Court. It takes a couple of years.

It is exactly like the old system. This is what we said. In a compulsory system it is practically impossible to eradicate ...So the long and the short of it is that people are not given their jobs back because they are exhausted by the process. If you look at the statistics, there are very few cases were they are in fact reinstated, rather compensation is awarded. Even if they are reinstated, people just challenge it and eventually the worker settles on some money. I think the test of whether an unfair dismissal regime is working, is what is the percentage is of people being reinstated and remaining in their job. An enormous amount of state and employer resources are spent on the whole system.

Better than going through the whole farce, which does not result in real reinstatement, why don't you have a system where employers can dismiss workers at will, with or without just cause, provided the employer is prepared to pay compensation equal to pay to the worker. If employer does, there is no challenge. But if the employer does not, then the worker can claim reinstatement, etc. If you did that what you would do is instead of the state spending a fortune on the CCMA and the employer spending all the money on lawyers and so on, you would have a system that makes a lot more sense...

The employer thinks the system is hostile to employers, but it is only employer hostile because it costs the employer a lot of money to get rid of a person. But it adverse in the sense that it does not force him to employ a person he does not want, because the system is loaded against the worker, because the employer can act in the way I have described. So the system is simply not working as it should, ie putting persons who have been unfairly dismissed back in their job. It actually allows workers who deserve to be dismissed, to distort the system.

In particular, high level employees can hold an organisation to ransom. It is so difficult to get rid of a manager or an executive. Some cases run for more than 40 days in arbitration. You would expect the system to exclude such employees as they would be able to look after themselves. So you have to totally exclude the senior managers. So you exclude such employees and you provide that if you dismiss employees you have to pay compensation. If you choose not to compensate them, then they can challenge the dismissal.

The other thing that is possible, is pre-dismissal arbitration. But for reasons I have written up, they are so badly regulated that they are virtually useless. Its in the latest ILJ. The advantage of pre-dismissal arbitration is that firstly you can cut out internal disciplinary enquiry, and go straight to arbitration. It actually promotes a co-operative relationship between state arbitration and private dispute resolution. At present everything is being done to frustrate private dispute resolution. Some people refuse to allow the accreditation of private bodies. They say that if they allow it, it will allow a market in private dispute resolution. This should be done by the state, they say. However, my view is that if you want the system to work properly in a country like this, you want a synergy between the state and private systems of dispute resolution. You want to do everything you can to encourage those that can afford it, to use private dispute resolution and pay for it themselves, and take that burden off the CCMA so that it can look after the vulnerable and the poor, the farm and domestic workers. You must put pressure on the powerful unions and employers to do their own thing. For example you could say, as in s23 of the LRA where all disputes about implementation and interpretation go to arbitration, that one of the consequences of recognition is that the parties must provide for their own private dismissal arbitration. And subsequently they will make more use of private dispute resolution agencies. Instead what they did is to discourage private resolution because of the mentality of some union people. The irony is that managers etc who can pay themselves, clog up the system.

Its so insane that you have to replicate the enquiry that you have internally, again in the CCMA. Cut all that out, and go directly to pre-dismissal arbitration. Pay R2000-R3000 and get a final arbitration. Otherwise parties can do it by agreement, but its just not encouraged by the state. Another way is just to write it into the contract of employment of senior and management employees. Its certainly not supported by the unions either. Its much easier for them to go to the CCMA, and they just have someone sitting at the CCMA day in and day out, and find some cases to recruit. There is no duty on unions to service their members. The system also suits the employers because they can do it themselves if they exhaust the employee, and it also suits the unions because they are able to say this is our system – we designed it and the CCMA is our agency. The employer must sit there until the

case is called. Of course what they don't say is that by the time the case comes up, the employee is so exhausted that he will accept compensation. The system will never change because it suits the big powers – the big unions, the big employers, because they call the shots. The fact that it does not suit the average employer, its just a charade. Nobody is going to …No employer is going on the record saying…

There has been some research as to what a dismissal costs the employer. However, it could not be published for some reason. The actual data was not published. Big companies will be able to give information about down time and I suppose what it is costing. It is interesting data.

They spend lot of time training people supposed to chair disciplinary enquiries. Generally the standard of those people are so low. Let us put it differently. For people to work through the minefield of the LRA to be able to get it right, they have to be a highly knowledgeable and skilled person. There is no way that the average line manager stands any chance at all of conducting a fair internal disciplinary enquiry. Nor is there any chance of them really understanding whether this dismissal is fair or not, and whether the person should be dismissed. You can throw as much resources at it as you like, there are just not people in organisations that have the time or the interest or the ability to become that expert in the system.

Can you train the middle management? Yes you can train the middle and senior management how to chair a disciplinary enquiry. And train shop stewards and middle managers how to present a case, present evidence. But I don't have any confidence that even with that competence they will get it right. It is just so very, very complicated. That's a serious problem. If you have high competence requirements for a fair dismissal, you need a competent person to come in as early as possible to determine if there are grounds for dismissal or not. But I don't think that exists in-house in companies. They just don't have people with the necessary skills. At Wits, for instance, there are highly skilled and highly intelligent academics to chair disciplinary enquiries, but they have just abandoned the idea of in-house disciplinary enquiries. They use external people to chair their enquiries – no matter how good these academics were, they were not perceived to give good advice, so they will always use the CCMA. Its such a minefield and if you also take those professors' time, it just does not work – rather get an outside person. For companies it is even worse because they don't have this type of intelligent persons, especially small and medium employers, I just think the situation is hopeless. There is no prospect of a small employer ever being able to comply with the LRA.

What was intention of the Act – less legalistic, less technical?

The emphasis on conciliation I just think was a pipe dream. The intention was just naïve and childish. The whole thing is about technical legal rules. The moment you have to determine whether a person is guilty or not, there is no way of resolving this, of whether they should lose their jobs, when the consequences are just so dire with 40% unemployment. It is a complex task to determine if that person is guilty. There is no simple way of doing it, there is either a right way of doing it or a wrong way of doing it. For example we were asked to design an arbitration system for commissioners that require no evidence and no cross- examination. So I asked what do you have in mind. So they said the commissioner must hear the employer and the employee and then make a decision. Now you cannot believe how infantile that is. What if the employee says thus and the employer that, and they are contradictory versions, how do you decide - a complete nonsense to decide on "suss". For the first nine months of the CCMA they tried to do away with evidence and they got reviewed out of their minds, because in a constitutional state you have to have proper legal enquiry. There has to be some rational process if you are going to grant compensation against an employer. You may not like it but you cannot get away from it.

The only way you can simplify it is by some voluntary process – an arbitration procedure where you have no exchange of arguments, no statement of case. This will work because both parties agree to go there. Arbitration has always been a voluntary process and it is not any more. CCMA arbitration is a misnomer for state adjudication without a right of appeal. (Author's NOTE: this supports the contention that CCMA arbitration is not ADR). A 'court of arbitration' can have consequences. You are forcing the employer into this institution. You are imposing a decision on this person, and he will do everything he can tlo get out of it. If you rule against them, they are going to fight that by way of review, etc. The incidence of review for private arbitrations is less than 1% and for CCMA arbitrations it is 30%, or whatever it is now. It is not only the poor quality of arbitration, but because in a compulsory system the employer is going to fight it tooth and nail. Its like a first year university student that has some idealistic notion that you can have this type of system, but it is nonsense. It has failed, but they will not now acknowledge it. No country in the world will say that their criminal procedures are too long - that is what it takes to establish guilt or not, there is just no short cut for that. There are ways of expediting things but the more you expedite, the more skilled your decision- makers have to be. Another problem was to try to get people to do 3 arbitrations a day. It's the most technical task under the sun. It is just conceptually flawed. And that is why the whole system is fundamentally and conceptually flawed, and no amount of tinkering is going to get it right. What we can do about it is to go back, have a judicial enquiry, and listen to the experts.

Is is not based on the Australian system?

It's a lie. There is no relationship with the Australian system. There is nothing like it. The Australian system is geared to interest disputes, and not for rights disputes and dismissals. It is a gross misrepresentation. They pulled the wool over our eyes and the ILO... it was based on the Australian system, which is false. But at the time we were so vilified for saying the system will not work, we were called a traitor, called rash, called ...No proper discussion, no engagement and so on. The whole discussion just closed down.

Some people say it works well? Is it a sophisticated system?
The only way that you can get to the truth over whether a person did or did not do something, is by cross-examination. And cross-examination is a difficult skill to get on top of. I have arbitrated in hundreds of arbitrations, and I think this is the most difficult thing to do. So I don't agree that it is an easy system. I don't think its so simplistic in terms of schedule 8. They can make it seem so simple in Schedule 8, but its not simple at all. The factual conflicts as to whether there was a rule or not, whether something happened or not, whether the rule was known, whether it was breached, whether it was consistently applied, whether it is legitimate, are very difficult and complex to determine. There is a whole series of complex....You need a highly skilled person to be able to do this.

Is it possible at all to have one process? Should you not clearly separate the process of conciliation and arbitration? Have them at different bodies?

I think they must be more closely integrated. The CCMA has a con-arb system. However, what I think is that you really have to come to the CCMA for arbitration. There must be a standby group of conciliators, and the precondition for going to arbitration is that there must first be conciliation. The conciliator's function must be to try to settle the matter or to narrow down the issues. It must replace the pre-arbitration meeting. You start with conciliation and there is an attempt to settle. If not, it goes to arbitration by another person. It is not possible for the two processes to be done by the same person. It will also cut down on the delay of setting down arbitration for another day. It is similar but also different from con-arb.

Most commissioner think we need more con-arb?

Some unions have a most weird attitude to dispute resolution. They say nobody should ever be dismissed. Therefore, design a system that actually discourages dismissals and forces compensation for everybody, guilty or not guilty. Therefore they will not support us on con-arb. They are not going to support pre-dismissal arbitration and con-arb. That's why I think that a system designed by the kind of people that are operating ... will not work.

What about small to medium sized employers?

They are so underskilled and the system is so expensive. I sold my small businesses because I could not bear the thought of all the complexities around hiring and firing. What is the relationship between this and the growth of small to medium enterprises. Its just too complicated. That's why I go back to my idea that if you want to dismiss someone and pay him for three months, I would say fine. But if I have to worry about holding an enquiry etc, and run a risk of being called away to the CCMA if I am a one-man business...I know a lot of people who are trying to find a way around it.

Anything more about the low settlement rate?

There are two reasons. One, its impossible to do a proper conciliation in half an hour. Especially if people do not have the proper skills. Perhaps someone like myself with 20 years experience can do something, but not otherwise. The other thing...no, its fine.

What is the role of labour lawyers and consultants?

They are not a problem at all. Not a major problem. There are very competent and helpful labour lawyers and consultants. The bigger problem is the poor representation of union organisers and employers. As an arbitrator I would prefer to have the consultants there. My trouble is with bad representatives, most of them are not lawyers. But having said that, I must deal with the problem of bad representatives not classify them all as bad and ban them from the system. I don't share this general idea of lawyers and consultants are bad for the process. Our labour law departments have expanded by thousands. Its not the lawyers fault, the lawyers are providing a service, it's the system.

Should the system change?

I think it should. It should back to the drawing board. A full-scale Wiehahn commission style, looking at the whole thing anew. ...
But I do think there is a degree of truth in that what has happened is that things have become totally rights orientated. Parties are totally focussed on rights rather than looking for solutions.

I prefer appropriate dispute resolution in that you must choose a forum and a process that is appropriate to that specific dispute. Sometimes it might be the CCMA, sometimes a day in the Court, sometimes arbitration. There is no doubt in my mind that voluntary private dispute resolution is preferable to compulsory state dispute resolution. Because the parties agreed on a mutual basis, it is much easier. What happens in the CCMA, is that it is very difficult for the commissioner because in most cases you have a reluctant party – he might take technical points, take you on review, you don't have credibility. They are hostile, whereas in private arbitration they have agreed on the arbitrator. If it is voluntary, it is so easy to conciliate and arbitrate.
But if the employee faces a very hostile employer then perhaps it is appropriate to go to the CCMA or the Court, it's a fall back in other words. There is a time and a place for the Court if you have a reluctant employer; if you cannot get an agreement on going to arbitration. On the day of the enquiry, the arbitrator is to decide on compensation or whatever...Often there are very powerful employer who use their power to fashion an arbitration agreement or process that suits them. For instance that the arbitrator must decide in the light of certain factors, etc. In this case there might be a role for the Court to perform its constitutional role.
It goes back to my whole approach, that is that you want to encourage a co-operative approach; I don't like to set the systems up one against the other. If the parties are sophisticated enough then it should be voluntary, but if they are highly adversarial then if might have to be compulsory.

It is not so much schedule 8, but rather that the whole system allows ...makes it very difficult and costly. It costs you a lot of money to get rid of a bad manager or substandard staff. That is what we experienced in our firms.

Interview Participant 11: Director of a private dispute resolution body; private dispute resolution facilitator, consultant, dispute resolution trainer, 45-55 age group, male

19 September 2003

What are the reasons for the high referral rate?

There are a number of reasons but the two most primary reasons are, firstly, that there is no limitation on the nature of the dispute in terms of large or small. They have to take even the smallest of disputes. Secondly, the problem is that it is free. Specifically for the unions - even if they know their case is not good they can always take a shot at it. Because there is a chance that they can rule in your favour – you know what I mean. The employers might use a bad representative or unions can win their case on a technicality. Even if your case is weak you can take a chance, you might get a commissioner that will rule in your favour. Nothing to lose, everything to gain. No penalty if you do lose. However, the one caveat in the judicial system is the cost order. If frivolous you can get cost order. But even if you get it, how do you enforce it.

You might want a different mechanism to deal with the small issues. A different process-type mechanism. Its like in the court system we have a small claims court. To make it easy. Make it quickly, expeditiously for the ordinary person in the street if it is a R 1000,00 dispute or so. It will depend on the value of the claim. It enables people to take small matters to court quickly and efficiently. Its got to be a State run system but it does not mean that the State can't outsource. To a particular body. Look at what happens in other countries. I'm not saying it should be a court but a similar example. In the civil system you have it as to not bog down the civil courts with small cases. You need that expeditious access to justice. Go to the same convoluted system - it shouldn't clog the system. Specifically he unfair dismissal cases – so that it doesn't clog up the CCMA system. Small claims court for individual dismissal. Separate mechanism. Example of small claims court. Create special interest / consequence.

It doesn't cost any money to go there and there is no penalty – could be the worst case – you can get a bad commissioner and you get favourable outcome. That I think is the reason.

Small and medium employers who may have an unfair dismissal cannot afford to get lost in the CCMA system for 8 months - they need a quick and expeditious service unless it is case with special consequences. Then you need a separate mechanism.

What about labour consultants and labour lawyers?

I haven't practiced in a while. You see I don't work through the CCMA although I helped to set the thing up. I have been oversees for two years. I am a director of Tokiso which is the largest private dispute resolution body in SA.

In private arbitration, yes the lawyers do come. It will result in a more protracted proceeding if the lawyers are involved. On the other hand you can not deny people the right to legal representation - you shouldn't. Particularly in the case of an uneducated or unsophisticated employee. It is not a big issue in private dispute resolution. Lawyers don't get involved in private conciliation. It's only in arbitration. Can not deny the right to legal representation.

Most of the disputes that go to private resolution are disputes of interest, conditions of employment. Although you might have retrenchments etc.

Needs and problems of employers and employees?

It is the traditional stuff. The whole purpose of creating a specialist dispute resolution body was to create a vehicle that has the expertise to deal with labour disputes. But it also needs to be quick and inexpensive. Expertise in addressing labour disputes. Access should be good. They can now get access to a process, provided they go through conciliation first. The efficiency of the system is stumbling – lot of back-log – the thing is clogged up.

Big companies create their own – such as South African Revenue Services - dispute resolution panel to resolve disputes. Internally? Employers now have the option to go the pre-dismissal arbitration route since the changes to the LRA. You will see this increasingly but that will be outsourced to a private firm. So if there is a dispute it will go private.

What about ADR and what is the definition of ADR?

They (the CCMA) have to accredit more agencies. They must have a real assessment of their (CCMA) capacity to deliver. Accreditations have been a problem. Real assessment of their capacity. The degree of efficiency in relation to the type of service they are delivering. Where they can't deliver they should outsource it or create a separate mechanism. If they can't do it they need to outsource it. For example Tokiso has set up a special dispute resolution body for the entire metal industry – do not go to CCMA for all disputes in metal industry – that's private – and contained in the collective agreement.

It takes a heck of a load off the CCMA. The employers and employees are happy – they get quick access to justice by a panel of expert mediators and arbitrators. And the employers are happy – it's a win/win situation for everybody. Employers carry the costs. Yes but NUMSA also carries a part. You can speak to Patrick Deale in this regard.

Should the system change? Is it a good system?

You see you can contract out of the CCMA. It's not a problem. You make it a condition of employment in the contract where you make it clear that if there is a dispute it will be resolved by a private conciliation or arbitration body. You can do that. The parties have to agree. This is happening more and more as employers realise they cannot have somebody on suspension for eight months, paying him a salary and awaiting the outcome of the CCMA decision.

80% of cases come from small to medium employers and they are the ones who cannot contract out of the CCMA. Yes but if there was a special purpose vehicle established to address those lower level disputes – to handle small disputes such as the small claims court. I think it is going to take a while before they are going to realise that they cannot continue with this ineffective bureaucracy. What you don't want is for the institution – and what will happen is that the CCMA will lose its credibility. They will have to try to catch up. This is something that need to be addressed by the Board of the CCMA that consists of the three parties labour, business and the state. They should address these issues as a matter of urgency. Before the CCMA loses its reputation.

It is difficult to get accreditation – why? Because I think the CCMA actually wants to keep the territory for themselves – but that is stupid.

What is ADR in current context?

Private. I don't think the meaning of ADR has changed. Yes it has been institutionalised but essentially the traditional meaning was that in addition to adjudication through the courts ADR means those that are outside the statutory system. The CCMA is a statutory institution but it uses ADR – mediation and conciliation.

Employers are forced into a legalistic process which is not really ADR – not in a strict sense. Idea that it should be easy, simple without a legislative burden – but now parties are forced into legal process. That is why the private dispute resolution bodies will have an advantage. They are quick and informal and you can get the best judges in the country to come and do the adjudication. Go to Tokiso you can get John Myburgh to adjudicate – you will never get him through the CCMA because they only pay R1500,00. You must be prepared to pay more for a quick, highly professional service. That is worth paying for. In the long run it is cheaper to pay for a good process. Most of the employers do not perceive that as being the case at the moment but with time this realisation will filter through. After 5 or 6 appearances at the CCMA you weigh up the time and cost and then realise its cheaper to go private.

The option that employers should have, is the option not to go through the process as long as you pay something eg 3 – 6 months. If person accepts, then he or she cannot go the CCMA. This can be an option – you pay for your problem to go away. More favourable system but you lose the fairness. Private arbitration is the only way to get to fairness. That is why I think hat this move to pre-dismissal arbitration is a good initiative and why I think more employers will go for this option. From there you cannot be taken on review.

What about con/arb?

We do it in private processes but it is less popular.

What about the low settlement rate?

I cannot answer that – I am not familiar with quality of commissioners at CCMA. Most that I work with do not work through CCMA. You won't get a Paul Pretorius, John Brand and Charles Nupen to work through CCMA. Many of them have been involved in CCMA – yes, but no more. A lot of the well known specialists are in private practice so they have to meet targets and cannot earn R 1500,00 per day - they need to earn R 6000 - R 7000 a day.

More emphasis – I am in favour of conciliation – with good commissioners you can settle many disputes. These days very low settlement rates. People also use the process just to get certificates. Before people would actually exhaust the situation – now they build the certificate into the process because they know they are going to negotiate after the certificate has been issued. Use it as a bargaining strategy.

They do not put their full package on the table. They hold back. The intention of the certificate is that it should be the final. The parties misuse the process.

Private – the advantage is much quicker, informal and get the best judges to adjudicate. Its also less expensive (takes only 2 days whereas with the CCMA it might take up to 7 days).

The problems that the CCMA commissioners experience is far removed from the world of the private dispute resolution commissioners. I cannot give info about problems of CCMA. We get different kind of people. Most people that I get, do not work with… People come to Tokiso with a different attitude.

Reasons for the high referral rate and what could be done to deal with the problem

Participant one indicated that on the one hand, employees know they have certain rights and that they are protected. However, they do not know what these rights are and have high expectations. On the other hand, the high referral rate might be an indication of 'a pathology of conflict' in the workplaces, as well as the fact that employers have a disregard for procedures due to a very paternalistic approach to human resources.

Participant two explained that small employers, and he defines a small employer as one with less than 20 employees, are not, and do not have IR and HR practitioners in their businesses and do not follow the correct internal procedure. The CCMA is on the right track with their dispute prevention initiatives to train employers and employees to refer disputes correctly.

Participant three referred specifically to the merits of the pre-mediation screening process for decreasing the high referral rate. When an applicant comes to the CCMA to refer a dispute there is a practice where a commissioner will contact the participant and attempt to do a 'telephone conciliation'. This participant was however of the opinion that these commissioners should be specifically trained in

telephone skills. Another suggestion by participant three was that powerful mass media such as Yiso Yiso or Isidingo should be used to increase public awareness of the CCMA. "... *It is amazing that one still finds, eight years down the line, people still do not know what the CCMA is doing...*"

Participant four emphasised the benefits and successes of the conciliation and arbitration 'rolls' to deal with the high referral rate. Parties are informed that their cases will be heard on a specific day at nine, twelve or two o'clock. There is a group of commissioners that take the cases as they are called and if parties are not there they call the next one. This is normally done to deal with the backlog and the participant suggests that this should be standard practice.

Participant five was of the view that the screening process is not to lessen the referrals but to determine the type of dispute. He supported the payment of a R 50,00 fee for a referral.

Participant six was in agreement that there should be some kind of penalty for pursuing a frivolous case to be decided by the arbitrator.

Participant seven: Many employees realise that there is a certain 'nuisance value' that employers are willing to pay and they would take a chance to see if they can get that money. A cost order against a frivolous employee does not work in practice because you will never get that money.

Participant eight felt strongly that case management should not do the screening of cases as it requires the knowledge and skills of commissioners.

Participant nine referred to the fact that labour relations in many organisations is still very adversarial and that the big companies are only now starting to take transformation seriously. Because of the historical imbalances in the workplace the employees questions the motives and fairness of the employers. There is also not enough communication and transparency to create that trust and credibility that is needed. Once employees start to view the internal procedures as credible, and buy into it, then the referral rates might come down.

Participant nine did not agree that there should be an amount payable to refer a dispute to the CCMA. He reiterated: "... *in our society with the high incidence of illiteracy and low level workers, unemployment and poverty there is a need for a very accessible system ...*". "... *I also do not think that so many of the cases are frivolous. Maybe from the employer's side but not for that employee who has to travel for miles by taxi to come and tell his sad story in the hope of a month's poverty wages...*".

Participant nine was further of the view that the high referral rate is an indication of trust in the system and people believe that justice will be done.

Participant ten mentioned that the CCMA was given an enormous jurisdiction by including the former homelands, and extension of the LRA to the public service. A radical solution was offered by participant ten in that employers should be allowed to dismiss workers at will, with or without just cause, provided the employer is prepared to pay compensation. This compensation could be three to six months' salary. If this is paid, there can be no challenge. If the employers do not, then the worker can claim reinstatement. The reason for this proposal is that very few employees that get dismissed are reinstated and even less are in the same job three years down the line. Compensation is thus the practice in any event.

Participant eleven was of the view that the biggest problem is the fact that no distinction is made between small and big disputes. He suggested that different system should be looked at for small issues like the small claims court. It will depend on the value of the claim. It has to be a state run system but it does not mean that the state cannot outsource. Specifically for the individual unfair dismissal cases so that it does not clog up the system.

Relationship between internal mechanisms and referral to CCMA

Participant one indicated that there is a very specific way in which conflict should be dealt with. The disciplinary procedures are usually well developed and used but the grievance procedures are neglected. In many instances if a worker invokes the grievance procedure the employer retaliates by turning it into a disciplinary procedure.

Participant two was of the opinion that the organisation should do more to attempt to resolve disputes internally. If the internal procedures are recognised as being credible and fair, then dismissed employees will not refer their cases to the CCMA. This view was supported by participant three who argued that it is irrelevant if the employer follows proper internal procedures or not. If the internal procedures do not have any credibility, the employee will refer the case to the CCMA in any case. Employees will buy into a process that they think is legitimate.

Participant four and five agreed that it does not matter what the employer does in the organisation - the parties will take the case to the CCMA. Participant five suggested that pre-arbitration meetings should be made compulsory to get clarity on the issues in dispute but this must not be done on the day of the arbitration as this is then done in the CCMA's time.

Participant six attributed the ignorance of employers to the fact that laws in the past had been written in a very legalistic manner that made it impossible for employers to understand. The LRA is also deceptive as it seems quite straightforward with simple language on the surface, but we know that it has all kinds of twists. People don't read it because they assume it is going to be difficult and training courses in this regard are overpriced.

Participant seven mentioned that there are very few employers who do not follow some kind of internal procedure and one should not expect the same procedures from the small and large employers.

Participant eight indicated that there is a theoretical link between the proper handling of the conflict internally and the referral of a dispute to the CCMA, however, nothing prevents a dismissed employee to take his chances at the CCMA.

According to participant nine the system works well for interest disputes but not for the internal handling of conflict.

Appropriateness of the system for small to medium sized employers

Participant one was of the opinion that the system is appropriate because the principles on which it is based are good and small employers should also adhere to the principle of procedural and substantive fairness. The reason why they do not follow these procedures is because they do not read the Act (LRA 66/95). They have a negative perception towards the Act without really knowing what it says.

Participant two agreed with participant one; "*...the procedures are simple. If somebody has done something wrong he should be told. Once the employers are on to it (following Schedule eight) they realise how simple it is...*".

Participant three agreed.

Participant four was of the opinion that when the bigger companies come to the CCMA they have dotted the i's and crossed the t's in their internal processes and are not prepared to settle and have no mandate to do so, often because the company has a policy not to settle when somebody is charged with theft. Small employers first find out that they have not followed the correct procedures when they come to the CCMA and are then prepared to settle.

Participant six agreed that just as employers have to register for UIF (Unemployment Insurance Fund) they should register at the Department of Labour to make sure that they know what is expected of them in case of conflict and disputes. She agreed that the system had been designed for large employers and that there is not enough flexibility for small employers but one cannot simplify the system further without losing its integrity.

Participant seven pointed out that the small employers do not budget for an external consultant to come and do disciplinary hearings. They rather join employers' organisations – which are in many instances consultants operating as employers' organisation to be able to represent their clients at CCMA proceedings. He also mentioned the existence of specific insurance policies against CCMA awards that can be acquired. Employers are becoming more reluctant to settle, as they realise that it is a lengthy process to get to arbitrations and if the awards is against the employer, the commissioner can always be taken on review. It is furthermore also difficult for the employee to enforce the arbitration award. Employers are beginning to play this game.

Participant eight mentioned that the small and medium sized employers use the disciplinary and grievance proceedings to demonstrate their power. If an employee starts a grievance procedure or challenges the employer in a disciplinary hearing, it is perceived by the employer that his power and position is being challenged and he/she has to reaffirm his/her power.

Participant nine was of the opinion that the system is appropriate for small employers. The problem lies in the fact that employers will have to change their organisational culture and management style and start to "... treat their employees like they would their diesel engine, by reading the manual and following the appropriate procedures...".

Participant ten was of the view that "... to work through the mine field of the LRA (66/95) to be able to get the internal procedures right, requires a highly knowledgeable and skilled person...". The system has high competence requirements for a fair dismissal and highly competent people should become involved in the system at the earliest stage possible. This participant was of the view that labour legislation has a detrimental effect on job creation.

According to participant eleven the small employer cannot afford to get caught up in the CCMA system for eight months for one individual unfair dismissals they need quick solutions.

Appropriateness of the system for individual employees

Participant one did not agree that it does not cost the employee anything to pursue a case. The white-collar workers usually approach labour consultants or labour lawyers to assist them when there was a dismissal. There are costs involved for the domestic worker who has to travel to Johannesburg to refer the dispute, then to go there for the conciliation and then for arbitration.

Participant two viewed the system as simple and "... drafted in particular for the lay person and members of the public..."

Participant three suggested that some low level disputes such as domestic worker disputes could be outsourced to NGO's, church groups and academic institutions.

Participant five thought the system is appropriate for individuals but the CCMA should look at ways to get rid of these individual unfair dismissal cases. The pre-dismissal arbitration is an excellent idea but many employers will not be able to afford the R 3000,00 per day to get the CCMA commissioners involved. A presiding officer from any recognised panel should be recognised to do the pre-dismissal arbitration.

According to participant seven the system is very accessible and "... *an illiterate individual can literally go and physically knock on the CCMA's doors for help...*"

Participant nine referred to the fact that the CCMA's national footprint is good, meaning that there are offices in all regions and that makes it very accessible for individual employees. What could be considered is a 'travelling CCMA office' bringing the CCMA to the people.

Reason for low settlement rate in Gauteng

Participant two had specific views on the level of expertise of the commissioners and about the screening process. He agreed that some employers only come to the CCMA to get a certificate with no intention to resolve the matter. However, if you have a skilled commissioner that has the expertise to dig deeper to get to underlying factors, such a dispute can be resolved provided that enough time is allocated for conciliation and one hour is not enough. He suggested that; " ... *you need very special people to deal with the screening of cases....*". They should have knowledge of the legislation as well as knowledge of processes and "*... should not allocate one hour for a mutual interest dispute between the Chamber of Mines and NUM...*". This response strengthens the plea for better trained case management personnel.

Participant three was of the opinion that settling disputes are "... *tremendously strenuous and when you get to dispute number 59 the last thing you want to do is to listen...*". If CCMA management

wants conciliations to be taken seriously, commissioners should be listened to and assisted. There is an Employee Assistance Programme at the CCMA but what is needed is "... *a little compassion for commissioners ...*".

Participant four suggested that the con-arb process should be made compulsory for all misconduct cases.

Participant five agreed with the other participants but suggested that there should be some sort of penalty such as a fine for non-appearance at conciliation and this amount should be made part of the arbitration award. The attitude of many employers is; why should I pay now if I can do so 5 to 6 months down the line at arbitration? (interpretation: it was not intended to take such a long time to get to arbitration.)

Participant six was of the opinion that commissioners are not properly trained to do successful conciliations. Non-legally trained commissioners are sometimes more successful in conciliations and they should be used for conciliations and not arbitrations. More use should be made of the con-arb process because if parties know the arbitration is in the next hour and not 6 months down the line, the chances are that the settlement rate will increase. The low settlement rate is also due to the non-appearance of parties and it is suggested that the parties should be phoned a day or two before the hearing to find out if they are going to be there or not.

Participant seven also questioned the future of conciliation process as it has become superfluous. Most cases are settled on the day of arbitration. Most employers wait until the arbitration, and if the applicant does not lose interest, they would rather settle 6 to 8 months later before arbitration.

Participant eleven reiterated that good conciliators have more success but the good conciliators do not work for R1 500,00 per day and have therefore left the CCMA. In the past the certificate was the last requirement before going on strike or referring the dispute further. Today the certificate is built into the negotiation process. Parties know that they will negotiate further once they have a certificate but on the CCMA statistics it reflects as low settlement rate.

The role of consultants and labour lawyers

Participant one was of the view that "*....the CCMA is absolutely paranoid about labour lawyers and consultants...*". Both these parties have a very specific role to play. The consultants have a preparatory role and the labour lawyers come in at arbitration. Where consultants and labour lawyers are involved they can play a positive role in conciliations because "*... there already exist a relationship of trust between them and their clients and they are usually more clued up than their clients. However, I do not allow them in processes because commissioners have to follow the Act....*".

Participant two focused on mutual interest disputes and have a passion for the settlement of disputes in conciliation. *"..... The lawyers and consultants are welcome in conciliation and I tell them that. But I also tell them that if they frustrate the process I will chase them out – and I do that...".* There are two reasons for allowing them in the process. The first reason is that they help to do 'reality testing' with their client, meaning that they inform their client if the case does not have merit. (Interpretation: My experience was that many lawyers and consultant hear the other side's story for the first time at conciliation and then need to advise their clients that they do not have a good case). The other reason is that if the consultant or lawyer sits outside the conciliation room, the parties need to caucus with their representatives every now and again to inform them of what is going on and get advice, and this leads to unnecessary delays.

Participant three made out a strong argument to allow the consultants and lawyers into processes, provided that the commissioners maintain the discretion. "*...I'd rather have the terrors inside than outside. If they are going to sabotage me, I want to see it and want to be able to stop it. I'd rather have them on board where I can see them than on the other side of the telephone. In the room, however, I find them quite helpful...*".

Both participants three and four indicated that applicants told them that consultants ask a fee of R 500,00 to fill in the referral form.

Participant five indicated that he allows specifically the lawyers in processes and indicated that poor representation is the reason for 60% of cases being lost.

Participant seven indicated a preference for the presence of lawyers and consultants in the processes. He also said that the labour consultants are more knowledgeable than ordinary lawyers that are not specialising in labour law.

Participant eight felt that the consultants are bad for the system because there so many 'fly-by-nights'. Representatives who understand the law makes the process easier because they understand the risks involved. Lay people only see the emotional side of people and not the legal risks. Their role in future will be that the lawyers focus on the hard issues (what you can and cannot do in terms of law) and the consultants will focus on the soft issues (what you may or may not do).

Participant nine described them as parasites who ask R650.00 to fill in a referral form. More use should be made of advice centres and non-profit organisations to assist employees to refer their cases.

Participant ten was of the view that it is ridiculous to ban labour consultants from the system just because they are 'bad'. As a commissioner one should deal with those 'bad' consultants and lawyers but you cannot ban them from the system if there is such a huge need for their services among employers and employees.

Participant eleven indicated that labour lawyers and consultants are not a big issue in private dispute resolution. Lawyers seldom come to conciliation and where they are present in arbitration it leads to more protracted process but you cannot deny a person his right to be represented.

Needs and problems of employers and employees with regard to conflict management and disputes

According to participant one, the parties to dispute resolution are very sceptical about the competence of the new CCMA commissioners and feel aggrieved about the fact that arbitration awards are so late. They also perceive a difference between the attitudes of CCMA commissioners and commissioners in private processes. The CCMA commissioners are perceived to be arrogant with an attitude of "*...I am the commissioner, I have power and you listen to me...*".

Participant three emphasised the fact that employees find it difficult to stand up for themselves because of the power imbalance in the workplace. Employers need to be educated about how the CCMA can benefit them and the fact that unions are not always a bad thing.

Participant five viewed the system as totally unfair towards the employers that follow proper internal procedures. He has to go through an internal process, then through conciliation and then again through arbitration or labour court. Even if there is a cost order at the end against the employee for frivolousness of vexation, the chances of getting his money are slim.

Participant seven was of the view that parties are experiencing problems because they are not notified properly. Employees are frustrated with the low attendance rate of employers. It is suggested that the whole process of serving of documents and filing of papers should be re-looked at to lessen the problem of non-attendance and default awards. The whole process is inadequate and both the employer and employee need assistance. Documents should be served on a party and he has to sign and acknowledge receipt. The services of the sheriff could be utilised for this and the opportunity could be used to make sure that the contact details of the parties are correct. He also supported the con-arb process and suggested that case management should phone the parties a day or two before the process to establish if they are going to attend or not.

Should the system change and if it should, how should it change

Participant three indicated that the processes are becoming more and more adversarial and technical, and more and more points *in limine* are being taken. The consultants and lawyers' role will definitely increase, with the consultants more involved in the internal processes and the lawyers more involved in arbitration. An interesting suggestion has been made:

> *"... The labour consultants should be brought on board. Give them credibility and legitimacy in the eyes of the employers and employees and let them take care of the disciplinary and grievance hearings.*

There is a definite problem with internal procedures – so use them -. Maybe a panel of consultants should be established that works with the CCMA or a panel accredited by the CCMA...".

Participant five suggested that employers should be required to register as employers at the Department of Labour. This registration will set in motion a process to ensure that they are aware of their obligations and have proper internal mechanisms to deal with conflict, such as disciplinary procedures etc.

Participant six suggested that the bigger parties – employers and trade unions – should be encouraged to use private dispute resolution. She was also of the opinion that employers should include provisions for private dispute resolution in contracts of employment for more senior employees such as those in management and professionals. "... *the CCMA must get its act together and accredit more outside private dispute resolution bodies...*". The issue of why the CCMA is dragging its feet over accreditation of private dispute resolution bodies elicited some interesting answers.

Participant seven indicated that he would like to see the better utilisation of the con-arb process, more conciliation and arbitration rolls and a better system of serving documents on parties.

Participant eight was of the opinion that the current system of dispute resolution that places so much emphasis on procedural fairness in the internal processes, has created a generation of employers, consultants, labour lawyers and trade union representatives that turn these internal processes into opportunities to show off their power. This aggravated the problem. If the employee then takes the employer to the CCMA the employer has to do everything possible to restore his power. The system is not going to change, not after the recent changes to the LRA (66/95). Not soon. Maybe the next generation.

Participant ten was of the opinion that the test for a system dealing with such a high incidence of unfair dismissal cases is to see how many employees are reinstated and how many remain in their jobs and this system does not achieve this. Participant ten proposed a system excluding senior managers and high level employees as they would be able to look after themselves, and a system allowing employers to dismiss at will provided he/she pays compensation. If the employer chooses not to compensate them, then the employee can challenge the dismissal.

The explanation for this proposal was provided in the participant's own words:
"... *Let me just go back and tell you the story about an employer who I was trying to convince to go to private arbitration instead of the CCMA. According to him the CCMA was the most wonderful thing for employers. It works wonderfully for us, he said, because this is how it works. We fire whomever we like. We just get rid of them. We have an internal enquiry. They are going to refer the matter to the CCMA in any case. The referral time is long and it takes a couple of months before it gets to conciliation. It takes a minimum of three months. Remember it's a poor employee with no resources and a fair percentage do not pitch for the conciliation mostly because they find alternative work. They have to survive somehow, so they disappear. If they do come to conciliation, you do not settle and allow them to refer the case to arbitration. That takes another couple of months. So it takes between 6-9 months to get to arbitration. The CCMA commissioners are so overworked or so 'undiligent' that it takes another 2-3 months to get an award, so we have a year to a year and a half. Show me how many workers will go on fighting a year without pay. Most of them disappear either by the time of the conciliation or the arbitration, or the arbitration award. If the award is against us we take it on review, and that takes 6-12 months. Then it takes another 2-3 months waiting for a judgement, and if its against us, we take it to the Appeal Court. It takes a couple of years. It is exactly like the old system. So, the long and the short of it is that people are not given their jobs back because they are exhausted by the process. If you look at the statistics, there are very few cases were they are in fact reinstated. Compensation is rather awarded and even if they are reinstated the employee just challenges it and eventually he settles on some money. I think the test of whether an unfair dismissal regime is working, is what is the percentage is of people being reinstated and remaining in their job...*".

The participant was of the opinion that instead of the state spending a fortune on the CCMA and the employer spending all the money on lawyers and other costs there would be a system in place that makes a lot more sense.

Participant ten was also of the opinion that the system should change; "...a full scale Wiehann commission style change going back to the drawing board..." . Things have become totally rights orientated and parties are focussing on their rights rather than looking for solutions.

The CCMA is part of a sophisticated system of dispute resolution created by the LRA in which most of the role players are not capacitated to operate effectively

Participant one agreed that the intention was not to create such a sophisticated system. The parties as well as commissioner must understand that Schedule eight is a guideline and not the Act itself and the cornerstone of discipline is corrective action. The onus is on the commissioners to interpret the guidelines correctly and to follow a conciliatory and not an adversarial approach to the resolution of labour disputes.

Participant three agreed that it is mostly the big employers that have the capacity to effectively deal with the system. Their lawyers are able to sabotage the dispute resolution process by becoming overly technical.

Participant five suggested that the Department of Labour should provide brochures and guidelines to employers on proper internal mechanisms to be followed before dismissal. Employers should also make sure that their internal mechanisms are legitimate and make use of impartial external people to chair internal hearings.

Participant six questioned the "sophisticated" adjective. It is not hugely complex, so a person with no legal background or a person without representation will be able to grasp the principles of conciliation. The CCMA forms have also been adapted and are very informative. The notification letters that are being sent out also contains a lot of information and guidelines.
She also felt that the legislation should not be relaxed for small to medium sized employers as "...*for every fair employer there are eight exploiters.....we must never underestimate human greed...*".

Participant seven was of the opinion that the CCMA is an 'applicant driven system' however, a large part of the population do not have the capacity to effectively function in such a system.

Participant nine suggested that one should also look at the good work being done by the CCMA. The CCMA should endeavour to inform the public and change these negative perceptions. *"... Yes, there are some problematic awards but there are also many excellent awards. There is little recognition for the extent of the CCMA's operation."*

Participant ten was of the opinion that there should be synergy between the statutory and private dispute resolution. Everything possible should be done to encourage those who can afford private dispute resolution. It could help to take the burden off the CCMA so that it can look after the vulnerable and the poor. The contracts of employment of senior and high level employees should make provision for private dispute resolution.

The technical requirements in Schedule eight of the LRA (66/95) prevent parties from seeking alternative dispute resolution methods

Participant three pointed out that dispute resolution has become very technical only because it has been interpreted in that way. The only reason why people do not use alternatives is because they are not aware of alternatives.

Participant six was of the opinion that parties are not prevented from using alternative dispute resolution. The LRA (66/95) provide a set of guidelines, once the employer has already made a decision to go the disciplinary route, regarding conduct for non-confirmation of probationer or incapacity due to illness or poor performance. Prior to that, employers should be encouraged to go ahead with RBO's (Relationship building by objectives), sensible grievance procedures, problem solving exercises etc. "...I would say to employers do all the nice stuff but make sure that you do it in the framework of the law, you don't open yourself or put yourself at risk...."

Participant eight was of the opinion that because of the technical requirements they will not seek the human orientated relationship solutions to the problem. The commissioner is at fault if he does not consider schedule eight but if he/she does consider it, he is also at fault if he applies it too strictly to small employers.

Participant ten was of the opinion that we have a system with high competence requirements for a fair dismissal and to be able to get the internal procedures right you need highly knowledgeable and skilled people.

What is seen as alternative dispute resolution

According to participant one, "alternative" only means going the non-CCMA route, namely private dispute resolution.

Participant two suggested the establishment of a committee in the organisation consisting of management and trade union representatives, which evaluate a case before there is a dismissal. If the credibility of this committee is acknowledged by the workers and the union informs the employee that they will not represent him at the CCMA - because they are satisfied that justice has been done - then the chances of this employee referring the case to the CCMA are less. "... *Such a committee can actually bring management and the union closer together* ...".

Participant three suggested a process she called "conflict resolution facilitation'. *"... People are scared to deal with conflict and need a facilitator to assist them."* (It is not clear if this facilitation forms part of the grievance and disciplinary procedure or if it replaces it). The organisation must arrange a meeting between the parties, on neutral ground, with a 'conflict resolution facilitator' who should be a highly skilled person to assist parties to work through the issues and emotions. At the CCMA there is no time to deal with emotions and if this could be handled internally the chances are firstly that conflict will not escalate to become disputes, and if they do the issues will be much clearer at conciliation and arbitration, making the commissioner's work much easier. She also suggested that the professional boards for psychologists and social workers should be approached to train their students in the field of facilitation and to allow them to do their practicals at the CCMA or in companies.

Participants six reiterated that big companies and sectors such as the mining industry could develop their own system of 'peer review' or sector ombudsman or their own internal mediators and arbitrators and facilitators to become involved in their processes. The biggest challenge will be to get the unions and the employees to buy into these processes. The pre-dismissal process that have been made available with the recent changes to the LRA (66/95) is not taking off because big companies invest a lot of money in training and developing their personnel to do the internal processes absolutely correctly. They are not prepared to spend an additional R 3 000,00 per day on a CCMA arbitrator to come and do something that they can do themselves.

Participant eight pointed out that unions and bigger employers are uncertain themselves as to what ADR is and when it will be recognised by the courts. The recent changes to the LRA (66/95) has given the parties more control over the process in that they can decide on the arbitrator etc.

Participant nine mentioned the existence of a 'review committee' or 'review panel' consisting of members of the trade union and members of management in some bigger organisations. This 'review committee' evaluates a case even after the appeal and only if they are satisfied that the dismissal is fair, will it be effected.

Participant ten was of the opinion that CCMA arbitration is a misnomer for state adjudication without a right to appeal. (This supports my contention that CCMA arbitration is not ADR.) Arbitration is in essence a voluntary process but at the CCMA the employer is forced into arbitration and they will do anything in their power to get out of it. The incidence of review for private arbitration is less than 1% but for CCMA arbitrations it is more than 30%. This participant was not supportive of the term alternative dispute resolution and preferred the term "appropriate" dispute resolution. If the parties are sophisticated enough it should be private dispute resolution but if they are highly adversarial then it might have to be compulsory.

Participant eleven was of the opinion that the meaning of ADR has not changed. It has been institutionalised and the fact that employers are being forced into arbitration and forced into legal processes is not really ADR. The only true ADR is in private dispute resolution. Employers think it is too expensive but after four or five appearances at the CCMA they begin to think differently. Another suggestion was that parties in different sectors should set up their own private dispute resolution bodies. He viewed pre-dismissal arbitration as a good initiative but indicated that the con-arb process is not very popular in private dispute resolution.

What are your views on private dispute resolution

Participant one felt that more and more employers will decide to use private dispute resolution.

Participant two was in support of more private dispute resolution *"... as long as it is not at the expense of the CCMA..."*. Most of the parties to disputes can not afford private dispute resolution and the CCMA commissioners must provide an excellent service for these individuals. The private commissioners are doing dispute resolution for their own benefit and reputation and are therefore motivated to settle disputes and provide good awards. The problem is, how do you keep CCMA commissioners motivated and instil in them a passion for their work if they work under strenuous circumstances?

Participant three viewed private dispute resolution bodies as private business initiatives based on market related principles which can supplement the CCMA.

Participant five was in favour of more private dispute resolution because there is more certainty, more control over time, more user friendly, with more skilled commissioners.

Participant eight was of the view that there is no reason for the parties to use private dispute resolution. The new system created after 1996 means that people are now using ADR more but there is a move back to statutory dispute resolution because of the fact that the CCMA has encapsulated the ADR processes.

The rigid system prescribed by Schedule eight has changed the labour relationship. No need for good human relations practices – only follow rules

Support for this statement was found in the views of the first participant. She was of the opinion that the human resources departments of big companies consists of industrial relations specialists, appointed specifically to deal with CCMA cases. They know the system and make sure that cases are being dealt with 100% correctly. They focus on being procedurally correct and do not focus on good human resources practices such as proper performance appraisals, training and development. This participant was of the opinion that employers use positional power to deal with conflict in the workplace. Employees are not equally empowered and if they are reluctant to communicate upward in the organisation they are more reluctant to start grievance proceedings. The existence of the grievance and disciplinary procedures allows the employer to use positional power. The employee has few alternatives if the case is not being dealt with to his/her satisfaction internally. If the employees were empowered in terms of knowledge, skills and funds they could have attempted alternatives to referring a dispute to the CCMA.

Participant three mentioned the fact that employers are scared not to follow the guideline in schedule eight. (Interpretation: this confirms the ADR model that the management style is based on fear – see chapter 7)

Participant five was of the opinion that the unions in rural areas are more emotionally charged than in urban areas. There is a trend towards unions and employers working together to resolve disputes in urban areas.

Participant seven was of the view that the system does have an impact on the relationship because employers are scared that they will create a precedent or will be accused of inconsistency if they allow themselves to deviate from the guidelines in schedule eight.

Participant eight commented that in the past the labour relationship was in essence a human relationship. The labour relationship has now become a legal arrangement with many legalistic prerequisites. People in the workplace do not know how to handle their relationship anymore, simply because they do not want to handle it anymore. People needed each other in the past and they were happy to work with each other and there was a burning desire to resolve conflict. People do not have that desire anymore. There is a changed frame of mind when going into grievance and disciplinary hearings. They prefer to focus on their differences and not on what they have in common.

LETTER AND QUESTIONNAIRE SENT TO FULL-TIME COMMISSIONERS

1 October 2003

TO ALL CCMA COMMISSIONERS

The CCMA requires information on the reasons for the high rate of referrals and low settlement rates as well as the problems and needs of Commissioners regarding their role in the dispute resolution system. A research project to investigate these issues has been launched with the approval and support of CCMA management.

The aims of this study are to explore the perceptions and experiences of CCMA Commissioners with regard to the following issues:

i) Reasons for the high rate of referrals to the CCMA.
ii) Nature and appropriateness of the dispute resolution system for small to medium sized employers and individual employees.
iii) Orientation of employers and employees towards conflict, and the use of the internal procedures.
iv) Ability of the parties to deal with conflict and disputes.
v) Labour lawyers and consultants.
vi) Problems and needs of commissioners, and
vii) Alternative dispute resolution processes and mechanisms.

Attached please find a questionnaire to determine your perceptions on the issues mentioned. It should take you no longer than 20 minutes to complete the questionnaire. Your participation is of vital importance to the success of this study.

If you are unable to open this document, please contact Hanneli Bendeman at: Cell 083 309 1188 or hbendema@postino.up.ac.za.

Please send your response to: hbendema@postino.up.ac.za or fax: (012) 420-2873.

Your co-operation will be highly appreciated.

Hanneli Bendeman
Cell: 083 309 1188
Tel: (012) 420-2715
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hbendema@postino.up.ac.za

Condensed questionnaire[1]

Perceptions of Commissioners regarding the CCMA's conciliation process and the low settlement rate

Record No: _____

It is common knowledge that the CCMA is experiencing case overload and a declining settlement rate. This investigation, which is a joint venture of the CCMA and Potchefstroom University aims to explore these issues and develop possible solutions. The CCMA management is of the view that the perceptions of commissioners in this regard are critical. Your cooperation is therefore much appreciated.

After completion, please e-mail to hbendema@postino.up.ac.za or fax to (012) 420-2873.

1. BACKGROUND INFORMATION

1.1 How long have you been involved in the CCMA as a commissioner? [ ] years

1.2 Full time [ ] or Part time [ ]

1.3 Please indicate your current level:
- Level A [ ]
- Level B [ ]
- Senior Commissioner [ ]

1.4 Gender: Male 1 [ ] Female 2 [ ]

1.5 Age: [ ]

1.6 Qualifications:

1.7 Training:

1.8 Previous work experience:

1.9 What is your perception of the CCMA as a dispute resolution mechanism in general?

Very Negative	Negative	Neutral	Positive	Very Positive
1 [ ]	2 [ ]	3 [ ]	4 [ ]	5 [ ]

1.10 What are the CCMA's two most important problems at the moment?

2. REASONS FOR THE HIGH REFERRAL RATES OF INDIVIDUAL UNFAIR DISMISSALS

2.1 What, according to your own experience, are the main reasons for the high rate of referrals of individual unfair dismissal disputes?

2.2 What could be done to alleviate this problem?

3. INDIVIDUAL DISMISSAL DISPUTES

From your experience in dealing with individual unfair dismissal cases during the conciliation phase, please indicate the extent of your agreement/disagreement with each of the following statements, by filling in the appropriate number (1,2….5) in the relevant block:

Disagree			Fully Agree	
1	2	3	4	5

Employers:

3.1 Most employers don't have proper internal procedures to deal with conflict: [ ]

3.2 Most employers don't follow internal procedures before they dismiss individual workers: [ ]

3.3 Most employers see conflict as destructive? [ ]

[1] Shortened by eliminating unecessary spacing

3.4 Employers generally don't follow Schedule 8 of the LRA to deal with conflict: ☐

3.5 There are better methods to deal with conflict than those referred to in Schedule 8 of the LRA: ☐

3.6 Employers are reluctant to use any other methods to deal with conflict than those prescribed in the LRA: ☐

3.7 Smaller employers are more inclined than larger employers to not follow proper procedures before dismissals: ☐

3.8 Employees are reluctant to use the grievance procedure: ☐

3.9 Employees are victimised by the employers if they use the grievance procedures: ☐

3.10 Employees see conflict as destructive ☐

3.11 Employees are not aware of the proper procedures to be followed during grievance and disciplinary hearings: ☐

3.12 Trade union representatives are ill prepared to represent their members during grievance and disciplinary hearings: ☐

4. APPROPRIATENESS OF THE DISPUTE RESOLUTION SYSTEM FOR SMALL AND MEDIUM SIZED EMPLOYERS AND INDIVIDUALS

4.1 Do you think the current system of dispute resolution is appropriate for small to medium sized employers?

Yes - 1 ☐ No - 2 ☐ Not sure -3 ☐

4.1.1 Reason for your answer:

4.2 Do you think the current system is appropriate for individual employees? (Where no trade union is involved?)

Yes - 1 ☐ No - 2 ☐ Not sure - 3 ☐

4.2.1 Reason for your answer:

5. CAPACITY AND ORIENTATION OF EMPLOYERS, EMPLOYEES AND TRADE UNIONS TOWARDS CONFLICT AND THE USE OF DISPUTE RESOLUTION MECHANISMS

This question deals with the Commissioner's **perception** of the capacity of the parties in terms of their **knowledge**, **skills** and **means** – to deal with disputes both in the workplace and at the CCMA

5.1 Please indicate what type of knowledge, skills and means the parties need to effectively deal with conflict and disputes.

	Employers	Employees	Trade union reps
Knowledge			
Skills			
Means			

5.2 Use the following scale to indicate to what extent the employers, employees and trade union representatives have the knowledge, skills and means to effectively deal with conflict and disputes in the workplace and at the CCMA.

Use the following scale:

None at all	Not Good	Average	Good	Very good
1	2	3	4	5

	Employers	Employees	Trade union reps
Knowledge			
Skills			
Means			

6. THE ROLE OF LABOUR LAWYERS AND CONSULTANTS

On a scale of 1-5, please indicate in the columns provided, what your perception is of labour lawyers and labour consultants in the following situations and give a reason for your response in every instance:

Negative			Positive	
1	2	3	4	5

6.1 (a) Labour Lawyers **6.1 (b) Consultants**

6.1.1 In conciliation ☐ ☐

Reason: _____ Reason: _____

6.1.2 In arbitration ☐ ☐

Reason: _____ Reason: _____

6.1.3 Advice to clients ☐ ☐

Reason: _____ Reason: _____

6.1.4 Fees they charge ☐ ☐

Reason: _____ Reason: _____

6.2 What role do you think labour **consultants** have to play in the labour relations system?

6.3 What role do you think labour **lawyers** have to play in the labour relations system?

6.4 The role of consultants will increase / decrease in future?

Increase - 1 ☐ Decrease -2 ☐

Explain: _____

7. PROBLEMS

Please indicate what are the most important **problems** that you experience with regard to the following?

7.1 Parties to the dispute resolution process

(a) Employers: _____

(b) Employees: _____

(c) Union representatives: _____

(d) Consultants: _____

(e) Lawyers: _____

7.2 With regard to CCMA administration and management

(a) Case management: _____

(b) Remuneration: _____

(c) Administration: _____

(d) Other: _____

7.3 **With regard to CCMA's processes**

(a) Conciliations: _____

(b) Arbitrations: _____

(c) Any other processes: _____

7.4 **What are the most important problems of CCMA commissioners with regard to:**

(a) **Knowledge:** (Please indicate any areas where you feel they do not have adequate knowledge)

(b) **Skills:** (Please indicate which skills they lack in order to be effective as commissioners?

(c) **Means**: (Such as offices, telephones, fax, photo copying, stationery etc that they need to effectively and efficiently operate as Commissioner)

7.5 **Any <u>other problems</u> that Commissioners experience in their work situation?**

8. <u>LOW SETTLEMENT RATE</u>

8.1 What do you think are the reasons for the low settlement rate:

8.2 Please indicate if you agree or disagree with the following statements (indicate the extent of your agreement/disagreement by filling in the appropriate number (1,2….5) in the relevant block)
Low settlement rate can be attributed to:

		Disagree				Agree
		1	2	3	4	5
(a)	Unco-operative parties					
(b)	Not enough time for proper conciliation					
(c)	Non-attendance by employer parties					
(d)	Employers not following internal procedures					
(e)	Employees not utilising internal procedures					
(f)	Too easy to refer cases to CCMA					
(g)	Parties scared of conflict					
(h)	No costs involved					
(i)	Employees are opportunistic					
(j)	Employees have high expectations					
(k)	Employers allowing conflict to escalate					
(l)	Employers do not have proper disciplinary and grievance procedures					

8.2.1 Please elaborate on any of the above issues that you feel strongly about:

8.3 On a scale of 1-5, please indicate to what extent the following have a negative influence on **your** ability to settle disputes during conciliations:

		Not at all				High degree
		1	2	3	4	5
(a)	High stress levels (self)					
(b)	Too many *in limine* points raised					
(c)	Insufficient training (self)					
(d)	Uncooperative parties					
(e)	Interpreters					
(f)	Too many hearings per day					
(g)	Labour lawyers					
(h)	Labour consultants					
(i)	Trade union representatives					
(j)	No support from management					
(k)	Bigger employers' internal procedures are sophisticated – only come to CCMA to get a certificate					

(l) No mention of parties to settle ☐

8.3.1 Please elaborate on any of the above issues that you feel strongly about:

9. HOW DOES THE SYSTEM COPE WITH AND ADJUST TO THE STRAIN CAUSED BY HIGH REFERRAL RATES

9.1 Do you think the CCMA will play an important role in dispute resolution in future?
Yes - 1 ☐ No - 2 ☐ Don't know - 3 ☐

9.1.1 Please give a reason for your answer:

9.2 How do you think the new private dispute resolution bodies impact on the work of the CCMA?

9.4 What should be done to alleviate the strain on the system caused by the high rate of referrals of individual unfair dismissal cases.

9.5 Do you think that labour legislation with regard to individual unfair dismissals cases should be relaxed
Yes - 1 ☐ No - 2 ☐ Don't know - 3 ☐

9.5.1 Please give a reason for your answer:

9.5.2 If you answer is Yes, please indicate which changes should be effected:

9.6 Please mention any other issues which should be addressed:

Your assistance in completing this questionnaire is highly appreciated.

H Bendeman **Cell**: 083 309 1188 **Fax**: (012) 420-2873 **Email**: hbendema@postino.up.ac.za

CODING OF RESPONSES TO QUESTIONNAIRE

1. BACKGROUND INFORMATION (QUESTIONS 1.1 TO 1.5)

NO	YEARS AS COMMI-SSIONER	FULL TIME	PART TIME	LEVEL	MALE FEMALE	AGE
1.	8	6.5	1.5	A	F	34
2.	3		3	B	M	41
3.	4	3	1	A	F	38
4.	7	7		SNR COMM.	M	43
5.	5	2	3	SNR CONVENING COMM	M	52
6.	2	2		A	M	50
7.	3		3	B	M	50
8.	7	7		A	M	40
9.	6	5	1	SNR COMM.	F	47
10.	4		4	A	M	49
11.	6		6	SNR COMM.	M	42
12.	6	6		A	M	45
13.	4	4		A	M	34
14.	2	2		B	F	28
15.	4	4		A	M	46

1. BACKGROUND INFORMATION (QUESTIONS 1.6 TO 1.9)

NO.	QUALIFICATIONS	TRAINING	PREVIOUS WORK EXPERIENCE	PERCEPTIONS	
				POSITIVE	NEGATIVE
1.	▪ B Proc ▪ MA Psychology	▪ Mediation Arbitra. ▪ Dispute Resolution ▪ Conflict Resolution	▪ NGO – dealing with community dispute resolution	4	
2.	▪ BA LLB +	▪ Adv Pupilage ▪ Adv Training Courses ▪ CCMA Training	▪ Teacher, ▪ Magazine writer		2
3.	▪ BA ▪ BProc ▪ LLB ▪ LLM ▪ Adv Diploma in Labour Law ▪ Diploma in Human Rights	▪ Attorney ▪ Mediator arbitration	▪ Attorney ▪ Lecturer ▪ Presiding officer	4	
4.	▪ Labour Economics Diploma ▪ CPIR – Wits	▪ CCMA Training	▪ Trade unionist	5	
5.	▪ MDP – Unisa	▪ CCMA Courses	▪ Productivity + change management consultant ▪ Exec IR and HR ▪ General Manager ▪ Union official	5	
6.	▪ BIURIS ▪ LLB	▪ Yes (CCMA)	▪ Yes	4	

7.	▪ Partly Completed BCom	▪ Extensive and various throughout career	▪ 21 years corporate HR/IR ▪ Last 10 years as director ▪ 5 years – self employed as labour consultant	4	
8.	▪ BA degree	▪ CCMA Training	▪ Dept of Labour – 8 years	5	
9.	▪ BA ▪ LLB ▪ LLM	▪ Arbitration ▪ Leadership ▪ Conciliation ▪ Dispute Resolution ▪ Facilitation ▪ Management	▪ Academic ▪ Legal Practitioner	4	
10.	▪ National Diploma Public Admin ▪ BA Hons (Cum Laude) ▪ MA(IR) Cum Laude ▪ B Proc ▪ LLB	▪ CCMA ▪ IMSSA ▪ Management	▪ Snr Work Study Officer ▪ Snr Manager, IR/HR ▪ Labour Law Advocate	5	
11.	▪ B Com ▪ LLB ▪ Advanced Diploma Labour Law (RAU)	▪ CCMA Training ▪ Writing arbitration awards ▪ Arbitration Skills	▪ Practising Advocate	4	
12.	▪ Diploma IR ▪ Diploma PR ▪ Certificate Programme in IR ▪ Certificate Programme Law	▪ Arbitration ▪ Facilitation Mediation Council ▪ Negotiation and interpersonal Skills ▪ Writing Skills	▪ Labour Negotiation ▪ Represent workers in dismissal cases ▪ User of arbitration and mediation processes	5	
13.	▪ BA Law		▪ Student, worked part-time in retail store	5	
14.	▪ B Soc Science (UCT) ▪ Post Grad Diploma (Employment Law) ▪ 2nd year LLB (Natal)	▪ CCMA training	▪ Only temporary work	5	
15.	• BA • Biuris • LLB	▪ CCMA training	▪ Attorney ▪ State prosecutor ▪ Private arbitration ▪ Advocate	4	

1.10 BACKGROUND INFORMATION

NO.	CCMA'S MOST IMPORTANT PROBLEMS
1.	▪ No accountability with the staff ▪ Very little support for staff, and either part time or full time commission
2.	▪ Allowing an excessive flood of baseless applications and poor management of such flow. ▪ Lack of distinction between conciliatory dispute resolving and quasi-judicial functions and thus disempowering of arbitrators.
3.	▪ Backlog ▪ Relationship with commissioner resulting in low morale
4.	▪ Unfair dismissal disputes ▪ Arbitration awards within 14 days
5.	▪ CCMA at risk of becoming solely an unfair dismissal tribunal. ▪ Poor budgeting of resources ▪ Too much emphasis on dispute resolution and not enough on dispute prevention.

6.	▪ Systems management and administration.
7.	▪ Too easy to refer a dispute = too many disputes and insufficient funding to cope. ▪ Too little if any quality control regarding commissioners and their awards and conciliations.
8.	▪ High case load. ▪ Insufficient commissioners.
9.	▪ Poor administrative services. ▪ Lack of competent commissioners capacity.
10.	▪ Admin can be streamlined. ▪ Backlog – reluctant to take/make additional efforts.
11.	▪ Lack of funds. ▪ No con-arbs.
12.	▪ Failure to meet national efficiencies. ▪ High number of referrals by the users of the processes.
13.	▪ Capacity problem, current staff not in position to deal with overwhelming referrals particularly in granting, the second problem relates to the quality of commissioners rulings and awards. ▪ This problem is accounted for partly by the amount of work given to commissioners and most importantly by the CCMA failure to attract well qualified full-time commissioners due to the low levels of remuneration compared to other institutions where most of the skilled and highly qualified commissioners work part-time. ▪ The organisation apart from work related training does not even encourage aggressively further academic training by staff or stimulate intellectual development. The above problem impacts greatly on institution's professionalism and effectiveness in delivering its statutory obligations.
14.	▪ Backlog ▪ Financial Resources
15.	▪ Obtaining and registering accurate details on the case management system ▪ Providing expeditious service

2. REASONS FOR THE HIGH REFERRAL RATES OF INDIVIDUAL UNFAIR DISMISSALS (QUESTION 2.1 & 2.2)

	WHAT, ACCORDING TO YOUR OWN EXPERIENCE, ARE THE MAIN REASONS FOR THE HIGH RATE OF REFERRALS OF INDIVIDUAL UNFAIR DISMISSAL DISPUTES?	WHAT COULD BE DONE TO ALLEVIATE THIS PROBLEM?
1.	▪ People are aware of the LRA but not sure what constitutes an unfair dismissal. ▪ No fee involved and some employees are opportunists.	▪ A fee should be imposed that could be claimed back after a successful arbitration. ▪ Public needs to be educated about acceptable work behaviour and the law.
2.	▪ The fact that referrals are gratuitous, not screened as the legal aid board does and the perception among the general public is that it is a favourable lottery to draw a winning number from.	▪ Essentially employing the legal aid board system ▪ There must be a qualified report on the merits of the case and proof of indigence otherwise the service will have to be charged for as in the ordinary courts at a reasonable rate to be set by all role players.
3.	▪ Economy – the argument is that the economy is poor, lot of unemployment, if jobs are lost, go to CCMA – might get something – take a chance.	
4.	▪ Poor union organisations ▪ High unemployment	▪ This is a macro-economic and political issue.
5.	▪ I believe that the referral rate does not reflect the actual situation i.e the actual rate is higher. ▪ A large sector of employers still do not regard the legislation seriously.	▪ Increase the awareness levels of benefits of fair employment practices. ▪ Target sectors that are problematic and deploy resources accordingly i.e. budgetary and human resources. ▪ Order costs more frequently so parties take the process seriously.
6.	▪ The high unemployment rate has a direct influence as there is an abundance of labour in the market and employers have no qualms to dismiss an employee as there would be an immediate replacement.	▪ Dispute prevention should play a more important role to train both employers and employees about their right and obligations.
7.	▪ Too easy with minimal consequences of a frivolous and vexatious referral ▪ Applicant will often receive a nuisance value "settlement", fuelling the belief that nil to lose, much to gain when referring a dispute.	▪ Parties pay a multiple of their monthly salary to refer and defend a dispute - a type of deposit. For example, applicants pay a month's salary, respondent pay 3 months. This would help fund CCMA's activities. ▪ Parties get their deposit back if settled at conciliation.
8.	▪ Employees think they can get easy money at CCMA. ▪ Some employers have a total disregard because if they get an award against them, it is difficult and costly to execute.	▪ Introduce a revenue stamp for applications. ▪ Award costs
9.	▪ Easy access – employees with weak cases have nothing to lose. ▪ Employees remain ignorant of their responsibilities. ▪ Poor labour practices in domestic and security sections.	▪ Consistent use of con-arbs. ▪ More professional pre-referral advice service. ▪ Promotion of pre-dismissal arbs. ▪ Focussed information sharing with regular users – unions.
10.	▪ Generally a too open system for referrals/cases without merits. ▪ Poor advice by DoL/consultants.	▪ Consider minimum payment of costs. ▪ Stricter appliance with cost orders against employer/TU and attorney referrals ▪ Training to TU's.
11.	▪ Lack of knowledge of employees. ▪ Unrealistic expectations.	▪ Booklet with basic info in all languages to be handed to employees before they refer cases.
12.	▪ Current socio economic condition in country. ▪ Inadequate skills to deal with disputes at their origin. ▪ Users misled to refer cases even if they have no case.	▪ Encourage users to exhaust internal mechanisms before referring a case. ▪ Change law so that users who earn more than R8000 to pay certain fees ▪ Employers to pay certain fee for unprocedural dismissal.
13.	▪ Flagrant disregard for the law by employers and also the vexatious referrals by applicants account for most of the cases.	▪ By encouraging employers to comply and educate the public on an ongoing basis of their rights.

14.	▪ Most of the cases are substantively fair but procedurally unfair.	▪ Employers to be trained / educated on following proper procedures.
15.	▪ Unrealistic expectations ▪ Trade union attitude ▪ Unsatisfactory internal procedures ▪ Free service to applicants ▪ High unemployment	▪ More effective macro-economic policy ▪ R20 stamp fee for referral ▪ Workshops and training for users ▪ Better screening of cases

3. INDIVIDUAL DISMISSAL DISPUTES (QUESTION 3.1 TO 3.12)

Disagree				Fully agree
1	2	3	4	5

	3.1	3.2	3.3	3.4	3.5	3.6	3.7	3.8	3.9	3.10	3.11	3.12
1.	2	1	5	3	5	4	4	5	5	4	4	4
2.	3	1	3	1	3	1	4	4	3	3	4	5
3.	4	2	4	2	1	1	3	4	2	1	2	3
4.	2	2	4	2	3	4	4	4	2	1	4	4
5.	4	3	5	4	5	4	5	4	2	2	4	4
6.	3	3	4	3	3	3	4	2	3	4	2	4
7.	2	2	5	3	2	4	4	5	3	4	4	3
8.	4	4	4	4	2	4	4	3	3	3	4	3
9.	3	4	4	4	5	4	5	3	2	4	4	5
10.	3	3	4	2	2	4	5	3	3	4	3	3
11.	4	1	5	4	3	4	5	2	4	3	4	5
12.	3	5	5	5	2	5	5	5	4	5	4	5
13.	5	5	5	5	4	3	5	5	4	5	5	5
14.	3	4	4	4	1	4	5	4	3	4	4	4
15.	4	3	4	3	2	3	4	3	1	3	2	2

4. APPROPRIATENESS OF THE DISPUTE RESOLUTION SYSTEM FOR SMALL AND MEDIUM SIZED EMPLOYERS AND INDIVIDUALS (QUESTION 4.1 TO 4.2)

	Is the current system appropriate for small to medium sized employers?		Do you think the current system is appropriate for individual employees?	
	Yes / No / Not sure	Reason for your answer	Yes / No / Not sure	Reason for your answer
1.	Not sure	▪ It appears that some small to medium sized employers take the Act to heart and others simply ignore it.	Yes	▪ Most employees are aware of the CCMA and their right to approach it.
2.	Yes	▪ Not sure that any other system, or any system for that matter will work better. ▪ An option is to stop internal enquiries with a foregone	No	▪ Participation of TU at the internal stage will go a great way to creating a perception of fairness before a crowded neutral forum is resorted to At the moment employees will carry on

		conclusion and make more use of truly independent dispute resolvers at the workplace itself.		thinking that their only shot is outside the employers disciplinary structure.
3.	Yes	▪ It is a fairly straightforward system that can be understood by small to medium sized employers.	No	▪ Once dismissal is in dispute it is always difficult for an individual employee to discharge the burden of proving that he/she was dismissed. ▪ Such employees should have the right to legal representation ie. if they do not belong to a trade union.
4.	Yes	▪ The current con-arb is a speedy resolution of dispute, one stop that saves time and money on all sides.	Yes	▪ Commissioners are experienced in dealing with disputes of this nature and higher settlement rates are achieved from small to medium sized employers.
5.	Yes	▪ Speedy, low-cost, simple resolution of dispute, one-stop that saves time and money on all sides.	Yes	▪ Speedy, low cost and simple procedure. 70% of all disputes are from unrepresented single employees.
6.	Yes	▪ Its simple and not complex. All that is required is for parties to treat one another with respect.	No	▪ Individual employees are incapable of presenting their disputes, and in the majority of cases are not even able to differentiate between substantive and procedural issues.
7.	Yes	▪ Relatively informed process and conciliation gives an employer the opportunity to participate in resolving a potentially harmful outcome.	Yes	▪ Process is designed to guide the less knowledgeable through the process without him being prejudiced for his lack of knowledge.
8.	Yes		Yes	
9.	No	▪ The system is designed for mediation to big large-scale users. This is especially so in respect of extended collective agreements and operational requirement dismissals. Many ideal procedures are almost impossible in the domestic sector.	Yes	▪ A good commissioner will not permit an individual with little formal education to be prejudiced in process. The fundamentals of our labour relations are not that complex that they cannot be explained and used by individuals.
10.	Yes	▪ Elective system, in theory to deal with disputes.	Yes	▪ If all the procedures are not meant to be meticulously met. ▪ Relaxed procedures / shorten proceedings.
11.	No	▪ Difficult for owner of one-man hamburger shop to follow procedures before dismissing the potato peeler for stealing.	No	▪ Bigger employers as a rule have trained IR persons who are on a much higher level than most employer's who normally do not know how to defend themselves in a hearing.
12.	Yes	▪ Current system is more user friendly and cheaper.	Yes	▪ More user friendly and accessible.
13.	Yes	▪ I do not think the current system is a problem for any party except that of course in terms of approach to certain issues regard must be given to the size of the employers business.	Yes	▪ The commissioner would from time to time have to take into account that an unrepresented employee has to be advised of his rights, throughout the process, particularly at arbitration.
14.	Yes	▪ Dispute resolution should be uniform and all employers should be treated alike. Differential treatment may lead to bigger employers feeling that they are being treated better, small employers may also take advantage of the different treatment. Also this may lead to big employers not wanting to grow or small employers not being allowed to grow out of fear of being treated differently.	Yes	▪ It allows all employees the same opportunities. It does not treat employers who are unionised differently to those that are not unionised. Belonging to a trade union should be an individual choice and not because they would be treated differently should they not join a union.
15.	Yes	▪ A proper balance is maintained ▪ Collective labour rights are often still applicable ▪ The right of small businesses needs protection	Yes	▪ Individual employees are the most vulnerable and are entitled to consistent and fair application of labour laws

5.1 CAPACITY AND ORIENTATION OF EMPLOYERS, EMPLOYEES AND TRADE UNIONS TOWARDS CONFLICT AND THE USE OF DISPUTE RESOLUTION MECHANISMS

	KNOWLEDGE			SKILLS			MEANS		
	Employers	Employees	TU Reps	Employers	Employees	TU Reps	Employers	Employees	TU Reps
1.	Conflict resolution Language LRA procedures	What constitutes an unfair dismissal	Lack of knowledge Law of evidence Behaviour arbitration	Listening skills Empathy Language skills	Cannot express themselves	Most are average workers prepared to take responsibility for their action	Most have access to means	Some employees do not have means	Most have transport phones and faxes
2.	lack of emotionalism	knowledge of LRA absence of victim mentally	knowledge of LRA non-conflictiality	human relations skills	capacity for self criticism	end the conflictuality driven perspective	Greater use of external experts	Attendance of appropriate courses	Learning about leadership, economy, the world around Different needs and demands of people
3.	Yes, need to be au fait with LRA & EEA related legislation	Yes – do	Yes – do	Skills understood and participate in arb. proceedings	-do-	-do-	Have the means to prolong the employee's suffering by requesting postponement and reviewing award	Do not have the means to review awards and sometimes do not have the means to attend the proceedings	Have limited means to review awards
4.	Procedures chairing hearings Alternative sanctions to dismissals LRA	Knowing their rights	Procedures Presentation Law of evidence LRA & jurisprudence	LRA Chairing hearings	Reading	LRA	CCMA workshops	Education through media	CCMA training
5.	benefits of legislation and its objectives	basic knowledge of what constitutes misconduct and poor performance	labour legislation and arbitration proceedings / processes	conflict handling dispute prevention Leadership	joint problem solving worker leadership of conflict handling	conciliation joint problem solving	Correct attitudes	Values	attitudes
6.	labour law	labour law	labour law	presentation	presentation	presentation	IR Personnel	Shop stewards	Officials

7.									
8.									
9.	Relevant legislation, LRA, BCEA, etc. Understanding of causes of conflict and mechanism to use it positively. CCMA rules and procedures.	Their legal rights and obligations in fair labour practices. LRA, BCEA, SDA, EEA	Relevant legislation. CCMA Rules and procedures Disciplinary enquiries Performance management	Dispute resolution Fair procedures Proper management of employee performance	Ability to deal with conflict at work Understand process	Adequate representation on behalf of employees in all areas of workplace interaction.	Training in substantial and procedural fairness in management of employees and access to qualified experts.		Training through union initiatives.
10.	Knowledge of general underlying theory of dispute resolution / conflict management	Do	Do	Conflict management. Communication in negotiation skills. Basic labour law. Cultural diversity.			Seminars and training		
11.	Basic knowledge of LRA and procedures			Basic skills to pursue a case properly in arbitration		Access to information available to the other side, that is needed to prepare their case.			
12.	Conflict is inherent	What conflict is and that it is inherent	Training on how to deal with conflict	Negotiation	Negotiation skills and interpersonal skills	Negotiations skills			
13.									
14.	Procedures	What is expected of them	Labour laws	Negotiation	Facilitation				
15.	Small employers have limited knowledge Labour laws	Inadequate – needs training	IR qualifications would assist	Need negotiation skills	Would benefit from training	Need negotiation skills			

5.2 CAPACITY AND ORIENTATION OF EMPLOYERS, EMPLOYEES AND TRADE UNIONS TOWARDS CONFLICT AND THE USE OF DISPUTE RESOLUTION MECHANISMS

1	2	3	4	5
NONE AT ALL	NOT GOOD	AVERAGE	GOOD	EXCELLENT

	KNOWLEDGE			SKILLS			MEANS		
	Employers	Employees	TU Reps	Employers	Employees	TU Reps	Employers	Employees	TU Reps
1.	3	3	2	2	2	3-4	4	2	3-4
2.	4	2	1	3	2	1	4	2	1
3.	5	3	3	5	3	3	5	1	2
4.	4	2	3	4	2	3	4	2	3
5.	3	2	3	2	3	2	2	2	2
6.	3	2	3	3	2	3	4	2	3
7.	4	2	3	4	2	3	4	2	3
8.	4	2	3	4	2	3	4	2	3
9.	4	1	3	3	2	3	4	2	3
10.	2	2	3	2	2	3	2	2	3
11.	4 big / 2 small	2	3/2	4 big / 2 small	1	3	4 big / 2 small	1	2
12.	2	1	3	2	1	3	5	1	3
13.									
14.	3	1	3	3	1	3	3	1	3
15.	3	2	3	3	1	3	3	2	3

6.1 THE ROLE OF LABOUR LAWYERS AND CONSULTANTS

NEGATIVE			POSITIVE	
1	2	3	4	5

LABOUR LAWYERS							
		CONCILIATION		ARBITRATION		ADVICE TO CLIENTS		FEES
1.	4	Reasonable, they can see the flaws in clients' cases	5	Knowledge about process and law	4	Usually good	2	Expensive for services rendered in some instances
2.	4	Facilitate agreement	4	Streamline proceedings but tend to exceed in	4	They know the law	4	Market values dominate naturally

				technicalities				
3.	4	-	4	-	4	-	1	-
4.	1	Not in their interest to settle too early	3	Sometimes they tend to assist the process and other times are highly technical	3	Sometimes helpful	1	Too high, which in effect increases the cost of employment
5.	1	They have a limited role given that issues are often relationship based.	2	Depending on complexity, they come from a litigation background and attempt to score points on technical issues	3	Unnecessary in most disputes (70%) issues are simple and a good conciliation can help parties to understand their positions.	-	Unknown, but must be market related if they want to survive.
6.	2	Lawyers are inclined to be very legalistic and raise unnecessary point in limine	3	Lawyers can be very useful especially if the dispute is well defined. If not, they have the tendency to argue irrelevant issues.	2	They have the inclination to push even where there are no prospects of success.	1	Exorbitant fees
7.	1	Allow the employer / employer to deal with issues themselves.	4	Often able to focus the issues on important elements.	4	Often able to focus issues on the important elements.	4	Usually give value for money – not always.
8.	2		5		3		2	
9.	4	Where settlement appropriate – will guide parties to settle.	4	Usually clear reasoning, research and argument.	4	Generally sound unless not labour law practitioners.	3	Too much but within legal framework.
10.	4	Understand process / desired outcome.	5	Experienced litigators shorten proceedings.	4	Generally good.	3	Prescribed by law society / fair.
11.	5	Know the law.	5	Court experience shows	4	Sometimes a bit too technical.	4	Entitled to fees.
12.	2	I often find them obstructive.	4	Assist in clarifying issues in dispute.	1	Because they want to appear at arbs and make more money.	3	Not sure.
13.								
14.	4	They know the law and understand conciliation.	5	They are usually experienced litigators and make an arbitrator's job easy, they also do a lot of research.	4	Usually give their clients objective advice.		I don't know what they charge.
15.	1	They create expectations that may frustrate the process	4	Some facilitate a solution – assist commissioner	4	Sensitive to issues and advise accordingly	?	Unable to comment

CONSULTANTS							
		CONCILIATION		ARBITRATION		ADVICE TO CLIENTS		FEES
1.	1	Too positional	3	Sometimes they are knowledgeable of the law.	2	Do not inform their clients of the flaws in their cases.	2	Exorbitant fees, pray on unsuspected individuals
2.	4	Facilitate agreement	3	Some are good as lawyers, but some are fraudsters and complicate things, they need to be selected on a basis of certain criteria.	3	Some are good but some are fraudsters based on certain criteria and complicate things,.need to be selected based on certain criteria	3	The impostors make money out of ill serviced clients
3.	2	-	2	-	2	-	1	-
4.	1	Not in their interest to settle at all	1	Consultants are problematic as they raise every technicality in the book.	2	Advice is not always good for business	1	Too high, which in effect increases the cost of employment
5.	1	They have a limited role given that issues are often relationship based.	2	If allowed they would allow clients not to settle at conciliation to gain two income streams: (1) at conciliation (2) at arbitration	3	Unnecessary in most disputes (70%) issues are simple and a good conciliator can help parties to understand their positions.	-	Unknown, but must be market related if they survive
6.	4	Consultants are more effective in assisting parties to settle mainly because they do not enjoy the right of appearance and therefore strives for the best.	3	Consultants can be very useful in ordinary dismissal disputes but I am doubtful if they can display the same clarity in other disputes.	2	The consultants employed by employers organisations also seem incapable to inform their clients about the true nature of the dispute. They like to impress their clients.	3	Clients are charged even for services that are obtainable free of charge.
7.	1	Allow parties to deal with issues themselves.	2	Often not more skilled than their clients.	2	Often not more skilled than their clients.	2	Usually give value for money – low cost, low value, but not always.
8.	2		2		3		2	
9.	1	Often there to make money – little interest in employment justice.	2	I never permit them – often not very skilled.	1	Driven by money		No regulations, fee, very high % of employee's entitlement.
10.	4	Understand process / desired outcome.	4	Average knowledge and skills.	3	Generally good – need to be sharpened / open minds.	3	Sometimes questionable.
11.	2	Think they know the law.	1	Normally have no court experience.	1	Appear to be motivated by previous conflict with	1	Worrying factor that they take money from the public

						specific employers.		but they have no trust account – no control.
12.	4	Find them helpful	1	Unable to deal with their unacceptable behaviour	4	Because they may not be permitted in processes.	0	Not sure
13.								
14.	2	They usually want to make money and do not want to settle.	3	They raise a lot of unnecessary objections to jurisdiction.	2	Advise their clients not to settle disputes whether their clients have a case or not.		I also do not know how much consultants charge.
15.	1	They tend to imbalance the process	2	They are often not bona fide employers and employee organisations and may be biased	2	They give the impression that they are bound by their instruction	?	Unable to comment

6.2 WHAT ROLE DO YOU THINK CONSULTANTS HAVE TO PLAY IN THE LABOUR RELATIONS SYSTEM?

1.	It is difficult to exclude them and any other practitioners who are not lawyers.
2.	As links between employers and employees in the workplace primarily and if qualified by an appropriate body, as representatives on par with other authorised representatives.
3.	Advise employers on HR matters and on legal requirements.
4.	Purely advisory - chairing hearings
5.	Ensuring that employers have 'their houses in order' i.e. similar to outsourced HR services.
6.	Labour consultants could be utilised in simple dismissal disputes where no complex and complicated legal services may arise. The majority of employees could benefit from such a concession.
7.	Low barriers to entry resulting in too many low quality opportunists.
8.	Yes, but they have to belong to an organisation from which they can be excluded in the case of misconduct.
9.	Advise employers in introducing and maintaining fair labour practices.
10.	Can be positive to enhance process. Job creation.
11.	Not much, they often give bad advice and often able to walk away from the problem. Client does not have a "method" to keep them liable.
12.	Assist parties in dispute resolution processes.
13.	
14.	They should act as mediators between their clients and employees and not merely do whatever their clients are saying. They should be able to be objective and assess the processes.
15.	Should be limited to internal structures of employers and HR management. In some cases they should assist non-unionised employees – they should be bound by an ethics code

6.3 WHAT ROLE DO YOU THINK LAWYERS HAVE TO PLAY IN THE LABOUR RELATIONS SYSTEM?

1.	Lawyers are useful when it involved legal points.
2.	Close to that of consultants (as intermediary between employer and employee in the workplace) with less involvement in the workplace and more involvement in representation at statutory bodies.
3.	To represent parties at arbitration proceedings.
4.	Chairing hearings – advisory
5.	To help clients in preparation and representation in complex matters.
6.	The need for lawyers is more apparent in complicated issues like unfair labour practice, retrenchments, constructive dismissals, unfair discrimination and have also played an important role in cases where there are many witnesses
7.	Whilst the law remains complex, lawyers will have an important role to place.
8.	Mostly good, especially at ARB but sometimes destructive.
9.	Advising parties re: legal rights and obligations.
10.	Positive, e.g. understand system / legal issues.
11.	Big, most arbitrations get finalised quicker when lawyers are involved, they understand the process and does not waste time on irrelevant issues.
12.	Provide legal advice and assist in dispute resolution processes.
13.	
14.	The same role as consultants.
15.	Legal representation at CCMA and arbitration where the dispute is not a single one based on misconduct or incapacity – unrestricted access to Labour Court.

6.4 WILL THE ROLE OF CONSULTANTS INCREASE / DECREASE IN THE FUTURE?

1.	Increase, difficult to exclude them and other practitioners.
2.	Decrease, if they are not allowed representation as improperly serviced people who burn their fingers with the wrong ones will become more cautious and if the law does not change too frequently and not more complexified, employers will tend to rely on the skills and experience they

	they have accumulated.
3.	Decrease, at the moment the consultants are thriving only because they pretend to be employer's organisations. If legal representation is allowed, the role of consultants will decrease because they will not survive the competition from the lawyers.
4.	Increase, because the employers still think that the labour law is too complex to handle.
5.	Unknown, it depends if the CCMA remains 99% focussed on dispute resolution or moves its focus more towards dispute prevention.
6.	Increase, it would seem that because consultants' fees are slightly lower than lawyers, most parties prefer the use of consultants.
7.	Increase, clients are often unaware whether or not they are getting quality services – they will often opt for the lower cost compared to law firms.
8.	Increase
9.	Increase, some are cheaper than lawyers and tend to chase ambulances. Often pick up disgruntled employees who have been abandoned by their unions.
10.	Increase, SME will make use as cases increase.
11.	Decrease, there is no standard. Every second dismissed ex IR dept employee operates as a consultant. The public is at risk – they realise the lack of knowledge / experience when it is too late.
12.	
13.	
14.	Increase, because they are employer's organisations officials as well. In fact, they usually come as officials rather than consultants.
15.	Decrease – need an ethical code

7.1(A) PROBLEMS OF EMPLOYERS

1.	Inflexibility and a conviction that they are always correct.
2.	Generally no problems
3.	Think that commissioners are biased in favour of employees. Consequently have an attitude problem because they have the means to take the award on review.
4.	Reluctant to accept that they are wrong.
5.	Arrogance, attitudes, racism
6.	Employers organisations still make use of outdated methods and duty tricks. They sometimes take advantage of the vulnerability of employees and would assist on disputes being referred to the labour court merely to frustrate the employee.
7.	Non attendance at conciliations wasting the CCMA's / applicants time and money.
8.	
9.	Notification not secured by appropriate person – non-attendance – default awards – recission application.
10.	Closed mind to underlying theory.
11.	Believe they cannot make a mistake – can't wait to get a certificate to go to arbitration.
12.	
13.	
14.	Do not follow procedures in effecting dismissals.
15.	Sometimes obstructive

7.1(B) PROBLEMS OF EMPLOYEES

1.	Far too high expectations and unwillingness to take responsibility for their actions.
2.	Lack of knowledge and a precipitate judgement in their perception of a dispute-resolver's impartiality.
3.	Think that commissioners are biased in favour of employers.
4.	Taking a chance as there is no employment.
5.	Ignorance of right and due processes.
6.	Most employees are not sophisticated and cannot fully articulate their problems.
7.	Frivolous referrals.
8.	

9.	Unprepared, frivolous cases, unable to argue merit.
10.	Lack of knowledge of the system.
11.	Have unrealistic expectations.
12.	Lack of knowledge and understanding of processes.
13.	
14.	They do not know what is expected of them as employees and often make unnecessary mistakes.
15.	Sometimes inaccurate unprepared

7.1(C) PROBLEMS OF UNION REPRESENTATIVES

1.	Spend time on irrelevant issues.
2.	A lethal cocktail of disparaging arrogance and inexcusable ignorance.
3.	Think that commissioners have to bend over backwards to accommodate their shadiness.
4.	Claim that they have an obligation to defend their members.
5.	Level of skills and attitudes.
6.	Some union representatives come to processes unprepared.
7.	Too many small and poor quality unions who are a hindrance to the process.
8.	
9.	Can be confrontational, often have wider agenda.
10.	Right(s) approach to conflict management.
11.	Have an axe to grind with management and do not concentrate on the issue at hand.
12.	Often not prepared.
13.	
14.	They do not properly prepare for hearings.
15.	Few problems

7.1(D) PROBLEMS OF CONSULTANTS

1.	Tend to undermine the commissioner's authority.
2.	Generally no problems.
3.	-
4.	Purely out to make money
5.	Focus on making money out of the system.
6.	I do not grant them right of appearance.
7.	They do not appear, therefore I have no opinion.
8.	
9.	Not very professional.
10.	Frustration of process in initial phases.
11.	Know less than they think and less than they hold themselves out to know.
12.	Refusing to co-operate.
13.	
14.	Make it difficult to settle cases, because they can make more money at arbitration.
15.	None, provided they are bona fide

7.1(E) PROBLEMS OF LAWYERS

1.	Tend to be adversarial in conciliation and even more so in arbitration.
2.	Generally no problems
3.	Most of them try to have the matter settled. If it does proceed to arbitration they adapt a legalistic approach.
4.	Dragging cases on unnecessarily.
5.	Too technical - often trying to score points against their "learned colleagues" rather than focussing on resolution and the merits of the case.
6.	Lengthy cross-examination.
7.	Complicate and confuse the issues if their client has a weak case.

8.	
9.	Generally helpful – well prepared.
10.	Frustration of process in initial phases.
11.	Full diaries leads to longer postponement. Points in limine that are academic.
12.	Unreasonably dragging cases.
13.	
14.	Lawyers usually raise all sorts of unnecessary technical points in order to avoid the process.
15.	None

7.2(A) PROBLEMS OF CASE MANAGEMENT

1.	Unhelpful, system is down, case gets shifted from one person to another.
2.	Poor, full of blindness, mitigating factor: high volume and high stress, better knowledge of LRA and ancillary legislation will help.
3.	No comment
4.	Data not always accurate.
5.	Lack of job enrichment and job satisfaction i.e. the same thing day after day.
6.	Failure to place documents in files compromises the quality and decisions of commissioners.
7.	This year in my section I have not experienced any problems worth recording.
8.	
9.	Poor supervision, (no) attention to detail, no follow-up, no accountability.
10.	Quite good, need however to sharpen process / scheduling done timeously.
11.	Good in Northern Cape.
12.	Replacement of CMO's with CMA's has dropped the CCMA's standards. The current inefficiency is due to lack of experience.
13.	
14.	Puts wrong party details on the system. Also advises parties incorrectly. Also accepts cases with no jurisdiction.
15.	Incorrect capturing of information

7.2(B) PROBLEMS OF REMUNERATION

1.	Below the market rate and needs to be adjusted.
2.	No mobility in the hierarchy despite clear knowledge from people concerned of the relative merits and elements of commissioners. No reward for quality and level of complexity unlike in the field of legal practitioners. Too much reward for stressful volume of work. It breeds mediocrity and preference for easy cases.
3.	Inadequate.
4.	-
5.	Fine
6.	Far below the market rates.
7.	Low rates of pay cause the better commissioners to leave. Rate differences between levels of commissioners are not justifiable. Cases are invariably allocated at random without case management having any knowledge of the commissioner's level. Fees for default award too high. Should reintroduce fees for rulings. With the current structures, commissioners manipulate the system to make it work for them.
8.	
9.	Probably too high.
10.	Disturbed by "unilateral changes" / decrease of tariffs/fees. Not really good re practice.
11.	Part-time commissioners should be paid a more marketable fee to keep the better part-time Commissioners interested.
12.	Reasonable.
13.	
14.	Fine.
15.	No problems

7.2(C) PROBLEMS WITH ADMINISTRATION

	ADMINISTRATION
1.	Needs to be streamlined.
2.	Same as case management - poor, full of blunders, high volume of work, need knowledge of labour legislation.
3.	Biased against part-time commissioners. They are treated like beggars. Too many unnecessary strict rules for claims, eg. A penalty for submitting a claim late, even when the award was submitted timeously. Policies changing too often causing confusion.
4.	Not service orientated.
5.	Poor attendance to correspondence.
6.	It is chaotic with correspondence misplaced and sometimes it takes a considerably long period to receive correspondence.
7.	This year, no problems, my accounts are paid on time all the time and are always correct.
8.	
9.	Very poor, inefficient and haphazard.
10.	Can improve.
11.	Good in Northern Cape.
12.	CMA's highly skilled in so far as typing is concerned. They also do not understand the processes evolving at the CCMA. They also click wrong buttons in the computer and this leads to incorrect stats.
13.	
14.	It could be improved where mistakes are picked up early and rectified.
15.	Duplication of files

7.2(D) PROBLEMS WITH REGARD TO CCMA ADMINISTRATION AND MANAGEMENT

	OTHER
1.	-
2.	The real problem lies at the top of the CCMA and how it has allowed parties' attitudes to unfold.
3.	Administration must jack up its act with regards to payment of commissioners.
4.	
5.	
6.	
7.	Too many commissioners are paid to sit around – parties don't come, or they postpone. Better management of commissioners is needed, but need to set out the fee structures first to avoid the exploitation perception.
8.	
9.	CMO's in Gauteng have very cavalier approach to their work and some seem to resent part-time commissioners and whites.
10.	
11.	
12.	
13.	
14.	
15.	

7.3 PROBLEMS WITH CCMA'S PROCESSES

	CONCILIATION
1.	More time is needed
2.	Obsolete, largely a waste of time
3.	Adequate
4.	No shows
5.	None

6.	Except for mutual interest disputes, conciliation must be replaced with the con-arb process.
7.	Process works for me, Maybe employers should fax through whether they intend attending the conciliation, thereby avoiding the matter being set down for no purpose.
8.	
9.	Interview.
10.	Sometimes an unnecessary step – con-arb process much more effective.
11.	Should be more con-arbs.
12.	Time allocated not enough.
13.	
14.	Conciliations are good processes and should be exhausted first before arbitration is done.
15.	Competently handled

ARBITRATION	
1.	-
2.	Hampered by poor screening, carte blanche to very poor representatives of employees, malfunctioning of facilities such as tape recording and allocation of venues and most crucially, the nefarious results of the lack of edification of statutory arbitrators by the top of the institution, which has consequently spread to the CCMA users.
3.	Adequate
4.	Awards within 14 days, unnecessary delays.
5.	None
6.	No problems
7.	Allocation of cases is problematic regarding duration allocated. After conciliation the commissioner must give his/her view of the arb process; time needed and complexity of the matter - that commissioner is the only person with a reasonably guesstimate.
8.	
9.	Interview
10.	Good – venues can be improved.
11.	Quality of interpreters sometimes suspect.
12.	Failure by commissioners to comply with 14 days statutory limit.
13.	
14.	Arbitration to be done quickly and speedier rather than having many postponements of a case.
15.	

ANY OTHER PROCESSES	
1.	-
2.	Con-arb should be empowered. It is the way forward.
3.	-
4.	-
5.	The con-arb process is a very positive improvement, both from an attendance and settlement point of view.
6.	-
7.	Con/arb is often applied for, but seldom scheduled as such. The process is largely under-utilised which is adding to the caseload and high running costs.
8.	
9.	Interview.
10.	
11.	
12.	
13.	
14.	Facilitation is very important.
15.	In limine hearings are satisfactory

7.4 MOST IMPORTANT PROBLEMS OF CCMA COMMISSIONERS

KNOWLEDGE	
1.	Most recent case law.
2.	Non-legally trained commissioners have poor knowledge of legal reasoning, principles and evidentiary matters, cannot conceptualise and panoramically view the issues in dispute.
3.	Training only focuses on unfair dismissal disputes and does not cover other disputes.
4.	Not keeping up with jurisprudence, not being consistent.
5.	The new training is great.
6.	Law of evidence and evidentiary rules.
7.	Regular briefing sessions should be convened regarding latest case law or FAQ's.
8.	
9.	
10.	Advanced labour law / law of contract and law of evidence.
11.	CCMA commissioner who sits in arbitrations should have a legal background / experience.
12.	Writing of binding agreements. Effective engagement of parties in conciliation.
13.	
14.	Law of evidence
15.	Substantive labour law

SKILLS	
1.	-
2.	A good mediator does not make a good arbitrator. Knowledge of the law generally is missing in respect of the same class of commissioners referred to above. The skills they lack stem from the knowledge gap they suffer from.
3.	They have adequate skills
4.	Diplomatically robust
5.	The ability to put themselves 'in the shoes' of the parties
6.	Facilitation and negotiation.
7.	
8.	
9.	
10.	Understanding conflict / cultural diversity and labour market economics.
11.	Negotiation / conciliation skills
12.	
13.	Negotiation skills are lacking in some respects.
14.	
15.	Experience, credibility, mediation skills

MEANS	
1.	-
2.	An office for part-time commissioners equipped with such facilities is a must. Training courses on the law generally and in particular the law of contract and evidence and criminal law for non-legally trained commissioners. A venue for the entire day must be allocated to a commissioner and he must have a personal tape recorder set aside for him.
3.	No subsidies for commissioners even though they constantly have to leave the office whenever they have cases out of faith.
4.	Computer knowledge.
5.	Would be more efficient and effective if equipped with lap top computers when travelling to outside venues.
6.	Time to access and read new judgements on the computer.
7.	I understand that all commissioners are self-sufficient? If not, they should be.
8.	
9.	
10.	Office equipment – poor tape recording and lack of CCMA to assist part-time commissioners with return calls.
11.	Part-time commissioners should have access to CCMA library on line.
12.	These may only apply to part-time Commissioners.
13.	

14.	They have all that except that part-timers have to provide their own work equipment.
15.	Part-timers need unrestricted access to telephones and faxes

7.5 ANY OTHER PROBLEMS OF COMMISSIONERS IN THEIR WORK SITUATION

1.	-
2.	The answer to this question would necessitate an entire volume. Disempowering emasculation of their status is the No.1 problem. The CCMA has placed them disastrously on par with the parties undermining the foundation of quasi-judicial functions. If a commissioner has not got the basics in order, he should be singled out for attending without adversely affecting the competent ones.
3.	Support and understanding with regard to claims.
4.	Time management.
5.	Insecurity – no job tenure. Part-time commissioners feel they do not belong.
6.	Lack of support and interference by management.
7.	Allocation of rooms is problematic. Some cases are not allocated a room and the parties report to reception. When a room is found, invariably some other commissioner argues a bit later about who has been allocated that room. The resulting conflict is very unprofessional and embarrassing. All cases should report to reception and rooms occupied on demand. A large room with tables should be demarcated as a commissioners "lounge" while they wait for parties. The trend is to occupy a room to do other work while waiting and commissioners needing a room cannot find a vacant one.
8.	
9.	
10.	
11.	
12.	They are sometimes abused by the users and there is a general feeling that they have no protection from the institution.
13.	
14.	Not enough time for hearings. An hour for a conciliation is too short.
15.	Low morale

8.1 REASONS FOR THE LOW SETTLEMENT RATE

1.	Some parties rather wait for arbitration - do not want to mediate.
2.	1 of 3 conciliations sees the attendance of both parties. Humans are more prone to fight it out than to settle even if the facilitation of settlement is provided free of charge. The requests of parties especially employees and their representatives, are often excessive and scupper the possibility of an amicable solution in these instances. Where the other party is not close to any possible such solution, one could study a system whereby a tender of settlement should be kept secret and disclosed to say the taxing master, and to order costs in the event of unnecessary prolongation of a dispute eminently capable of being settled at an early stage.
3.	More employers are following proper procedures, thus obviating the need to settle as a result of procedural unfairness.
4.	Parties trust our awards, clearer jurisprudence, point scoring.
5.	We do not have a law settlement rate in this province (Mpumalanga). Where it exists, one should examine attitudes of parties - including mediate.
6.	Employers organisations are not prepared, under any circumstances, to explore the possibility of settling disputes. The role that the commissioner plays is also critical. Commissioners exercise maximum restraint for fear of descending too much into the area.
7.	Report back to commissioners on their settlement rate and settlement targets. This awareness may increase their desire to achieve settlement.
8.	
9.	

10.	No show by parties / employees at conciliations. Reluctance – strong attitude by ER/TU officials.
11.	Fact that there is nothing to lose for parties at conciliation
12.	This is caused by a combination of factors such as: Insufficient time allocated for consultations; the attitude of parties themselves; the different industries from which parties come and the number of cases allocated per commissioner.
13.	
14.	The settlement rate is not low, it is higher than 70% especially in Kwazulu Natal. But if there are other provinces where the settlement rate is low it is probably because parties who are knowledgeable do not want to make compromises n order to resolve disputes they would rather have a decision made by a commissioner.
15.	In other areas – settlement rates are OK

8.2 DO YOU AGREE OR DISAGREE WITH THE FOLLOWING STATEMENTS?

Disagree				Agree
1	2	3	4	5

	A	B	C	D	E	F	G	H	I	J	K	L
1.	4	4	4	3	4	4	4	4	5	5	5	4
2.	4	1	5	1	1	5	1	5	4	5	2	2
3.	4	1	5	1	1	1	1	1	1	5	4	1
4.	4	3	4	3	3	3	2	3	4	4	3	2
5.	2	1	4	1	1	2	1	2	2	3	2	2
6.	4	3	5	1	2	4	2	4	3	4	3	2
7.	2	3	5	1	1	1	1	4	3	3	3	3
8.	4	4	5	3	3	4	4	4	5	4	4	3
9.												
10.	4	2	5	3	5	5	5	5	5	5	4	3
11.	5	2	4	2	3	1	4	4	5	5	3	2
12.	3	5	2	1	1	1	1	4	3	4	2	1
13.												
14.	4	5	4	3	3	4	4	5	3	5	5	4
15.	4	3	4	1	1	2	1	3	2	2	1	2

8.2.1 ANY OF THE ABOVE ISSUES YOU FEEL STRONGLY ABOUT

1.	-
2.	-
3.	-
4.	-
5.	Where the CCMA is committed to the process the settlement rate is high. We need to examine ourselves, our approaches, our attitudes and our incentives. At con-arb the attendance of parties is better.
6.	-
7.	
8.	
9.	Interviews
10.	All issues marked 4 and 5
11.	If offer was made to employee at conciliation and it is not accepted – employee must pay cost of arbitration if he does not get more at arbitration. The offer should be taken into account when compensation is decided on.
12.	Employees sometimes have high expectations because of their representatives i.e. lawyers and labour consultants and unions.
13.	
14.	Not all employees are opportunistic but there are certainly many who are.
15.	Each referral should have a R20 referral stamp (revenue stamp) to discourage frivolous cases

8.3 INDICATE TO WHAT EXTENT THE FOLLOWING HAVE AN INFLUENCE ON YOUR ABILITY TO SETTLE DISPUTES

Not at all				High degree
1	2	3	4	5

	A	B	C	D	E	F	G	H	I	J	K	L
1.	4	4	2	4	4	4	3	5	3	4	5	5
2.	1	3	1	4	1	1	1	1	4	1	1	1
3.	1	4	1	1	1	1	1	2	1	1	5	1
4.	4	3	1	4	1	3	3	3	3	2	4	?
5.	1	2	1	2	1	1	n/a	n/a	2	1	2	1
6.	4	2	3	4	1	4	1	1	3	4	3	1
7.	1	2	2	3	1	1	2	-	2	4	4	-
8.												
9.												
10.	2	3	1	4	3	3	3	3	3	3	4	3
11.	1	4	1	4	4	2	1	4	4	1	5	5
12.	3	2	1	4	1	3	4	4	3	1	4	1
13.												
14.	3	4	1	4	4	4	3	4	4	1	5	3
15.	2	1	1	3	1	3	1	2	2	2	2	3

8.3.1 PLEASE ELABORATE ON ANY OF THE ABOVE ISSUES YOU FEEL STRONGLY ABOUT

1.	-
2.	Parties (and some representatives) have no interest in settling. That is the bottom line for most of them.
3.	-
4.	-
5.	Exceptions - Shoprite Checkers - no settlement practice. I achieve a 90% settlement rate and as mentioned the province has a 80% settlement rate.
6.	-
7.	
8.	
9.	
10.	
11.	Do con-arbs and save money.
12.	
13.	
14.	Not all union officials make it difficult to settle. I believe that they lack experience and are not trained at all to conduct CCMA hearings.
15.	A "conveyor belt" mentality impacts negatively on quality and efficiency

9.1 HOW DOES THE SYSTEM COPE WITH AND ADJUST TO THE STRAIN CAUSED BY HIGH REFERRAL RATES?

DO YOU THINK THE CCMA WILL PLAY AN IMPORTANT ROLE IN DISPUTE RESOLUTION IN THE FUTURE, AND GIVE A REASON FOR YOUR ANSWER

1.	Yes	It is a cheap and sometimes efficient way to access justice.
2.	Yes	Because it is free of charge (and the general level of commissioners is good). Waiting period so little compared to courts.

3.	Don't know	It is not seen to be delivering according to expectations.
4.	Yes	Alternatives are costly and if there is no system then there will be total chaos.
5.	Yes	It is, and will remain the statutory body for dispute resolution.
6.	Yes	The CCMA is a statutory body that has been established to provide a dispute resolution function.
7.	Yes	No cost – alternative DR forums will increase, but will only be used by bigger employers for bigger cases.
8.		
9.		Interviews
10.	Yes	Still an effective / open system
11.	Yes	Parties rely on CCMA to solve their problems for them.
12.	Yes	It is one of the best systems currently available in dispute resolution on labour disputes.
13.		
14.	Yes	There is a need for a body like this system and so far it has done a good job in mediating and keeping stable the industrial relations arena.
15.	Yes	It has achieved considerable success and a favourable international reputation. High unemployment and disputes will continue

9.2 HOW DO YOU THINK THE NEW PRIVATE DISPUTE RESOLUTION BODIES IMPACT ON THE WORK OF THE CCMA?

1.	Hopefully decrease the amount of work the CCMA has and lend credence to ADR.
2.	Marginal, it remains, and will probably remain for long, an elite phenomenon for a minority.
3.	Help with the backlog.
4.	Very little as private comes with a cost.
5.	They play a minimal role, and we receive regular feedback from unions in this province that they would prefer to leave it to the CCMA.
6.	They would definitely alleviate the plight of the CCMA by taking away most disputes where parties can afford to pay private rates.
7.	Will increase but only used by bigger employers for bigger cases.
8.	
9.	Interview.
10.	Don't know, believe not to be serious.
11.	Only better ones will survive.
12.	They do impact insofar as dealing with the more sophisticated parties.
13.	
14.	They do not have any impact because their services are paid for and parties have to agree to refer disputes to them. So, it may not be as accessible as the CCMA to the needs of the ordinary people.
15.	Expensive alternatives that actually assist in absorbing some of the work pressure – like bargaining councils – ADR should be encouraged.

9.4 WHAT SHOULD BE DONE TO ALLEVIATE THE DRAIN ON THE SYSTEM CAUSED BY THE HIGH REFERRAL RATE OF INDIVIDUAL UNFAIR DISMISSAL CASES?

1.	There should be some fee paid by the individual referring the matter but it should be refundable if individual applicant wins in arbitration.
2.	The 100% free of charge concept must go.
3.	More bargaining councils should be accredited. Employers not falling in the high referrals segment should be given incentives by government e.g. tax concessions.
4.	Special telecon system "telephone conciliations".
5.	Better allocation and management of resources plus recognition of the good work done in this regard.
6.	Proper screening.
7.	Parties pay a type of deposit to refer and defend a case. Applicant 1 month's salary and employer 3 months. Parties get their deposits back if they settle at conciliation.

8.	
9.	Interview.
10.	Address the burning issues above.
11.	Arbitration award that indicate that CCMA is not a one arm bandit that produces money when the claim form is entertained.
12.	Minimum fees be imposed on those who can afford to pay i.e. earning above R8 000-00.
13.	
14.	Employees should be required to pay an initial deposit. Should they then win the case their money should be given back and if not, the money should be used by the CCMA. If the matter is settled at conciliation, their money should be given to them. In this manner employees will not bring frivolous cases and will also try to settle at conciliation rather than pursuing a case without merit through to arbitration.
15.	Educate employers and employees; Screen out frivolous cases/duplication; Penalty for irresponsible employer conduct – amend LRA; Mandatory tariff to refer a dispute

9.5. DO YOU THINK THAT LABOUR LEGISLATION WITH REGARD TO INDIVIDUAL UNFAIR DISMISSAL CASES SHOULD BE RELAXED? GIVE A REASON FOR YOUR ANSWER

1.	No	-
2.	Yes	It should be easier for employers to deal internally with issues revolving around capacity, probation and the like therefore, with a freer hand. Disciplinary inquiries chaired by commissioners with no further recourse to the CCMA should be encouraged.
3.	No	There is absolutely nothing wrong with it, so if its not broken, lets not try to fix it.
4.	No	There has to be a consistent application of the law.
5.	No	It provides the necessary protection for employees against arbitrary unfair treatment.
6.	No	Not at the moment as many employers are unaware of the Act and many employees are badly treated.
7.	Yes	Smaller employers are losing cases because they do not and cannot be expected to know and understand the subtleties of labour law. Picture the common green grocer or the domestic dispute.
8.		
9.		
10.	No	Too simple, relaxed procedure will cause further escape routes for unwilling parties to the system.
11.	No	Rather keep standards high.
12.	No	Greater majority will suffer prejudice.
13.		
14.	No	If the legislation is relaxed many people will lose their jobs for unnecessary and sometimes no reason. Until the labour market has improved the system should stay as it is. Also the reason for the stringent labour law is because employers do not follow proper processes in doing things. Therefore it is clear that there is a need for the stringent laws because employers do not seem to want to do things properly.
15.	Yes	Domestic workers are overloading the system. They should be handled by a special tribunal appointed by the DoL. There should also be an internal tribual for individual retrenchments (with safeguards)

9.5.2 IF ANSWER IS YES, PLEASE INDICATE WHICH CHANGES SHOULD BE EFFECTED?

1.	-
2.	Easier to deal with disputes internally. Commissioners to chair disciplinary hearings with no further recourse to CCMA.
3.	No problem with it.
4.	No

5.	Not applicable
6.	-
7.	Allowing an opportunity for the employee to state case should be the only basic element for procedural fairness, for the most basic offences.
8.	
9.	Interview
10.	
11.	
12.	
13.	
14.	
15.	

9.6 ANY OTHER ISSUES THAT SHOULD BE ADDRESSED?

1.	-
2.	The CCMA must separate neatly the conciliation and arbitration dimensions and it must, as a top priority, stop being a retail shop treating its users as customer to be pleased. Ensuring justice by empowering commissioners is the best way of treating, serving and caring for them. Mobility of commissioners with upgrading and downgrading, should be a free-flowing thing as in an enterprise.
3.	-
4.	-
5.	Cost awards and arbitration fees (sec 140(2)) should be rigorously applied to prevent both frivolous referrals and defences.
6.	-
7.	
8.	
9.	
10.	
11.	Employers should be divided into small and big as the bigger employers have access to labour lawyers who are competent role players. A right of appeal is necessary if you don't allow legal representation.
12.	
13.	
14.	
15.	Morale of staff – avoiding embarrassment by, for example, reducing staff's salaries when renewing contracts. The need to promote a culture of professionalism