

REPRESENTATION DURING ARBITRATION HEARINGS: SPOTLIGHT ON MEMBERS OF BARGAINING COUNCILS

1 Introduction

With the adoption of the Labour Relations Act (66 of 1995) policy-makers sought to limit the presence of legal representatives during specified labour dispute resolution processes. Although a “legal practitioner” (as defined in s 213 of the Labour Relations Act) has the right of appearance in the labour court, there is a

limitation on such a representative's representation of clients during the arbitration of unfair dismissal disputes relating to conduct and capacity at the Commission for Conciliation Mediation and Arbitration (the "CCMA").

Strong views in favour of and against the limitation of legal representation have been expressed before and after the establishment of the CCMA (Benjamin "Legal representation in labour courts" 1994 *ILJ* 250; Buirski "The Draft Labour Relations Bill 1995 – The case for legal representation at its proposed fora for dispute resolution" 1995 *ILJ* 529; Collier "The right to legal representation under the LRA" 2003 *ILJ* 753). The limitations have been associated with problems since their introduction into the Labour Relations Act. Uncertainty has reigned regarding the question when one will be deemed to be a "legal practitioner" and there have been failed attempts to declare the restrictive measures unconstitutional (*Colyer v Dräger SA (Pty) Ltd* 1997 2 BLLR 184 (CCMA); *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2009 *ILJ* 269 (LAC); Grogan "Not unconstitutional: The right to exclude lawyers" 2003 19(6) *EL* 7).

During 2011 the CCMA issued two circulars to all commissioners with the view of tightening the regulatory screws in relation to the enforcement of the restrictions. The circulars directed that commissioners should adhere to the restrictions pertaining to representation contained in CCMA rule 25. However, the labour court in *AHI Employers' Organisation obo Members v CCMA* (case nr J 656/2011 (unreported) 1-02-2012) set these circulars aside and the decision effectively curtails attempts by the CCMA to uphold and enforce limitations pertaining to the presence of a "legal practitioner" at the CCMA.

This decision serves as a reminder that policy-makers have not been particularly successful in attaining the original goal of limiting the involvement of attorneys, advocates and labour consultants during arbitration. The purpose of this contribution is to reflect on the reasons why these restrictions were introduced in the first instance and whether any other countries limit legal representatives at labour tribunals. Furthermore, it considers whether members of employers' organisations, who may fall under the definition of "legal practitioner", should have the right to represent their fellow-members during arbitration proceedings. In the final analysis suggestions are made to amend the existing CCMA rule 25 to provide improved clarity and consistency in respect of representation at the CCMA.

2 *Specialist labour dispute resolution institutions*

The reasons for establishing specialist dispute resolution institutions include the need for expeditious, informal and affordable procedures that take place before accessible and specialist dispute resolution institutions. (Van Eck "The constitutionalisation of labour law: no place for a superior labour appeal court in labour matters: (part 1) background to the South African labour courts and the constitution" 2005 *Obiter* 549; Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2012) 429.)

These reasons were also relied on when the CCMA and the labour court were established shortly after South Africa became a constitutional democracy in 1994. The *Explanatory Memorandum to the Labour Relations Bill* (1995 *ILJ* 278 285) envisaged the introduction of a "speedy, cheap, and non-legalistic procedure for the adjudication of unfair dismissal cases". One of the ways in which the authors of the *Explanatory Memorandum* proposed that the mentioned goals should be reached, was to restrict legal representation. It suggested the following:

“Legal representation ... [should] not [be] permitted during arbitration except with the consent of the parties. Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach that they adopt. Allowing legal representation places individual employees and small business at a disadvantage because of the cost” (*Explanatory Memorandum* 319).

Buirski (1995 *ILJ* 533 n 24) suggests that the authors of the *Explanatory Memorandum* may have been strongly influenced by Benjamin’s arguments (1994 *ILJ* 251-260) in favour of restricting legal representation that were made before the adoption of the Labour Relations Act. Benjamin considered the results of studies regarding industrial court decisions between 1988 and 1992 and found that management was represented by counsel in 402 of the cases compared to employees being represented by advocates in 272 cases. He concluded that the “figures reveal the extent to which employers are represented by more qualified representatives” than employees (1994 *ILJ* 255). He also took account of international developments before concluding that there were strong indications that legal representatives “may lead to dispute resolution procedures becoming more formal, time-consuming and expensive” (1994 *ILJ* 255-260).

It is submitted that these are sound considerations for placing restrictions on the presence of legal representatives. This is, of course, if one supports the underlying purpose of the establishment of specialist labour dispute resolution institutions. It is difficult to accept Buirski’s arguments that favour the presence of legal representatives at specialist labour dispute resolution institutions if one also supports the expeditious, informal and cheap resolution of such disputes. He argues that legal representatives add value during the process of cross-examining, and by organising the case and protecting witnesses against giving self-incriminating evidence (1995 *ILJ* 359 and 543). However, he loses sight of the fact that the proceedings before institutions such as the CCMA are tailored to an inquisitorial model, rather than the more cumbersome adversarial process of the criminal and civil courts.

Even though there are strong arguments in favour of limiting the presence of legal representatives, implementing the limitation may be easier said than done. Since the introduction of the restrictions, it has become apparent that it is a complex issue to apply the rules; and added to this, it is difficult to strike a proper balance between limiting the presence of legal practitioners on the one hand, but on the other hand permitting representation by members and officials of trade unions and employers’ organisations who may also be legally qualified.

3 *Labour dispute resolution in other jurisdictions*

3.1 Introduction

South Africa is not the only country that has introduced specialist labour dispute resolution forums. In some European jurisdictions, this function is predominantly performed by specialised labour courts. So, for example, Germany established the *Arbeitsgericht*, France the *Conceils de Prud’hommes* and Sweden the *Arbetsdomstolen* (Aaron *Dispute Settlement Procedures in Five Western European Countries* (1969) 2-4; Blanpain *International Encyclopaedia for Labour Law and Industrial Relations* (2010) “France” and “Germany” (vol 7), “Sweden” (vol 10)). In other countries of the world, specialist labour tribunals, not dissimilar to the CCMA, have been established. For the purposes of this contribution, the emphasis falls on two countries that have introduced labour tribunals, which are also responsible, among other things, for the resolution of unfair dismissal disputes.

3.2 Great Britain

A specialised system of employment tribunals has existed in the United Kingdom since the 1960s. The Industrial Training Act (1964) established the “industrial tribunal” and since 1998 they have been known as “employment tribunals” (hereafter the “tribunal”; s 1 of the Employment Tribunals Act, 1996). Each tribunal has a tripartite structure, consisting of a chairperson with legal training and two lay members with employment experience drawn from panels appointed by the state. The tribunals were designed to determine disputes between employees and their employers covering almost all statutory individual employment rights – among other things, disputes about unfair dismissal, redundancy and claims for breach of the contract of employment (Blanpain “Great Britain” (vol 7) 68).

There are no restrictions in respect of legal representation, and parties may choose to represent themselves or by whomever they want to represent them during the arbitration of labour disputes (s 6 of the Employment Tribunals Act, 1996; House of Commons *Employment Tribunals* 2003 research paper 3/87 www.parliament.uk/commons/lib/research/rp2003/rp03-087.pdf (24-05-2012) 10). The tribunals were designed to serve as easily accessible, informal and inexpensive dispute resolution bodies. However, a number of studies have raised concerns about their ability to attain the mentioned goals. Knight and Latreille quote an employment practitioner as saying that “tribunals are popularly believed to be non-legalistic, non-bureaucratic and suitable for lay-people to use, whereas in fact the opposite is nearer the truth” (“Gender effects in British unfair dismissal tribunal hearings” 2001 *Industrial and Labour Relations Review* 818; House of Commons *Employment Rights (Dispute Resolution) Bill [HL] 1997/98* 1998 research paper 98/13 www.parliament.uk/briefing-papers/RP98-13.pdf (24-05-2012) 8; House of Commons *Employment tribunals* 16).

A study conducted in 2010 indicated that employers were more likely than employees to be represented at tribunal hearings at a ratio of 73% versus 34% (Peters, Seeds, Harding and Garnett “Findings from the survey of employment tribunal applications 2008” 2010 *Employment relations research series* 107 <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008> (24-05-2012) xxii). Despite the problems associated with costs and unequal representation before the tribunals, the solutions thereto are not sought in restricting representatives’ right to appearance in Great Britain. Due to the complexity of employment law, arguments have been advanced that claimants should rather be entitled to legal aid as the lack of funded legal assistance could possibly amount to non-compliance with article 6(1) of the European Convention on Human Rights (House of Commons *Employment Tribunals* 2003 11).

In 2007 the comprehensive Gibbons report identified three main problems relating to labour dispute resolution in Great Britain: the cost of the employment tribunal system for society as a whole; the number of cases lodged at the tribunal – some with limited prospects of success; and the complexity of employment law (Department of Trade and Industry *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (2007) www.bis.gov.uk/files/file38516.pdf (24-05-2012) 8-11). The report mentions that the tribunal system costs an estimated £120 million per year; it costs employee claimants on average £2 493 to bring an employment claim to conclusion; and it costs employers on average £9 000 to defend each such claim (Department of Trade and Industry *Better Dispute Resolution* (2007) 22; Renton “‘Deliver us from employment tribunal hell’?: Employment law, industrial

relations and the Employment Bill” 2008 <https://uhra.herts.ac.uk/dspace/bitstream/2299/1632/1/S87.pdf> (24-05-2012) 3).

Of significance here is the fact that the Gibbons report did not suggest that representation should be limited. Its main findings were that the complex unfair dismissal regime, which prescribed a detailed internal grievance and a disciplinary enquiry procedure, should be replaced by a new regime that would result in fewer cases being lodged at the tribunal. Although not specifically mentioned in the report, it is submitted that the reluctance to limit the right to be legally represented may have been influenced by provisions contained in the European Convention on Human Rights or an entrenched British culture that supports representation at all arbitration hearings.

3.3 Australia

The situation in Australia is quite different from the one in Great Britain. Australia has recently reformed its dispute resolution framework, and strict limitations have been introduced pertaining to the right to be represented during the arbitration of labour disputes. The Fair Work Act (2009) established an independent labour tribunal, “Fair work Australia” (the “Australian labour tribunal”), to oversee, among other aspects, unfair dismissal claims. The Fair Work Act took full effect from 1 January 2010 and it applies to all employers and employees in the federal system. The *Explanatory Memorandum to the Fair Works Act* (http://www.austlii.edu.au/au/legis/cth/bill_em/fwb2009124/memo_0.html (20-05-2012)) recorded that the objectives with the establishment of the new Australian labour tribunal included: “to ensure [that] the public is provided with a streamlined, accessible, one-stop shop on workplace relations issues. ... The aim is to ensure the new institutional framework is both accessible and responsive in providing fair, efficient services to users” (*Explanatory Memorandum* par 320). The *Explanatory Memorandum* further stated that the system “will move away from formal, adversarial processes, with legal representation and intervening parties. ... It is envisaged that in most cases legal representation will not be necessary” (*Explanatory Memorandum* par 327). Pursuant to the publication of the *Explanatory Memorandum*, the Fair Work Act introduced strict limitations pertaining to dismissed employees’ right to be legally represented. In accordance with the act, a claimant may only be represented by a member, official or employee of a trade union or employers’ association. A person may not be represented by a “lawyer or paid agent” during arbitration unless explicit permission has been obtained from the Australian labour tribunal. Section 596(2) of the Fair Work Act provides that such permission may only be granted if:

- “(a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.”

Early indications are that since the enactment of the Fair Work Act it has become much more difficult to be represented by a lawyer or paid agent than before the implementation of the new dispute resolution system. In *Rodney James Rodgers v Hunter Valley Earthmoving Business Pty Limited* (2009 FWA 572 par 11) the Australian labour tribunal refused permission to a firm of attorneys to represent the employer in an unfair dismissal dispute. The commissioner relied on the fact that it

was noted in the *Explanatory Memorandum* that it was the intent of parliament that the Australian labour tribunal should operate efficiently and informally and, where appropriate, in a non-adversarial manner. It was also parliament's intention that persons dealing with the Fair Work Act would generally represent themselves. (This view was echoed in *Chris Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* 2011 FWA 1520.)

It may be too early for Australian studies to indicate whether placing restrictions on the presence of legal representatives has had any positive influence on the initial intentions of policy-makers pertaining to the Australian labour tribunal. However, one aspect that is clear is that as recently as two years ago Australian policy-makers decided to restrict the presence of legal representatives and paid agents to attain the goals of informal, expeditious and affordable labour tribunals. Furthermore, the commissioners of the Australian labour tribunal are adhering to these limitations in their awards.

4 *Current regulatory framework*

4.1 Labour Relations Act

In South Africa, section 115(2A)(k) of the Labour Relations Act empowers the CCMA to establish rules that regulate representation of parties by "any person or category of persons" during conciliation and arbitration proceedings. Before the insertion of this section by section 22 of Labour Relations Amendment Act 12 of 2002, representation at CCMA arbitrations dealing with conduct and capacity dismissals was governed by sections 138(4) and 140(1) of the Labour Relations Act. Section 115(2A)(g) also empowers the CCMA to "publish guidelines in relation to any matter dealt with in this Act". Commissioners must adhere to the guidelines issued by the CCMA in terms of section 138(6) of the Labour Relations Act that states that commissioners "must take into account any code of good practice ... or guidelines published by the Commission in accordance with the provisions of this Act". Before section 138(4) was deleted in 2002, it read:

"In any arbitration proceedings, a party to the dispute may appear in person or be represented only by a legal practitioner or a co-employee or by a member, office-bearer or official of that party's trade union or employers' organisation and, if that person is a juristic person, by a director or an employee."

Currently, the CCMA rules provide for a complex web of general permissions, exceptions to the general rule and restrictions that culminate in a commissioner's discretion ultimately to make a ruling pertaining to the presence or absence of certain categories of representatives.

4.2 CCMA rule 25

When CCMA rule 25 was introduced in 2003, it essentially repeated the former provisions of the Labour Relations Act (s 138(4)), but initially excluded the members of trade unions and employers' organisations to represent their fellow-members. However, when the CCMA amended its rules in 2004, the members of both trade unions and employers' organisations were allowed to represent their fellow-members (CCMA rule 25 amended by GN R530 of 30 April 2004). CCMA rule 25(1)-(4) currently regulates the presence and absence of representatives during conciliation and arbitration proceedings.

During conciliation, parties to a labour dispute have no right to legal representation and they must appear in person or may be represented by any member, office bearer or official of that party's registered trade union or employers' organisation (CCMA rule 25(1)). There is no blanket prohibition against legal representation during arbitration proceedings. CCMA rule 25(1)(b) provides that a party to the dispute may appear:

“in person or be represented *only* by: (1) a *legal practitioner*; (2) a director or employee of that party and if a close corporation also a member thereof; or (3) any *member*, office-bearer or official of that party's registered trade union or a registered employers' organisation” (my emphasis).

Although, at first glance, it may seem that legal representatives who qualify as “legal practitioners” have a foot in the door during all arbitration proceedings, there are significant limitations on this right. Firstly, the word “only” precludes persons who do not fall within the definition of “legal practitioner” and/or the other categories mentioned in CCMA rule 25(1)(b)(2) and (3). The phrase “legal practitioner” has a particular meaning that has an exclusionary effect. It means “any person admitted to practise as an advocate or an attorney in the Republic” (s 213 of the Labour Relations Act). Although this aspect does not form part of the focus of the contribution, it has been ruled that candidate attorneys, labour consultants and para-legal officers do not fall within the definition as they are not admitted to the attorneys' or advocates' professions (*SA Post Office Ltd v Govender* 2003 ILJ 1733 (LC); *Colyer v Dräger SA (Pty) Ltd* 1997 2 BLLR 184 (CCMA); *Vac Air Technology (Pty) Ltd v Metal and Engineering Industries Bargaining Council* 2006 11 BLLR 1125 (LC)).

Furthermore, despite the general right of “legal practitioners” (and the other mentioned categories) to represent their clients during arbitration proceedings, the rule provides that if the dispute being arbitrated is about an unfair dismissal “and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity” the parties are not entitled to be represented by a “legal practitioner” (CCMA rule 25(1)(c)). Unfair dismissal disputes relating to conduct and capacity make up the vast majority of cases being considered by the CCMA. According to the 2009-2010 *CCMA Annual Report*, these disputes account for 81% of the total number of cases received (*CCMA Annual Report 2009/2010* available at <http://www.ccma.org.za> (10-04-2012) 18). This, in a certain sense, makes the exception the norm in so far as in most instances “legal practitioners” are excluded. It is submitted that this is in line with what policy-makers had in mind when the Labour Relations Act was introduced.

As peculiar as it may seem, this limitation does not extend to all types of disputes being arbitrated. So, for example, disputes about alleged unfair labour practices (s 186(2) of the Labour Relations Act), the non-renewal of fixed-term contracts (s 186(1)(b) of the Labour Relations Act) and constructive dismissal disputes (s 186(2) (e) of the Labour Relations Act) are not subject to the limitation and disputants are under these circumstances at liberty to appoint “legal practitioners” to represent them.

As noted above, there is no absolute bar against “legal practitioners”. CCMA commissioners and all parties to the dispute may consent to their involvement in the process. Furthermore, the commissioner has a discretion to permit a party to be represented by a “legal practitioner” where it is unreasonable to deal with the dispute without legal representation, taking account of “(a) the nature of the questions of law raised by the dispute; (b) the complexity of the dispute; (c) the public interest; and (d) the comparative ability of the opposing parties or their representatives to deal with the dispute”. If the commissioner suspects that the representative of a party to the

dispute does not qualify, or if a party objects to the representation of another party, the commissioner “must” consider and determine the issue (CCMA rule 25(2)). If requested to do so, a representative must also provide evidentiary proof requested by the commissioner, including contracts of employment and proof of membership of a trade union or an employers’ organisation (CCMA rule 25(4)).

CCMA rule 25(1)(c) provides commissioners with a discretion to make a ruling on the presence of a representative during the arbitration hearing. This discretion must be exercised judicially and rationally, taking into account the totality of circumstances before him or her. The CCMA has issued commissioners with two circulars with the view of improving consistency in respect of the commissioners’ rulings pertaining to representation and also to encourage commissioners to be strict in applying the restrictions.

4.3 The circulars

In the first circular, dated 28 March 2011, it was stated that

“this office will ... with immediate effect require all commissioners to comply with the rules and insist that ... all representatives provide proof of legitimacy to present parties regardless of whether or not the issue is challenged or raised. ... The commissioner ... must require the person who is seeking to represent a party on the basis that he/she is a member, official or office bearer of a trade union or an employers’ organisation, to establish each of the following –

That the representative is a member, official or office bearer of the trade union or employers’ organisation....

Only a natural person may represent an employer party on the basis that they are fellow members of an employers’ organisation. ... Directors of companies, members of close corporations and employees of companies and close corporations are not employers and are therefore not entitled to be members of employers’ organisations. Such persons may not be allowed to represent employer parties to the dispute on the basis that they are fellow members of an employers’ organisation.”

On 10 June 2011 the CCMA issued a second circular which replaced the first. It sought, among other things, to ameliorate and expand on the first circular. This circular had two purposes. Firstly, an attempt was made to change the nature of the circular from a set of binding rules to a guideline. This was done to remove any impression that the discretion which CCMA rule 25 gives to commissioners had been removed. Secondly, it added an additional criterion, namely, that the party representing the fellow-member of an employers’ organisation may not simply do so in terms of a commercial agreement but should rather do it out of a selfless sense of solidarity shared by other employers. The idea behind this was to prevent a situation where, for example, an attorney or labour consultant may join an employers’ organisation with the view of representing fellow-members merely for purposes of commercial gain.

The circulars were the subject of judicial scrutiny in *AHI Employers’ Organisation obo Members v CCMA*. The application was launched by the AHI Employers’ Organisation, which sought to ensure that its members may be represented in proceedings of the CCMA by other members irrespective of their status and without the introduction of the above requirements.

The AHI contended that the CCMA does not have the power to instruct commissioners, which it argued that the circulars did, to apply their discretion in a particular manner. Furthermore, it was argued that the second circular added an additional requirement to CCMA rule 25, namely, that it excluded legal representation where there was a commercial agreement between members of an employers’ organisation in terms of which the representation took place. This, it was

argued, was incompatible with the wording of CCMA rule 25, which referred only to the fact that membership entitled a person to represent another.

Lagrange J upheld the arguments of the AHI. CCMA rule 25 initially did not permit fellow-members of trade unions and employers' organisations to represent each other during arbitration proceedings. However, this changed in 2004 when the rules were amended to permit representation by fellow-members of trade unions and employers' organisations. However, when this amendment was introduced the additional criterion, namely, that fellow-members are precluded from representing each other where there is a commercial agreement between them, was not added (par 18). Considering the second circular as a whole, the court concluded that even though it was said to contain mere guidelines, it still expected strict compliance by commissioners and specifically mentioned that it would be enforced (par 23 and 26). The court concluded that this would effectively "rob a commissioner of any exercise of their independent judgement" when conducting an enquiry in terms of CCMA rule 25(2) (par 34).

5 General perspectives

Before turning to an analysis of the *AHI Employers' Organisation* case, the following perspectives should be noted. South Africa does not stand alone in its quest to provide expeditious, affordable and informal dispute resolution processes available to parties involved in labour dispute arbitrations. Australia is an example of a country that has as recently as 2010 revamped its labour dispute resolution system and policy-makers there have also opted to place limits on the right to be represented during arbitration proceedings. Even though the CCMA was established in 1996, its aims remain modern and relevant. These are to replace the lengthy, costly and formalistic court-like proceedings associated with civil and criminal courts with an institution where disgruntled employees and employers can resolve their labour disputes in an inquisitorial environment. It is submitted that, even today, there are sound reasons for placing restrictions on the presence of legal representatives during arbitration hearings at the CCMA.

The question can be posed whether the introduction of such limitations do not contravene the letter and spirit of South Africa's constitutional democracy. South Africa is not bound by article 6(1) of the European Convention on Human Rights, but there are provisions in the constitution that may have an influence on the debate whether litigants have a general right to be legally represented. Section 33 of the constitution makes provision for "just administrative action". Section 34 protects "access to courts" and the right to have disputes "decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". This section makes no reference to the right to be represented. Under the heading, "Arrested, detained and accused persons", section 35 spells out the right "to choose, and to consult with, a legal practitioner" and to "choose, and be represented by, a legal practitioner".

In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (2002 ILJ 1531 (SCA)) the supreme court of appeal held that it is significant that section 35 only applies in the context of the right to a fair trial when a person is arrested for allegedly committing an offence (par 8-9). There is no comparable protection in relation to the provisions of section 33 that apply to just administrative action and there is a similar omission in the Promotion of Administrative Justice Act (3 of 2000). Section 3 of the Promotion of Administrative Justice Act makes provision for legal representation in "serious or complex cases". It provides for an

“opportunity” to obtain legal representation and it makes provision that permission to such representation “may, in [the administrator’s] discretion” be given (s 3(3)). The court stressed that these principles reflect the common-law developments “in the most general sense, ie to include *inter alia*, quasi-judicial proceedings” (par 11; *Dabner v SA Railways & Harbours* 1920 AD 583 598; *Maynard v Osmond* 197 QB 240 (CA) 255H-256B; *Lamprecht v McNeillie* 1994 3 SA 665 (A) 672A-G). In *Sidumo v Rustenburg Platinum Mines Ltd* (2007 12 BLLR 1097 (CC)) it was held that even though CCMA proceedings constitute administrative action, only the LRA (and not the Promotion of Administrative Justice Act) applies to such actions.

Even more to the point, the labour courts have specifically considered the argument that limitations pertaining to legal representation before the CCMA may be unconstitutional. In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* (2003 ILJ 1713 (LC)) the labour court confirmed that the former section 140(1) and the latter CCMA rule 25 are not inconsistent with the provisions of the bill of rights. (See also Grogan 2003 19(6) EL 7.) Having considered the *Explanatory Memorandum to the Labour Relations Bill* and the nature of the CCMA (1724D-J), the court concluded that the “constitutional point raised in the application falls to be dismissed” (1730A). In the *Netherburn Engineering* case the labour appeal court confirmed the position adopted by the court *a quo*. The court held that the employer’s contention that there is a constitutional right to be represented is “completely devoid of merit” (par 38) and that there are rational reasons why section 140(1) and CCMA rule 25 could specifically restrict legal representation during conduct and capacity arbitrations. CCMA statistics between 2004 and 2006 revealed that 80% of disputes involved unfair dismissal. The court accepted that placing limits on legal representation in respect of conduct and capacity arbitrations was intended to be the norm and not the exception (par 41-42). This high percentage of conduct and capacity disputes indicates that the fashioning of the limitation to cover such disputes was acceptable.

To return now to bargaining councils: attorneys who are fellow-members of their clients at bargaining councils should not be entitled to represent their clients on grounds of such membership alone. One of the main reasons why an employer would want to join an employers’ organisation is to receive advice and assistance from the relevant institution. The reason for joining an employers’ organisation should not be to thwart the restrictive measures contained in CCMA rule 25, with the view of engaging more clients to provide them with legal services. As mentioned, the restrictive measures have been held to be constitutional, and this principle was accepted by the CCMA in *National Education Health & Allied Workers Union on behalf of Damoyi and Willow Park Primary* (2008 ILJ 796 (CCMA)).

However, on a practical level, it should be accepted that it is difficult to draw a proper line between who should, and who should not, be allowed to represent disputing parties at arbitration proceedings. On the one hand, it is accepted that employees should be entitled to be represented by members or officials of their trade union. Added to this, nothing precludes a trade union from appointing a “legal practitioner” or other legally qualified person as a trade union official. The same applies to employers who are not precluded from appointing “legal practitioners” as employees. Such persons are entitled to represent their employers during arbitration proceedings in their capacity as employees.

This, it is submitted, is exactly why the commissioners have been provided with the discretion to determine whether one party has a distinct advantage over the other when it comes to comparable qualities and experience of the adversary’s legal representative. Even though it does not apply to CCMA arbitrations, this discretion

is not dissimilar to that provided for in terms of the Promotion of Administrative Justice Act. As long as policy-makers and social partners are still of the view that the underlying purpose of the CCMA is to provide affordable and expeditious dispute resolution procedures, there is nothing wrong if the CCMA were to continue to attempt to plug the holes in respect of limiting “legal practitioners” from appearing before it during arbitration proceedings. This is irrespective of how difficult it may be to do this in a fair and equitable manner.

Employers and employees should invest their time, energy and money in what they are supposed to do, namely, to provide and render services and to be economically productive rather than being involved in protracted dispute resolution processes. Time and money spent in this manner should be limited.

There are no sound reasons why policy-makers should not extend these restrictions. Why should the restrictions in the first instance have been imposed only in respect of dismissals pertaining to conduct and capacity? Why could the limitation not have been extended to disputes about alleged unfair labour practices, disputes about the non-renewal of fixed-term contracts and constructive dismissal? Even though the labour appeal court found justification for the limitation in respect of dismissal disputes, I can see no reason why the norm should not be extended to the exceptions as well. There is no basis for the argument that dismissal disputes relating to conduct and capacity are less complex or easier to resolve and that this justifies the limitation being placed only on these types of disputes.

6 *Analysis of the AHI Employers’ Organisation case*

The court was correct in holding that CCMA rule 25 does not contain the restriction pertaining to the non-existence of a commercial agreement between members of an employers’ organisation. This, however, is not the end of the enquiry, and it does not necessarily preclude the CCMA from adopting guidelines to assist with the interpretation of its rules. In *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* (2006 5 SA 483 (SCA)) the supreme court of appeal accepted that there is no prohibition against the adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers, “particularly so where the decision is a complex one” (par 19).

The court was correct in so far as it held that guidelines cannot remove the discretion provided for in the primary rule. However, the court was overly strict in holding that the circulars did just that and the court could have given attention to the reasons for the establishment of the CCMA. The circular explicitly mentions that it is a mere guideline. Surely an issuing institution can insist that commissioners must at least apply their minds to issued guidelines and circulars? This in itself does not remove the decision-makers’ discretion. The circular confirmed that commissioners must consider the guidelines before they apply their discretion and they could be held to account if the guidelines are not considered. This reminds one of section 188(2) of the Labour Relations Act, which provides that when a person considers whether dismissal is fair or not, such person “must take into account any relevant code of good practice issued in terms of the Act”. The value of the guideline would be rendered worthless if the particular circular could be applied or ignored at the whim of a commissioner.

Added to this, the court did not consider the following scenario. If for example, a person is both a qualified “legal practitioner”, and a fellow-member of an employers’ organisation, there should be no problem if a commissioner excludes such a person on account of the fellow member’s status as a “legal practitioner”. The

existence of a commercial agreement could be the decisive factor in determining whether the “legal practitioner” is representing the fellow-members in the capacity as a fellow-member or as a “legal practitioner” when the commissioner applies his or her discretion. Another worrying factor is the fact that in so far as fellow-members could possibly still be excluded from representing their clients on grounds of their status as legal practitioners, this limitation does not apply in respect of labour consultants who join bargaining councils who wish to represent their fellow-members. If something is not done about this loophole pertaining to the limitations on legal representation, there is a real risk that more and more attorneys would start establishing labour consultancies in order to get a foot in the door regarding arbitrations at the CCMA.

7 Conclusion

South Africa does not stand alone in its quest to establish informal, expeditious and affordable labour tribunals. Furthermore, there is no ideal “one model fits all” policy on the international front in relation to the presence or absence of legal representation before labour tribunals to attain these goals. Great Britain has not implemented any limitations regarding the right to be legally represented during the arbitration of labour disputes. In contrast, Australia is an example of a country where steps have recently been implemented to restrict legal representation during the arbitration of labour disputes to reach these goals.

South Africa implemented limitations pertaining to legal representation more than fifteen years ago. Despite the relatively long passage of time, it seems that the ideals pertaining to specialist labour dispute resolution institutions remain as relevant now as they were then. In 2009 the labour appeal court considered whether South Africa’s limitations pertaining to legal representation conform to the provisions of the bill of rights (the *Netherburn Engineering* case). The court held that there are no problems regarding the limitation of legal representation during conduct and capacity arbitrations, while, at the same time, the CCMA is striving to perform its functions in a non-legalistic and informal fashion (2009 *ILJ* 269 (LAC) par 44). Even though arbitrations before the CCMA do not fall under the ambit of the Promotion of Administrative Justice Act (the *Sidumo* case), it is informative that this piece of legislation that gives expression to section 33 of the constitution (preamble to the Promotion of Administrative Justice Act) also provides administrators with the discretion to determine whether representatives should be permitted or not.

It is submitted that CCMA rule 25 should be amended to make it clear that members of bargaining councils are permitted to represent their fellow-members only if this is based on solidarity but not in the instance where there are commercial gains to be made in consideration of representing a client. This limitation should apply to all members representing fellow-members, and should not be limited to those who fall under the definition of “legal practitioner”. It is submitted that South African policy-makers could consider the wording of the Australian Fair Work Act in so far as it places limitations on legal representation and “paid agents”. It is further suggested that during the same revision of CCMA rule 25, serious consideration should be given to extending the limitations on legal representation beyond disputes relating to dismissals on ground of conduct and capacity and to include unfair labour practice disputes, constructive dismissal disputes and those in respect of the non-renewal of fixed-term contracts.