LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS
AND BEFORE THE CCMA

by

WERNER KRUGER

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MAGISTER LEGUM (LLM)

Prepared under the supervision of

PROF S R VAN JAARSVELD

FACULTY OF LAW
UNIVERSITY OF PRETORIA

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CHAPTER 1
INTRODUCTION

1 GENERAL

The right to legal representation at disciplinary hearings and before the Commission for Conciliation Mediation and Arbitration (CCMA) is controversial and this issue has been in the past under previous dispensations debated in our courts since 1920.

2 DISCIPLINARY HEARINGS

The Labour Relations Act 66 of 1995 (LRA) is silent on the rights of an employee in an in house disciplinary hearing and therefore one has to rely on the common law, the constitution and the position in other countries.

In terms of the common law an employee did not have an automatic right to legal representation in disciplinary hearings. This question was over the years the subject of various court cases and there were judges that stated that if the right to legal representation was unfairly refused and the chairman did not exercise his discretion in a proper way, such a hearing could be procedurally unfair.

Currently the position in South Africa is that legal representation is not a requirement for a fair hearing in disciplinary matters. An employee that faces disciplinary action can request legal representation and the chairman of the hearing has got the discretion whether to allow representation or refuse it.
In 1996 the Constitution of the Republic of South Africa, Act 108 of 1996 was promulgated with the commencement date 4 February 1997. In terms of this act citizens of South Africa have certain constitutional rights. The question that arose was whether the refusal to legal representation in disciplinary hearings was unconstitutional. The Supreme Court of Appeal found in the *Hamata*\(^1\) case that such a limitation was not unconstitutional.

If one compares the legal position in South Africa with the position in the United Kingdom, it seems that the position in South African law is in line with the position in the United Kingdom. In the United Kingdom a person does not have an automatic right to legal representation, but in cases where an employee not only faces dismissal but will also be prohibited from practicing in his professional capacity, legal representation are allowed by the courts.

3 CCMA

Already in 1920 in the *Dabner*\(^2\) case, Innes J stated that an employee is not automatically entitled to legal representation before a statutory tribunal. When the Industrial Courts were established under the Labour Relations Act 28 of 1956 legal representation was allowed, unless one of the parties objected thereto.

\(^1\) *Hamata & Another v Chairperson Peninsula Technikon Internal Disciplinary Committee and others* (2002) 23 ILJ 1531 (SCA) at 1533.

\(^2\) *Dabner v SA Railways and Harbours* 1920 (AD) 583.
At the time when the CCMA was established in terms of the Labour Relations Act 66 of 1995, legal representation was excluded in cases of conduct or capacity, in terms of section 140(1). A commissioner could only allow legal representation in certain limited circumstances, as will be discussed later\(^3\).

\(^3\) See Chapter 3.
CHAPTER 2

COMPARATIVE SURVEY REGARDING THE RIGHT TO LEGAL REPRESENTATION

1 INTRODUCTION

In this chapter the right to legal representation at disciplinary hearings as well as the statutory tribunals will be explored. More specifically the position in the United Kingdom, Australia and Namibia will be looked at and at the end of this dissertation a comparison of the position in these countries with the position in South Africa will be made.

2 LEGAL REPRESENTATION IN THE UNITED KINGDOM

2.1 BACKGROUND

When the Labour Government was elected in 1997 they introduced their “Fairness at Work” White Paper. The aim of the government was to create the most “lightly regulated labour market of any leading economy of the world, while at the same time arguing the need for minimum infrastructure of decency and fairness”.4

In terms of the “Fairness at Work” White Paper5 it was therefore recommended that employees must have the option of being accompanied by a trade union representative or fellow employee of his or her choice.6 As a result of the White Paper section 10 of the

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5 Department of trade and industry 1998.
6 Op cit 19.
Employment Relations Act 1999 established that an employee has the right of accompaniment in disciplinary hearings and grievance hearings.⁷

Requests for accompaniment had to be reasonable and the companion could either be a fellow worker or a trade union official. It did not matter whether the union was recognised or not by the employer. This right of accompaniment did not include legal practitioners, however employers could allow a legal practitioner at their own discretion.⁸ At the disciplinary hearing the companion was allowed to confer with the worker and to address the hearing, however the legislation did not allow such a companion to answer questions or to attend the hearing on behalf of the worker.⁹

Due to the fact that the rights with regard to accompaniment were limited, section 37 of the Employment Relations Act 2004 came to effect and now the companion was allowed to –

- put the worker’s case forward;
- sum up the case;
- respond on the worker’s behalf on any view expressed at the hearing.¹⁰

It is important to note that the Employment Act 2002 came into effect on 1 October 2004. In terms of this Act certain minimum procedures had to be followed in disciplinary proceedings.¹¹

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⁷ Op cit 19.
⁸ Idem.
⁹ Idem.
¹⁰ Op cit 20.
¹¹ Idem.
Saundry has the following to say on page 21:

“The rational for statutory accompaniment at grievance and disciplinary hearings is that it will promote both equity and efficiency. Individuals will receive much needed support and advise at a difficult time, workplaces will be deterred from making excessively harsh decisions and the involvement of a third party will encourage the resolution of work place disputes. However to date there is little evidence as to whether the right to accompaniment is helping to achieve these laudable goals.”

He concludes by saying on page 51:

“If accompaniment is to have a positive effect on workplace relations and disciplinary outcomes, it is essential that the right is applied consistently. Unfortunately the findings of this report suggest that this is far from the case with more than a third of workplaces failing to meet the minimum criteria of offering accompaniment to either a work colleague or a trade union representative.”

In order to understand the reason for the workplace’s failure to meet the minimum criteria with regard to the offering of accompaniment, one needs to understand the development of labour law in the United Kingdom. According to Davies & Friedland the position in Britain with regard to labour law was a policy of non-interference. There were relatively

13 Op cit 21.
14 Op cit 51.
few statutes obliging employers to treat individual workers in a specific way and to promote collective bargaining between trade unions and employers. However, during the period from 1960 to 1970\(^\text{16}\) the British Governments became increasingly interested in promoting workers’ rights and the active management of the economy. As a result of this, there was more legislative intervention; to such an extent that one can no longer associate the United Kingdom with a policy of non-interference. This development of legislative interference does not have a long history and that may be one of the reasons why the workplaces are reluctant to meet the legislative minimum criteria.

2.2 IS LEGAL REPRESENTATION A REQUIREMENT FOR A FAIR HEARING?

2.2.1 Common Law

There is no inherent common law right to legal representation before a domestic tribunal. The adjudicator must assess the case and then determine whether the assistance of counsel is needed for an effective hearing and he must keep in mind the consequences of such a denial.\(^\text{17}\)

In this article\(^\text{18}\) the judgement of Webster J\(^\text{19}\) is quoted and according to the judge one must consider the following factors in deciding whether to allow counsel (in criminal proceedings):

(i) The seriousness of the charge and the potential penalty;

(ii) whether any points of law are likely to arise;


\(^{17}\) Author unknown “Natural Justice” http://en.wikipedia.org/wiki/Natural_justice accessed 17/05/2012.

\(^{18}\) Author unknown “Natural Justice” supra.

\(^{19}\) R v Secretary of State for Home Department, ex parte Tarrant 1985 1 QB 251 Divisional Court (England & Wales).
(iii) whether the prisoner is capable of presenting his own case;

(iv) whether there are any procedural difficulties faced by prisoners in concluding their own defence;

(v) Whether there is reasonable speed in making the adjudication;

(vi) Whether there is a need of fairness between prisoners or between prisoners and prison officers.

The same article\textsuperscript{20} quoted a Malaysian case\textsuperscript{21} in which it was suggested that if the hearing at the tribunal concerns the individual’s reputation or right to livelihood, there is a greater need for allowing legal representation.

2 2 2  \textit{The Queen on the Application of “G” v the Governors of X School and “Y” City Council}\textsuperscript{22}

(a) \textit{Factual Background}

The claimant was employed as a music assistant at the school. It was alleged that on 20 September 2007 the claimant kissed one of the scholars. On 12 December 2007 the school wrote a letter to the claimant and the following was said –

"If the Governors find that allegations against you have been proven, the school is obliged to inform the Secretary of State that they have concluded that you are unsuitable for work with children. Therefore any future job applications you make that involve children may be affected."\textsuperscript{23}

\begin{thebibliography}{9}
\bibitem{20} Author unknown “Natural Justice” \textit{supra}.
\bibitem{21} Doresamy \textit{v} Public Services Commission (1971) 2 MLJ (Malayan Law Journal) 127 (High Court Malaysia).
\bibitem{22} (2009) EWHC 504 (ADMIN).
\bibitem{23} \textit{Op cit} 3 par 8.
\end{thebibliography}
The head teacher informed the claimant that he was entitled to be represented at the hearing by his trade union or colleague. On 14 February 2008 the attorneys wrote to the school requesting to represent the claimant. In their letter they stated the following –

“In view of the contents of your letter of 12 December and the potential repercussions of an adverse finding the potential impact on our client is such that it would be a breach of his human rights not to be represented. We appreciate that in ordinary cases the employee could have the matter dealt without legal representation but this is an extraordinary case that could result in a lifetime disadvantage for our client.”

This request for legal representation was denied.

In order to understand the reasoning of the Court one must consider the relevant legislative background in the United Kingdom.

(b) *Legislative Background*

The judge considered the following statutory provisions -

(aa) Section 142 of the Education Act 2002. This section generally results in the individual being forbidden indefinitely from carrying out work that directly or indirectly involves children.

(bb) Article 6 of the *European Convention on Human Rights* (ECHR) which reads as follows –

“Right to a fair trial

\[24\] *Op cit* 3 par 11.
(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent impartial tribunal established by law.

(2) 

(3) Every one charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require.”

(cc) Section 10 of the Employment Relations Act 1999 that reads as follows:

“An Employer must permit the worker to be accompanied by one companion who is either employed by a trade union of which he is an official... or an official of a trade union whom the union has reasonably certified as having experience of or as having received training in, acting as a workers companion at disciplinary or grievance hearings; or another of the employers workers”.

(c) Judgement

The judge concluded in paragraph 67 as follows:

“However, even though the present proceedings are ‘civil’ for article 6 of ECHR purposes, in principle I accept the Claimant’s alternative submission that, by reason both of the serious nature of the allegations of misconduct and the severity of the consequences of a section 142 direction the claimant is entitled to a commensurately enhanced measure of procedural protection... In particular in the
Fleurose case where the Court of Appeal identified the “gravity and complexity” of the charges as a relevant factor in determining what fairness requires.”

He continued in [paragraph 69] that:

(i) “the gravity of the particular allegations made against the Claimant; taken together with the very serious impact upon the Claimant future working life of a potential s142 direction are such that he was and is entitled to legal representation at hearings before the Disciplinary Committee and Appeals Committee”.

(d) Court of Appeal

The judgement was taken on appeal and the Court of Appeal had to consider the application of article 6 of ECHR in internal disciplinary hearings in the cases of Kulkarni25 and R v Governors of X School.26

In the R v Governors case the court found in a 4-1 majority decision that the question was whether the disciplinary hearing and the barring proceedings conducted by the ISA were linked. The majority found that the proceedings were sufficiently independent and dealt with different issues.

The court concluded that the preferred test is as set out in the Kulharni case supra, in that article 6 will not be applicable if the loss of only a specific job was at stake. It can however

26 R (G) Governors of X School and others (2010) IRLR 222.
be applicable if the effect of the proceedings could be far more serious such as the loss of
the claimant to practice his profession.

In the *Puri* case\(^{27}\) a doctor was dismissed for rude, aggressive and inappropriate behaviour.
The court found that his civil right to practise was not at stake and therefore article 6 was
not applicable.

2.3 CONCLUSION

It is clear that the employment law in the United Kingdom was built on an approach of
minimum legal interference. A company was only required in 2004 to follow a minimum set
of procedures if it wanted to institute disciplinary action against an employee.

In terms of the common law legal representation was not an automatic right at a tribunal
and the logical development was that legal representation would therefore not be an
automatic right in disciplinary hearings.

There has however been some progress in this area and it seems as if the current legal
position is to allow legal representation if the gravity of the consequences of the misconduct
is such that an employee may not only be dismissed, but also be prohibited from practicing
in his professional capacity.

It is however interesting to note that while legal representation is not automatically allowed
at tribunals, this is not the case in Employment Tribunals where legal representation is

\(^{27}\) *R v (Puri) v Bradford Teaching Hospitals NHS Foundation Trust LTL 27/4 2011.*
specifically allowed. These employment tribunals are mandated to resolve labour disputes and it is more or less based on the same principals as our Commission for Conciliation Mediation and Arbitration.

3 POSITION IN AUSTRALIA

3.1 GENERAL PRINCIPLES

The previous section highlighted the position in the United Kingdom, namely that legal representation in disciplinary enquiries is only allowed in limited circumstances, while it is allowed in the employment tribunals. Employment related matters in Australia are regulated by the *Fair Work Act 2009*. Section 575 of this Act establishes an employment tribunal named Fair Work Australia (FWA).

Section 596 of this Act deals with legal representation and reads as follows:

(1) “Except as provided by subsection 3 of the procedural rules, a person may be represented in a matter before the FWA (including an application or submission to FWA on behalf of the person) by a lawyer or paid agent only with the permission of FWA.

(2) FWA may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWA only 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.

Note: Circumstances in which FWA might grant permission for a person to be represented by a lawyer or paid agent include the following:

(a) Where a person is from a non-English speaking background or has difficult reading or writing.

(b) Where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.”

3.2 CASE LAW

In *R J Rodgers v Hunter Valley Earthmoving Company Pty Ltd*\(^{28}\) the commissioner had to decide whether legal representation should be allowed. In his decision he referred to *In Re Colonial Weighing Australia Pty Ltd*\(^{29}\) in which it was stated that in the normal course of events in an ordinary unfair dismissal the applicant should be allowed legal representation. The commissioner also referred to the case of *Timothy Visscher v Teekay Shipping (Australia) Pty Ltd*\(^{30}\) in which the full bench stated that:

“It has become almost a formality that leave to be represented by counsel, solicitor or agent be granted to a party in such matters\(^{31}\)”

\(^{28}\) (2009) FWA 572.
\(^{29}\) (1998) Q 1048.
\(^{31}\) At page 1236
The commissioner then went further and he referred to the *Explanatory Memorandum* published at the time of the *Fair Work Bill’s* introduction in 2008:

“FWA is intended to operate efficiently and informally and where appropriate in a non-adversarial manner. Persons dealing with the FWA would generally represent themselves. Individuals and companies can be represented by an officer or employee, or a member, officer or employee of an organization of which they are a member, or a bargaining representative. Similarly an organization can be represented by a member, officer or employee of the organization. In both cases, a person from a relevant peak body can be a representative.

However, in many cases legal or other professional representation should not be necessary for matters before FWA. Accordingly, clause 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission.

In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties”

The commissioner then considered the above considerations and in paragraph 12 he stated as follows:

“In practice the Tribunal would usually grant permission in formal proceedings, however if a party raises an objection, the discretion afforded to the Tribunal will be exercise on the facts and circumstances of the particular case”
The commissioner then considered the facts and decided to refuse permission for legal representation.

In *R Tokoda v Westpac Banking Corporation*\(^{32}\) the commissioner considered the act and then concluded in paragraph 7 that:

“I am satisfied that I should grant permission for the respondent to be represented by a lawyer as it will enable the matter to be dealt with more efficiently. There are serious matters for determination in the case and the facts are relatively complex.”

In *Australian Federation of Air Pilots v Regional Express Holdings Limited*\(^ {33}\) the commissioner also considered the act and concluded that:

“Leave will assist Rex to put the best case possible and in the unusual circumstances of this matter, representation by counsel will assist in the hearing and determination of the matter.”\(^ {34}\)

In considering whether he should allow legal representation, Deputy President Leary in *L J O ‘Grady v Royal Flying Doctor Service of Australia*\(^ {35}\) referred to the Hunter Valley case *supra* in which legal representation was refused because of the “relatively simple factual contest”. The Deputy President then stated in paragraph 30 that:

“FWA is intended to operate efficiently and informally and where appropriate in a non-adversarial manner” where parties “would generally represent themselves”. However this is a threshold matter challenging the jurisdiction of FWA which is a

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\(^{32}\) (2012) FWA 809.

\(^{33}\) (2011) FWA 7716.

\(^{34}\) At page 7719

\(^{35}\) (2010) FWA 1143.
legal question and will be determined following a formal hearing, albeit a hearing which will be somewhat less formal than a court proceeding. Nonetheless witness evidence will need to be tested by examination and cross examination if necessary."\(^{36}\)

3.3 CONCLUSION

In summary it seems that in terms of the Australian law legal representation is not a requirement for a fair hearing. Unlike the position in the United Kingdom where legal representation is allowed in their Employment Tribunals, the position is somewhat different in Australia.

In Australia a person must obtain permission to be represented at the Fair Work Australia. The commissioner dealing with the case will only allow legal representation if he or she considers it to be fair and appropriate to grant permission. In exercising his discretion he will take section 596 of the *Fair Work Act 2009*, as well as the explanatory memorandum into consideration.

4 LEGAL REPRESENTATION IN OTHER COUNTRIES

According to Benjamin\(^{37}\) the right to be represented by counsel of his or her own choosing has been a subject of debate in the USA. This right has been expressed in the rules of the American Arbitration Association and statutes in many states protect this right.\(^{38}\) Benjamin noted on page 257 that:

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\(^{36}\) At page 1147


\(^{38}\) *Op cit* 256.
“... a substantial and growing number of lawyers specializing on behalf of either labour or management.”

Already in 1994 Benjamin noted that the tendency towards a greater level of involvement of lawyers has also been noticed in European courts. Certain countries have responded to this trend by adopting measures to ensure equality in litigation. In Germany for example the court must assign a lawyer to an unrepresented party who requests this.39

Collier 40 wrote in 2003 that the Labour Code of Namibia was drawn up with the assistance of the ILO. It allows for legal assistance in the court of first instance and requires the permanent secretary to appoint persons to assist complainants before the court. However since her article, the Labour Act 2004 came to effect and in terms of section 83(13) parties must generally represent themselves. A legal practitioner may however appear with the leave of the arbitrator if the parties agree, or if the dispute is of such complexity that it is required and the other party would not be prejudice thereby. It seems that the rules with regard to legal representation in Namibia before the Tribunals are much the same as that of Australia.

5 CONCLUSION

In terms of the common law legal representation is not considered as a requirement for a fair hearing. In the United Kingdom legal representation is only allowed in disciplinary hearings in exceptional circumstances.

39 Op cit 257.
40 Collier “The Right to Legal Representation under the LRA” 2003 ILJ 767.
Once a person is dismissed and he wants to refer the matter to a tribunal legal representation is allowed in the United Kingdom, but in Australia and Namibia the arbitrator must consent thereto.

It seems that because of the complexity of labour cases in both Europe and the United States, lawyers are becoming more involved in these matters\footnote{See par 4 supra.}.

The final conclusion with regard to this comparative survey is that legal representation will generally only be prohibited (in countries where permission is required) in cases where the facts are not complex and of a relatively simple nature.

The position in South Africa will be discussed and compared with the position in the countries referred to in this chapter. The purpose for this comparison is to establish whether legal representation is a requirement for a fair disciplinary hearing. Once that is determined, the right of legal representation as a requirement for a fair hearing before the CCMA will be considered.
CHAPTER 3
LEGAL POSITION IN SOUTH AFRICA

1 INTRODUCTION

In this chapter the development of the legal position with regard to legal representation will be looked at. The main development periods that one must consider are those that pertain to the common law, the Labour Relations Act of 1956 and the Labour Relations Act of 1995. With regard to the Labour Relations Act of 1995 one must consider the position before and after the 2002 amendment of the act.

An attempt to differentiate between the development of the right to legal representation at disciplinary hearings on the one hand and the development of the right to legal representation at the CCMA on the other hand, will also be made.

The factors that were considered in determining whether legal representation should be allowed or refused will be highlighted.

2 COMMON LAW

2.1 CASE LAW

According to Buchner the common law as a general rule affords a party a fair opportunity to present his or her case (audi alteram partem principle). However in Dabner v SA Railways

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and Harbours, the court had to decide whether to allow legal representation before an administrative tribunal. Judge Innes held that such a person is not entitled to legal representation. He explained it as follows:

“Now clearly the statutory board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to legal representation before courts of law are beside the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and most important of all, it has no power to make any order. It reports its finding, with the evidence, to an outside official and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The board is a domestic tribunal constituted by a statute to investigate a matter affecting the relations of employer and employee. And the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its real character.”

In Lamprecht & Another v McNeillie the court found that if a person is dismissed the onus is on the employee to prove the contractual right to legal representation. In this case Nissan initiated a disciplinary inquiry against McNeillie under the chairmanship of the first appellant who was the manager of the supply department. He was found guilty of transgressions as stipulated and his services were terminated with immediate effect. The

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43 1920 AD 583.
45 (1994) 15 ILJ 998 (A).
ground for review was that the principles of natural justice had not been complied with, due to the fact that legal representation was denied during the disciplinary hearing. The court found that it was clear that in terms of the disciplinary guidelines the employer’s intent was that the employees could only be represented by a layperson. The court also found that these guidelines gave the employee certain procedural rights, but these rights were not granted *animo contrahendi*.

Van Jaarsveld\(^\text{46}\) criticised this judgement in that the court followed a strict contractual approach, which was not in accordance with the principles of natural justice, which was already established as an integral part of our labour law. He preferred the *Lace v Diack* \(^\text{47}\) judgement in which it was stated that legal representation could be allowed in complex cases, despite the fact that such a right was not provided for in terms of the contract of employment.

In *Hamata & Another v Chairperson Peninsula Technikon Internal Disciplinary Committee & Others*\(^\text{48}\) the court referred to the *Dabner* case *supra* and stated that the courts already in 1920 categorically denied the existence of an absolute right to legal representation. The court then went further and Judge Marais explained the legal development as follows:

> “There has always been a marked and understandable reluctance on the part of both legislators and the courts to embrace the proposition that the right to legal representation of one’s choice is always a sine qua non of procedurally fair administrative proceedings. However it is equally true that with the passage of the

\(^{46}\) Van Jaarsveld “Weereens die Reg op Regsverteenwoordiging by Disiiplinere Verhore” 2005 THRHR 480.  
years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding.\textsuperscript{49}

In this case however it is important to take into account that it was not about an employer employee relationship, but rather about disciplinary steps that a university took against one of its students. The question that needs to be answered is if an employee can expect more rights due to the specific nature of the relationship.

In the \textit{Lace}\textsuperscript{50} case the applicant was found guilty of attempted fraud and a gross irregularity in that he had instructed that an adjustment be made to his personal tax deduction on the basis of a tax directive which had not materialised. According to the rules of the company, an employee whose offence warrants dismissal has the right to be represented by a co-employee of his choice. On the question of legal representation Judge van Zyl stated the following on page 865:

\begin{quote}
“There is certainly no absolute right to legal representation in our law, to the best of my knowledge, although I am of the opinion that where an employee faces the threat of a serious sanction such as dismissal, it may, in the circumstances be advisable that he be permitted the representative of his choice. This approach may be considered in complex and difficult matters in which legal representation may be regarded as essential for a fair hearing. Our law has not however developed to the point where the right to legal representation should be regarded as a fundamental right required by the demands of natural justice and equity. It may well be that, in
\end{quote}

\begin{footnotes}
\footnote{Op cit 1536.}
\footnote{(1992) 13 ILJ 860.}
\end{footnotes}
time to come public policy may demand the recognition of such a right. In my view, however, that right has not yet arrived. In this regard guidance may be found in the English law, which likewise does not recognise an absolute right to legal representation.

In Cuppan v Cape Display Chain Services\textsuperscript{51} the appellant was charged for “alleged complicity in unauthorized removal of company property”. In an affidavit the appellant pointed out his lack of skill in such proceedings and the necessity of having the assistance of a legal representative to enable him to properly present his case. Judge Page said the following:

“It appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation; and where the relationship is governed by a contract, the right of the person being subjected to an inquiry must depend on the contract itself.”\textsuperscript{52}

The court then referred to the \textit{Ibhayi} case\textsuperscript{53} where the respondent was employed as a principal foreman in the appellant’s roads department. The respondent was suspended for alleged misconduct. It is important to note that in this specific case the regulations specifically stated that representation is allowed and it does not state what form the representation may or must take. It was held that:

“Where the contract conferred upon the employee the right to representation this was not restricted to lay representation and would include legal representation.”\textsuperscript{54}

\textsuperscript{51} (1995) 16 ILJ 846 (D).
\textsuperscript{52} \textit{Op cit} 851.
\textsuperscript{53} \textit{Ibhayi} City Council v Yantolo (1991) (3) SA 665 (E).
\textsuperscript{54} \textit{Op cit} 1005.
In *Dladla v Administrator Natal* the applicants were summoned to attend a hearing and they were informed that legal representation will not be permitted. Judge Didcott then referred with approval to the case of *Enderby Town Council Football Club v The Football Association Ltd* in which the court stated as follows:

“Is a party who is charged before a domestic tribunal entitled as to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure, and if they, in the proper exercise of their discretion decline to allow legal representation, the courts will not interfere. But I would emphasize that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A tribunal is not at liberty to lay down an absolute rule. ... He must not fetter his discretion by making an absolute rule from which he will never depart.”

In *Fourie v Amatola Water Board* the applicant was the Chief Executive Officer of the Respondent. He was charged with serious misconduct and he brought an urgent interdict asking for a postponement, pending the finalisation of a criminal case and to be allowed legal representation at the disciplinary hearing. The request for postponement was refused, but the court made an order allowing legal representation. Judge Basson stated as follows:

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56 1971 (1) ALL ER 215.
57 At page 218
58 (2001) 22 ILJ 694 (LC).
“Taking into account the factors in favour of legal representation, it is my view that the applicant has made out a case that his right to fair procedure will be infringed upon should he not be allowed to be represented by a legal representative”59.

In making this decision the judge took the following factors into account:60

(i) Counsel was involved in drawing up the charges;
(ii) a forensic witness will testify and certain forensic evidence will be used to prove the charges;
(iii) the applicant is the most senior person in the employ of the respondent;
(iv) a legally qualified independent chairperson will chair the hearing; and
(v) the applicant had to make a difficult choice and that is whether to abandon his defence in the proceedings before the disciplinary enquiry or whether he should waive his right to remain silent, especially in light of the criminal proceedings that might eventually take place.

Collier discussed legal representation and related cases.61 In Majola v MEC, Department of Public Works Northern Provinces and Others62 the employer sought to rely on the contract between the parties in order to exclude legal representation. In this instance it took the form of a collective agreement. The court however was of the view that, notwithstanding the primacy of collective agreements, if a collective agreement prohibits or restricts the

59 Op cit 699.
60 Idem.
granting of legal representation an adjudicator may allow such representation provided just cause exists not to apply the terms of the collective agreement.\textsuperscript{63}

In \textit{MEC Department of Finance Economic Affairs & Tourism Northern Province v Mahumani}\textsuperscript{64} the respondent was employed as a game ranger. He was suspended because he was implicated in the theft and disposal of five rhinoceroses from the reserve. Legal representation was refused, because in terms of a collective agreement legal representation was not allowed. The chairman of the hearing was of the view that because of this agreement, he did not have a discretion to grant legal representation. The Supreme Court of Appeal confirmed that notwithstanding a collective agreement to the effect that neither employer nor employee may be represented by a legal practitioner, the presiding officer was nevertheless required to ensure a fair procedure and therefore had to consider an application to allow legal representation and had to exercise a discretion to allow legal representation if representation was required for fairness.\textsuperscript{65}

The court then referred to the \textit{Hamata case}\textsuperscript{66} and lists the following factors which must be taken into consideration in the exercise of such a discretion\textsuperscript{67}:

\begin{itemize}
  \item[(i)] The nature of the charges brought
  \item[(ii)] the degree of factual or legal complexity attendant upon considering the charges
  \item[(iii)] potential seriousness of the consequences of an adverse finding
\end{itemize}


\textsuperscript{64} (2004) 25 ILJ 2311 (SCA).

\textsuperscript{65} \textit{Op cit} 13.

\textsuperscript{66} (2002) 5 SA 449 (SCA)

\textsuperscript{67} At page 2316
(iv) Nature of the prejudice to the employer in permitting legal representation.

2 2  WRITERS

Van Jaarsveld\textsuperscript{68} referred to the \textit{Ibhayi and McNeillie} cases and concluded that in these cases the courts followed a contractual approach, whereas in the \textit{Lace}\textsuperscript{69} case a discretionary approach was followed. According to him the approach in the \textit{Lace}\textsuperscript{70} case was the preferred one. On page 483 the learned author argued that the time has come to allow legal representation in all disciplinary hearings, unless it can be shown by the employer that the charges are not serious and that the employee will not be dismissed.

John Grogan\textsuperscript{71} stated that the complexity\textsuperscript{72} of the case and the terms of the disciplinary code will determine whether an employee is entitled to legal representation. He continued to state as follows on page 343:

\begin{quote}
“Representation, even by lay persons, serves two main purposes: it gives accused employees moral support and ensures that the scales are not unfairly tipped or seen to be unfairly tipped against the employees. The presence of a representative also ensures that justice is seen to be done.”
\end{quote}

\textsuperscript{68} Van Jaarsveld “Weereens die Reg op Regsverteenwoordiging” (2005) 65 THRHR P 482.
\textsuperscript{69} (1992) 13 ILJ 860.
\textsuperscript{70} (1992) 13 ILJ 860.
\textsuperscript{72} See also Le Roux “The Right to Legal Representation at Disciplinary Hearings” (2004) CLL 51; Grogan “Is there a lawyer in the House” (2005) EL (3) 3 and Van Jaarsveld, Fourie & Olivier “\textit{Principles and Practice of Labour law}” (2010) 806. See Also Grogan Sibergramme 22/2010 in which John Grogan discussed Volschenk & Another \textit{v} Morero & Another Case number J2247/10 dated 10/11/2010 (unreported) in which the court said that the essential test whether to allow legal representation is fairness.
2.3 SUMMARY

It seems that in terms of the common law there is no absolute right to legal representation. The general consensus is that the employer has a discretion whether to allow legal representation. It seems as if the courts agree that the law must be developed to a point that legal representation will be allowed in certain extraordinary circumstances. One would think that factors like the complexity of the case and the seriousness of the sanction will be of paramount importance in the exercise of such discretion.

If the employment relationship is regulated by a contract and the contract excludes legal representation, the presiding officer must still ensure that a fair procedure is followed and therefore he must use his discretion and consider any application for legal representation. The employer must act fairly and if it will only be fair to allow legal representation, it must allow it.

Lastly, if the employee alleges that in terms of the agreement he or she has a contractual right to legal representation, the onus is on him or her to prove it.

3 THE LABOUR RELATIONS ACT OF 1956 (LRA OF 1956)

3.1 INTRODUCTION

This act is silent in this regard and therefore reference has to be made to the common law to address this issue.

The LRA of 1956 provided in section 37(1) that disputes could be settled at the industrial councils or the establishment of a conciliation board that would endeavour to settle
disputes between employer and employee parties. This Act further made provision for representation to the extent that each party was entitled to three representatives on the conciliation board, unless otherwise agreed, except that officials of unregistered trade unions or unregistered employer’s organisations and legal practitioners were not entitled to represent a party.\(^{73}\)

In terms of section 45(9) of the Labour Relations Act of 1956 a party may be represented by its legal practitioner if all the parties consent. According to Benjamin\(^{74}\) this section was interpreted to mean that the court’s common law discretion to allow legal representation is restricted by statute only to the extent that the court may not prevent legal representation by a party where all other parties have consented. The only decision to the contrary was *Mynwerkers Unie v African Products*\(^{75}\) where the court based its decision on the assumption that there is no common law right to representation at an administrative tribunal.\(^{76}\)

Benjamin explained that the major focus of the industrial court’s enquiry on whether to allow legal representation had been on the complexity of the dispute and the questions of law facing the dispute.\(^{77}\) Benjamin then went further and said that although the court was designed to be informal, lawyers had unfettered access to the court.\(^{78}\)

\(^{73}\) Collier “The Right to Legal Representation Under the LRA” 2003 (24) ILJ 754.  
\(^{74}\) Benjamin “Legal Representation In Labour Courts” 1994 (15) ILJ 250.  
\(^{75}\) (1987) 8 ILJ 401 IC.  
\(^{76}\) Benjamin “Legal Representation In Labour Courts” 1994 (15) ILJ 254.  
\(^{77}\) Op cit 254.  
\(^{78}\) Op cit 255.
According to Benjamin\textsuperscript{79} the reason for this approach by the court was to a large extend attributable to the fact that proceedings in the Industrial Court are adversarial with parties assuming the responsibility of presenting their cases and the presiding officer playing a role similar to that of a judge or a magistrate.

3.2 CASE LAW

In \textit{Morali v President of the Industrial Court & Others}\textsuperscript{80} Berman M had the following to say with regard to the effect of section 45(9)(c) on the question of the discretion to allow legal representation:

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“The question which next arises is whether this discretion has been taken away by the provisions of section 45(9)(c). An analysis of the clear, lucid and plain language of the subsection shows that the discretion vested in the Industrial Court to permit or refuse legal representation to a party or parties in dispute before it has indeed in specific circumstances not been taken away and that such party or parties is or are entitled as of right to representation, that is where no party objects thereto. And the subsection goes no further than that. It does not strip the Industrial Court of its discretion to permit a party to be represented even if the opposing party objects: it only deprives him of right to demand legal representation.”\textsuperscript{81}
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In \textit{Mynwerkers Unie v African Products}\textsuperscript{82} Ehlers P had to consider whether to allow legal representation in a situation where the respondent was part of a large international group with specialist employees who could appear on their behalf. The court then referred to the

\textsuperscript{79} Idem.
\textsuperscript{80} (1986) 4 IJ 690 (IC).
\textsuperscript{81} At page 694
\textsuperscript{82} (1987) 8 IJ 401 (IC).
Morali case supra and concluded that the judgement is debatable and that there is no common law right to legal representation before an administrative tribunal. The objection was upheld and it was found that legal representation was not allowed.

In the National Union of Textile Workers v Braitex\textsuperscript{83} Coetzee M had the opportunity to consider both the Morali and Mynwerkers Unie case judgements and he concluded that in his view the Morali case supra was correctly decided.

“What Ehlers, with due respect does not take into account is that, according to the common law although a party was not entitled to legal representation, the tribunal still had a discretion. The question therefore remains whether the relevant act takes this discretion away from a tribunal. To do this the Act should be clear. ..... It would have been a simple matter for the lawmaker to state that unless the parties agree he would not be entitled to legal representation if that was the intention. I do not think that the said section can be interpreted to mean that the discretion of the court to allow legal representation was ousted.”\textsuperscript{84}

Lastly in General Industries Workers Union of SA & Others v Eggo Sand\textsuperscript{85} the court said that although section 45(9)(c) states that notice of objection to legal representation must be in writing as soon as practical before the commencement of the proceedings, this requirement was not imperative and the court had the discretion to condone such a failure.

\textsuperscript{83} (1987) 8 ILJ 794 (IC).
\textsuperscript{84} At page 797
\textsuperscript{85} (1990) 11 ILJ 179 (IC).
3.3 SUMMARY

The position under the LRA of 1956 was therefore that at the conciliation proceedings parties were not allowed to legal representation.

At the Industrial Court the position was that if all the parties consented to legal representation it was allowed. If a party objected, then the court had a discretion to allow it. According to Benjamin *supra* the courts usually allowed legal representation and the attorneys basically had an unfettered right of appearance in the Industrial Court.

4 THE LABOUR RELATIONS ACT OF 1995 (LRA OF 1995)

4.1 LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS

As with the LRA of 1956 the LRA of 1995 is silent in this regard and one must therefore make reference to the common law and the Constitution to address this issue, as discussed at length in Chapter 4.3.

4.2 LEGAL REPRESENTATION AT THE CCMA

4.2.1 Introduction

It is important to differentiate between the position before the amendment of the 1995 LRA and the position thereafter. Before the Amendment Act in 2002 the position was regulated by sections 138(4) and 140(1) of the LRA of 1995. In 2002 these sections were however repealed and Rule 25 of the CCMA Rules was subsequently promulgated.
Currently a commissioner has the discretion to allow legal representation and in the exercising of his or her discretion he or she must consider the factors as listed in *Rule 25 of the CCMA Rules*.

4.2.2 Common Law

In the *Netherburn*\(^{86}\) case the Labour Appeal Court had to consider whether there was supposed to be a distinction between the CCMA and other tribunals. In this case the appellant was clearly aware of the common law position stating that there was no absolute right to legal representation. He therefore argued that there should be a distinction between dismissal proceedings before the CCMA and proceedings before other tribunals.

The Labour Appeal Court disagreed and on page 293 Musi J stated as follows:

““The first difficulty I have with this proposition is that there is no basis either in the common law or under the constitution for distinguishing between the CCMA and other statutory tribunals. They all perform similar functions and the same principals underlie the manner in which they operate. Although each of the various public tribunals deals with different subject matter, in all cases disputes range from the simple to the complex, the potential for complexity is always lurking and the consequences for the parties may be grave. The considerations referred to above are present in varying degrees in all disputes involved in proceedings before other statutory tribunals and are not peculiar to the CCMA”.”

\(^{86}\) *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau NO & Others* (2009) 30 ILJ 269 (LAC).
4.2.3 Position prior to the implementation of Act 12 of 2002

Before the 2002 Amendment, legal representation was regulated by sections 135(4), 138(4) and 140(1) of the LRA of 1995. These sections were repealed in the 2002 Amendment of the Act.

Section 138(4) read as follows:

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

Section 140(1) read as follows:

“(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee’s conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings, unless –

(a) The commissioner and all the other parties consent; or

(b) The commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –

(i) The nature of the questions of law raised by the dispute

(ii) The complexity of the dispute

(iii) The public interest and

(iv) The comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.”
In the *Netherburn*\(^{87}\) case *supra* the appellant dismissed the 3\(^{rd}\) respondent on account of alleged misconduct. The appellant was represented by an attorney, while the 3\(^{rd}\) respondent was represented by a union official. At the commencement of the arbitration the union official objected to legal representation and the commissioner decided not to allow legal representation. The appellant asked for a postponement, which request was denied. At that stage the appellant and his attorney left the proceedings and the arbitration was held in his absence. In the Labour Appeal court the appellant argued that section 138(4) provides for an automatic right to legal representation and that section 140(1) is an exception to it that limits that right. The judge disagreed and on page 297 he explained it as follows:

“The matter can best be approached by first determining what is the purpose that the impugned provision is meant to serve. In this regard, the court a quo referred to the Explanatory Memorandum on the labour relations bill as published in (1995) 16 ILJ 278 (the memorandum) The Memorandum takes into account the experience drawn from the application of the 1956 LRA and points out that under the latter act resolution of labour disputes had, contrary to earlier intentions, become legalistic in form with the result that the process had become expensive, inaccessible, protracted and adversarial. The Memorandum attributes this to the involvement of lawyers and recommends that the best way of correcting the situation is to exclude them from the process”.

\(^{87}\) *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau NO & Others* (2009) 30 ILJ 269 (LAC).
In *Ndlovu v Mullins NO & Another*\(^8\) the commissioner allowed legal representation on the basis that the applicant tacitly consented thereto. Judge Sutherland found that this was a gross irregularity and he stated as follows:

“Section 140(a) and (b) creates, in my view process rights. It affords a party in arbitration proceedings before a commissioner of the CCMA a right to object to his opponents being represented by a legal representative. That party is also entitled to the protection of the commissioner of the CCMA who must independently of the parties exercise a discretion whether it is equitable and necessary for one or more parties to be represented by a legal representative.”

In *Afrox Ltd v Laka & others*\(^9\) the employees were dismissed for assaulting a fellow employee during a strike. The company asked for legal representation and it was refused. In the Labour Court Judge Zondo referred to these sections and on page 1737 he stated as follows:

“In my view the effect of s 140(1) is therefore that in a case to which s140(1)(b) applies the central question is whether or not the commissioner is able to conclude that it would be unreasonable to expect the party seeking to be represented by a legal practitioner to deal with the dispute without legal representation. Accordingly, the party applying for legal representation should seek to persuade the commissioner to conclude in its favour that to so expect will be unreasonable whereas the party, if any, opposing that the first mentioned party be legally represented should direct its arguments and evidence to showing that it would not

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\(^8\) (1999) 20 ILJ 177 (LC) 187.  
\(^9\) (1999) 20 ILJ 1732 (LC).
be unreasonable to let the party concerned deal with the dispute without legal representation.”

In *Country Fair Food (Pty) Ltd v CCMA & others*\(^90\) the employees were dismissed after they refused to work overtime. The company asked to be represented by an attorney and the request was refused by the commissioner. In the Labour Court Judge Zondo referred to his own judgement in the Afrox case *supra* and once again concluded that:

“On the material which was placed before the second respondent there was enough for the second respondent to conclude that it would have been unreasonable for him to expect the applicant to deal with the dispute without legal representation.”\(^91\)

In *Strydom v CCMA*\(^92\) Judge Murphy also referred to the Afrox case *supra* and stated that:

“An application to be allowed legal representation in terms of section 140(1) must be approach from the premises that a party is not entitled to such representation. There is no absolute right to representation but the commissioner does have a discretion, which must be exercised judicially”\(^93\)

In *National Construction Building & Allied Workers Union v Betta Sanitaryware*\(^94\) the commissioner allowed legal representation in circumstances where the only other person able to represent the respondent was a key witness. Furthermore in *Goosen v Wiese*\(^95\) the commissioner stated that there was a duty on the legal representatives to advice the parties

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\(^90\) (1999) 20 ILJ 2609 (LC).
\(^91\) At page 2614
\(^93\) At page 2245
\(^94\) (1999) 20 ILJ 1617 (CCMA).
\(^95\) (1997) 18 ILJ 779 (CCMA).
beforehand that legal representation is normally not allowed in disputes for conduct and incapacity.

4 2 4 The Position after the 2002 Amendments

The Amendment Act, which came into operation on 1 August 2002, repealed both sections 138(4) and 140(1). The statute did not replace the sections referred to with any new provisions regarding the right to legal representation in arbitration proceedings.\(^{96}\) It did however insert section (2A) into section 115. Section 115(2A) reads as follows:

“The commission may make rules regulating-

(k) the right of any person or category of persons to represent any party in the conciliation or arbitration proceedings;

.....

(m) all other matters incidental to performing the functions of the commission.”

According to Judge van Niekerk in the *Norman Tsie Taxis case*\(^{97}\) *supra* the intention of the legislator was that the LRA would no longer regulate the right to legal representation in CCMA proceedings. Any rights to legal representation would after 1 August 2002 be determined by the CCMA, subject to a retention of the status quo until such time as the CCMA promulgates a valid set of rules.

\(^{96}\) See *Norman Tsie Taxis v Pooe NO and Others* (2005)26 ILJ 109 (LC) 114.

\(^{97}\) *Supra.*
After a few futile attempts to promulgate a valid set of rules, the current set of rules was published in December 2003. Rule 25 deals with legal representation. *CCMA Rule 25(1)(c)* deserves to be quoted in full and it reads as follows:

“If the *dispute* being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the *dismissal* relates to the employee’s conduct or capacity, the parties, despite sub rule (1) (b) are not entitled to be represented by a legal practitioner in the proceedings unless-

1) the commissioner and all the other parties consent;

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

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

(b) the complexity of the *dispute*;

(c) the public interest; and

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

In *Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson & Others*98 Judge Van Niekerk refused an interdict staying an uncompleted arbitration pending a review of the commissioner’s ruling refusing legal representation. On page 2517 he had the following to say:

“The limitation on the right to legal representation is an integral element of a system of expeditious and informal dispute resolution. The default position establish in rule 25 of the CCMA rules is that in cases of dismissal for misconduct and incapacity, a

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98 (2009) 30 ILJ 2513 (LC).
party to arbitration proceedings is not entitled to be represented by a legal practitioner unless the commissioner and the parties consent or the commissioner concludes, after considering specified factors, that it is unreasonable to expect a party to deal with the dispute without legal representation.

....

The commissioner’s primary obligation is to conduct the proceedings with the minimum legal formality.”

In *Frehse v Grand Roche Hotel* the commissioner stated that although there is no right of legal representation in conduct and capacity cases, the commissioner may permit legal representation on application. The question then arose whether an attorney is allowed to sign the referral document. In this regard Commissioner Everett stated as follows on page 408:

“*It is clear that a person, who may be entitled to represent the employee at arbitration, even if on application in terms of rule 25, is entitled to sign the form on behalf of the employee.***

4.2.5 Representation by a Candidate Attorney

A. General

According to Collier a legal practitioner means any person admitted to practice as an advocate or an attorney in the Republic and accordingly a candidate attorney is not allowed to represent a party in the CCMA. The Amendment Bill of 2000 proposed amendments to section 138, 140 and section 161 that would have accorded candidate attorneys the same

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100. Collier “The Right to Legal Representation Under the LRA” 2003 (24) ILJ 760.
right to represent as lawyers in the CCMA. These proposals did not reflect in Act 12 of 2002 and therefore candidate attorneys are still not allowed to represent clients at the CCMA.

According to Jansen\textsuperscript{101} this position is clearly wrong and it is as a result of an inflexible approach to legal interpretation, which led to a mistake that should have been corrected by the CCMA a decade ago. He then referred to Shenker \textit{v} The Master \& Another\textsuperscript{102} in which the court noted that it has been held that:

“The absurdity must be utterly glaring and the intention of the legislature must be clear and not a matter of surmise or probability before the literal meaning can be departed from.”

He then argued that the inclusion of candidate attorneys in the definition of a” legal practitioner” cannot be said to lead to any absurdities, whilst the deviation from the ordinary meaning thereof results in the repugnance to the intention of the legislature.

In \textit{Mbuli v SA Commercial Catering \& Allied Workers Union}\textsuperscript{103} Judge Waglay stated that –

“It has come to light that Sybia who represented the Applicant at the arbitration proceedings had no right of appearance at the arbitration. Sybia it appears is a candidate attorney and in terms of section 138(4) of the LRA excluded from representing any party at an arbitration held under the auspices of the CCMA... the fact is that the arbitration proceedings were tainted by an irregularity\textsuperscript{104}”

\textsuperscript{101} “Why Should Candidate Attorneys Not Have Right of Appearance in the CCMA” Society News 23 October 2008 23.
\textsuperscript{102} 1936 AD 136.
\textsuperscript{103} (2001) 22 ILJ 198 (LC).
\textsuperscript{104} At page 203 and 203
Collier\textsuperscript{105} then went further and referred to an explanatory memorandum, which advised that candidate attorneys are entitled to appear in the magistrates’ court, which is the equivalent status of the CCMA. It therefore proposed that the LRA must be amended to allow candidate attorneys with the right of appearance to represent clients at the CCMA.

\textbf{B. Conclusion}
I am of the view that it is clearly wrong to exclude a candidate attorney with right of appearance from arbitration at the CCMA. It simply does not make sense that a candidate attorney is allowed to represent a client at the magistrate court in both civil and criminal matters, but he is not allowed to represent a client at the CCMA. By excluding candidate attorneys the attorney’s profession cannot give a candidate attorney exposure to the CCMA and as a result there is a vacuum of properly trained attorneys in the labour environment.

\textit{4 2 6 Attending the Arbitration Proceedings as an Observer}

In \textit{Pelleteir v B \& E Quarries (Pty) Ltd B\&E Quarries v CCMA}\textsuperscript{106} the attorney asked permission to represent his client at the arbitration proceedings. This was refused, but the commissioner did allow the attorney to be present during the arbitration and to make remarks during the hearing. The attorney for the appellant argued that once the commissioner had decided not to allow legal representation, the commissioner did not have any discretion to allow the attorney to say anything at all. Judge Kennedy disagreed and on page 628 he stated as follows:

\textsuperscript{105} Collier “The Right to Legal Representation under the LRA” 2003 (24) ILJ 760.
\textsuperscript{106} (2000) 21 ILJ 624 (LC).
“In my view, the approach suggested by Mr Van Zyl is unduly formalistic. By allowing the attorney to remain in the room and on a few occasions to make a few remarks, the commissioner did not act in my view improperly or irregularly in a sense that this could constitute a ground to justify reviewing and setting aside the proceedings. It does not appear if any injustice to the employer resulted from what occurred in this regard.”

In *SA Post Office v Govender & Others*\textsuperscript{107} the commissioner also refused legal representation, but allowed the attorney to attend the proceedings, to make notes throughout the hearing and to prepare the closing arguments. The court held that by only preventing the attorney to be a spokesperson, the commissioner did nor bar him from representing his client and by doing that the commissioner was acting against his own ruling. The court found that this was a gross irregularity and the review application was successful.

### 4.2.7 Withdrawal of the right to legal representation

In *Coyler v Essack*\textsuperscript{108} the commissioner decided that the applicant was entitled to legal representation. The commissioner then at some stage during the arbitration accused the attorney of misrepresentation and asked him to leave the proceedings. The applicant asked for a postponement in order to obtain the services of a new legal representative, which request was refused. The court found that the commissioner committed a gross irregularity and explained it as follows on page 1383:

\textsuperscript{107} (2003) 24 ILJ 1733 (LC).

\textsuperscript{108} (1997) 18 ILJ 1382 (LC).
“Further it is clear that, once the commissioner thus allows legal representation, such party obtains a right to legal representation. It follows that, when a commissioner withdraws such a right he or she should exercise judicial discretion in this regard and once again, consider the factors listed in section 140(1)(b)(i) to (IV) of the act.”

5 WRITERS

Baxter\textsuperscript{109} states the following with regard to legal representation:

“There is no clear right to legal representation before a tribunal under the principals of natural justice. Many statutes do expressly create such a right; some allow any form of representation while others expressly stipulate representation through an attorney or advocate. It is sometimes argued that legal representation is counter – productive because it enables lawyers to over – judicialise the proceedings of the tribunal. It is claimed that it draws out the length of the hearings. In Britain there was an absurd over reaction against lawyers which led to the rule, before one tribunal that a party was entitled to any representative bar a lawyer. Attitudes have since changed and a right to legal representation is now generally accepted as an essential fact of tribunal justice in Britain”

According to Grogan\textsuperscript{110} the central question that a commissioner must ask is if it would be unreasonable to permit a party to continue without legal representation.\textsuperscript{111} I suggest a more


\textsuperscript{110} Workplace Law (2008) 441.

appropriate yardstick would be to ask if it would be fair to continue without legal representation.

6 SUMMARY

It seems that the present position is that a person does not have an automatic right to legal representation.

At the CCMA there is a distinction between disputes that involve dismissals for reasons of conduct and capacity and other disputes. With regard to dismissals for reasons of conduct and capacity there is no automatic right to legal representation, whereas legal representation is allowed for all the other disputes at arbitration proceedings.

The reason for this differentiation is according to Judge Musi in the Netherburn\textsuperscript{112} case\textsuperscript{supra} amongst others, that the bulk of disputes referred to the CCMA are dismissals based on capacity or conduct. The reason therefore to exclude lawyers is to provide a speedy, cheap and informal way to resolve disputes to the majority of cases.

In both the CCMA arbitration proceedings in respect of conduct and capacity disputes and at disciplinary hearings the commissioner and chairman must exercise his or her discretion in order to allow or refuse legal representation. In the exercising of this discretion certain circumstances must be considered in order to ensure that the proceedings will be fair towards both parties.

\textsuperscript{112} Netherburn Engineering cc t/a Netherburn Ceramics v Mudau NO & Others (2009) 30 ILJ 269 (LAC).
It seems that a candidate attorney is at this stage not allowed to represent a party at the CCMA. Once legal representation is allowed by the commissioner, the commissioner can only withdraw that right if the reasons for allowing it in the first place have changed during the proceedings (or if it is fair to do so).

CHAPTER 4

CONSTITUTIONALITY OF CURRENT POSITION AND COMPARATIVE IMPACT

1 INTRODUCTION

In the aforesaid the current position has been explained with regard to legal representation and how this right has developed over the years. Like most aspects of the law there are different views with regard to the right of legal representation at disciplinary hearings and at the CCMA. Some writers are of the opinion that it is a fair approach and that legal representation must be allowed subject to certain limitations, while others disagree.

In this chapter the arguments in favour of the right to legal representation and the arguments against it will be discussed. Once that is done, the question if the refusal to legal representation will withstand a constitutional attack will be considered.

Lastly, the current position in South Africa will be compared with the position in the United Kingdom, Australia and Namibia.
2 ARGUMENTS FOR AND AGAINST LEGAL REPRESENTATION

As early as 1994 Paul Benjamin wrote an insightful article about legal representation113 and on page 260 he concluded as follows:

“The right of a party to a dispute to have his or her case argued by a skilled professional is broadly accepted. But in situations of unequal access to legal representation, this may itself be a cause of injustice. In addition, participation by lawyers may lead to dispute settlement procedures becoming more formal, time consuming and expensive. In the past the industrial court has made short shrift of arguments opposing legal representation in particular cases. Now the broader labour community needs to debate these issues at a policy level in developing expeditious forums for resolving individual labour disputes, particular dismissal cases. There are strong indications that a degree of legal representation in such a tribunal would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in the favour of employers.”

According to the Explanatory Memorandum published in 1995114 the right of legal representation must be limited at arbitrations because:

“Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employees and small businesses at a disadvantage because of the costs.”

Van Jaarsveld\textsuperscript{115} stated that no statistics were given in support of this argument and that the memorandum does not deal with the problem of small employers having to face lawyers working fulltime for unions. This memorandum also does not indicate how many disputes are settled where lawyers were involved and where parties do not have legal representation.

In his dissertation Buchner \textsuperscript{116} referred to Geoffrey Fick who raised the following counter argument:

“The advantages of having a representative trained in law are too frequently ignored and consequently deserve a recollection. Counsel can inter alia, act as an deterrent to the summary dismissal of a party’s case; bridge possible hostilities between the party and tribunal member; clear up vagaries and inconsistencies in testimony; and focus attention of tribunal members on elements of a party’s claim. Moreover it is fair to observe that a lawyer has a rather unique ability to interpret relevant statutory provisions and to ensure consistency in administrative decision making by marshalling whatever prior decisions of the tribunal or the courts serve as a guide to the exercise of administrative discretions. The ability of a lawyer to delineate what may otherwise be a complex legal and factual issue and his role in acting as a check upon the administrative process should never be underestimated.”

According to Van Jaarsveld\textsuperscript{117} the question arose why legal representation can be refused, but an employee with legal qualifications or a skilled trade union representative will be

\textsuperscript{115} Van Jaarsveld, Fourie & Olivier Principals and Practice of Labour Law (2010) 995.
allowed at the proceedings. He is of the opinion that legal representation must be allowed in disciplinary hearings unless the employer can show that the consequences of the disciplinary hearing will not be that serious. In other words the employee will not be dismissed for the alleged misconduct.

According to Collier\textsuperscript{118} the Law Society of South Africa wanted to test the constitutionality of the article limiting legal representation in the Constitutional Court, but after obtaining a senior counsel’s opinion they have decided to rather engage in negotiations.\textsuperscript{119} According to her the main opposition against legal representation is that unions will be at a disadvantage and that their members will also insist on being represented by a lawyer, which the unions cannot afford.

On 3 September 2002 a meeting was held in which it was suggested that the legal profession offered free legal assistance as a \textit{quid pro quo} for the right to appear at the CCMA, but no concrete proposals were drafted.\textsuperscript{120} At the time of the writing of this dissertation I have been informed that the Law Society of South Africa has filed papers at the High Court and the matter is \textit{sub judice} at this stage.

Lastly Collier\textsuperscript{121} concluded that the persons that argued against legal representation for less complex labour disputes propose that the tribunal take a more inquisitorial approach.

\begin{flushright}
\textsuperscript{117}Van Jaarsveld “Weereens die Reg opRegsverteenwoordiging by Disiplinere Verhore” (2005) THRHR 479.
\textsuperscript{118}Collier “The Right to Legal Representation under the LRA” 2003 (24) ILJ 760.
\textsuperscript{119}Op cit 763.
\textsuperscript{120}Op cit 764.
\textsuperscript{121}Op cit 769.
\end{flushright}
On the other hand those that argues in favour of legal representation points out that any party to a dispute is entitled to give evidence, to call witnesses, to question any witnesses and to address the commissioner and that is the kind of work that an attorney is trained to do; not only in complex matters, but also in disputes whether conducted at conciliation or arbitration.\textsuperscript{122}

After considering the arguments for and against legal representation Collier then concluded on page 770:

“\textquote{It is ultimately a choice of policy. Rather than pit the advantages of speedy cheap and informal procedures against the advantages of legal representation, the interested parties are urged to explore, as they appear to be doing, whether the two are in fact mutually exclusive. As Baxter points out of course a lawyer can abuse procedure. But the remedy lies in the hand of the tribunal’s chairperson.}”

3 IS THE REFUSAL OF LEGAL REPRESENTATION AT CCMA CONSTITUTIONALLY ACCEPTABLE?

3.1 DIFFERENT CONSIDERATIONS

According to Collier\textsuperscript{123} the opinion on the appropriateness of legal representation before the CCMA is divided. It is clear that the CCMA is hoping for a compromise between the interested parties at NEDLAC before they formulate their new rules.

In formulating the policy one must consider the principles of natural justice, the Constitution, comparative law and private arbitration.\textsuperscript{124}

\textsuperscript{122} Op cit 769.
\textsuperscript{123} Op cit 765.
In this section the relevant parts of the Constitution, Act 108 of 1996 will be considered. The relevant sections are as follows:

Section 9(1)

“Everyone is equal before the law and has the right to equal protection and benefit of the law”

Section 23(1)

“Everyone has the right to fair labour practices.”

Section 33(1) –

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

Section 34 –

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

Section 35(3)

“Every accused person has a right to a fair trial, which includes the right to choose and be represented by, a legal practitioner, and to be informed of this right promptly.”

Section 36

“The rights in the Bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an

124 Idem 765.
open and democratic society based on human dignity, equality and freedom....”

In the *Netherburn case*¹²⁵ Judge Zondo considered these provisions and he concluded that these sections do not give a person an absolute right to legal representation. However, even if there are such a right, the exclusion or limitation thereof will be justified in dismissal proceedings with regard to misconduct and incapacity cases. On page 285 he explained it as follows:

“If provision was to be made for an absolute or general right to legal representation in respect of such disputes, that would make a serious contribution towards taking our new dispute resolution system in the 1995 act back to the pre-1994 dispute resolution system under the Labour Relations Act which had become totally untenable by the time the 1995 act was passed. This cannot be done”

In the *Norman Tsie Taxis*¹²⁶ case supra the judge agreed with Judge Landman in *Netherburn (a quo)*¹²⁷ in that the requirements for a fair hearing are not the same for a tribunal as that of a court. He then stated that the CCMA is not a court and continued to state:

“The fact that there is no right of legal representation in a tribunal even implicit in s34 does not necessarily mean that the right to legal representation may be denied in all proceedings before the CCMA¹²⁸ ... There is no basis for the applicant’s contention that the Constitution confers an absolute right to legal representation in arbitration proceedings before the CCMA. Even if section 140(1) is considered to

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¹²⁵ *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau NO & Others* (2009) 30 ILJ 269 (LAC).

¹²⁶ *Norman Tsie Taxis v Pooe NO and Others* (2005)26 ILJ 109 (LC).

¹²⁷ *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau NO & Others* (2003) 24 ILJ 1712 (LC).

¹²⁸ At page 122
have the effect contended for by the applicant, the nature of proceedings in the CCMA cannot confer an automatic and absolute right to legal representation where none exist under the constitution, the LRA, and the common law. It is entirely consistent with the right to a fair hearing before a forum such as the CCMA for the presiding commissioner to have a discretion to admit legal representation in appropriate circumstances.129"

The judge then concluded by stating that because there is no constitutional right to legal representation, there is no need to justify section 140(1) of the LRA in terms of section 36 of the Constitution.

In the Hamata case supra the judge said that the South African law does not recognise an absolute right to legal representation in forums other than a court of law. Section 35 of the constitution expressly spells out the right to choose and be represented by a legal practitioner, but it does so only in the context of an arrest for allegedly committing an offence.

3.2 SUMMARY

It seems that at this stage the case law suggests that there is no absolute right to legal representation and for the moment it seems as if rule 25 will survive a constitutional attack. In this regard Collier stated on page 16130 that, notwithstanding the dissatisfaction with regard to the status of legal representation, the current position has to date survived constitutional scrutiny and it looks as if it will remain unchanged for the near future. This

129 At page 125
130 Collier “The Right to Legal Representation under the LRA” 2003 (24) ILJ 760.
article was written before the Labour Appeal Court handed down its decision in the
*Netherburn case* and since the publication of that article. The position has strengthened in
that a person does not have an automatic right to legal representation.

4 COMPARATIVE SURVEY OF THE POSITION BETWEEN THE REPUBLIC OF SOUTH AFRICA, THE UNITED KINGDOM AND AUSTRALIA

4 1 DISCIPLINARY HEARINGS

At this stage there is no automatic right to legal representation at disciplinary hearings in
either South Africa or the United Kingdom.

In the United Kingdom the situation is that legal representation will be allowed in
extraordinary circumstances. This is usually when a person is not only going to lose his
employment but also his career; for instance if a doctor is charged for malpractice and as a
result he will not only be dismissed at the hospital, but he will also be prohibited to practice
further in his professional capacity.

In South Africa legal representation can be allowed at the discretion of the chairperson. In
the execution of his discretion there are certain factors that the chairperson must consider
and if he fails to do so the hearing may be procedurally unfair.

4 2 CCMA AND OTHER STATUTORY TRIBUNALS

In the United Kingdom labour disputes are referred to their so-called employment tribunals.
Legal representation is allowed at these tribunals.
In Australia labour disputes are also referred to a statutory tribunal. The Fair Work Act regulates these tribunals. In terms of this act legal representation is allowed if the commissioner concedes thereto. The main factor that the commissioner must take into consideration is fairness, however a person’s fluency in English is also specifically listed as an important consideration when deciding if legal representation should be allowed or not.

In South Africa legal representation is allowed in arbitrations, however there is not an automatic right to legal representation in cases of dismissal where the reason for the dismissal is for conduct or capacity.

Lastly the position in Namibia is similar to that of Australia and South Africa in that the commissioner must concede to legal representation before it is allowed.

In summary it can thus be said that in South Africa, Australia and Namibia legal representation at statutory bodies is not automatically allowed, while in the United Kingdom it is allowed.
CHAPTER 5

CONCLUSION

1 DISCIPLINARY HEARINGS

In terms of section 23(1) of the Constitution everyone is entitled to fair labour practices and as a result everyone is entitled to a speedy resolution of their disputes that is also fair towards both parties.

In the current situation an employer must conduct a disciplinary hearing fairly and in order to do so witnesses must be called and cross-examined. Once the hearing has been concluded and the employee is dismissed, the matter may be referred to the CCMA for a de novo hearing and once again the same witnesses have to testify and be cross-examined. If such an employee is going to have an automatic right to legal representation, it could mean that this method of dispute resolution can become extremely lengthy and expensive.

However, on the other side of the coin there are unfortunately a number of employers that utilise the services of unethical employer’s organisations and labour consultants to conduct their hearings. In some of these cases the verdict is pre-determined and the chairperson will only go through the motions in order to comply with the act. One way such an employee can be protected from an unscrupulous chairperson is if he or she is represented by an
attorney, and both that chairperson and the employer know that they must defend the
disciplinary process and the decision at the CCMA where they will have to face that attorney
once again.

It is suggested that as a starting point legal representation at a disciplinary hearing must not
be allowed. The use of the pre-dismissal arbitration method as set out in section 188A of the
LRA should also be encouraged. If an employee insists on the use of an attorney, the
employer should allow it on condition that there will not be a disciplinary hearing, but a pre-
dismissal arbitration hearing. Both the representatives of the parties can then agree that the
hearing will be conducted by a commissioner appointed by the CCMA or the relevant
bargaining council and that the decision of such a person will be final and binding, subject
only to review at the Labour Court.

If the parties follow this route there will be only one hearing before an independent
chairperson. This will assist both parties to not only resolve their dispute in an open fair and
transparent manner, but will also bring finalisation to the matter in a promptly manner.

2 CCMA PROCEEDINGS

The main argument for not allowing legal representation at the CCMA is that lawyers make
the process legalistic and expensive. It is argued that lawyers are often responsible for
delaying proceedings due to their unavailability and the legalistic approach they adopt and
that allowing legal representation places individual employees and small businesses at a
disadvantage because of the costs.
If one looks at this argument and one considers that both unions and employer’s organisations are allowed at the CCMA, one can only but wonder what lawyers do that these officials don’t do. These officials are also sometimes unavailable and they use the same tactics that an attorney uses. A lot of these officials have got legal qualifications and a commissioner has no discretion to disallow them in the proceedings.

If a party is represented by a union official or an employer’s organisation, legal representation should be allowed. The commissioner must only have a discretion not to allow legal representation in cases where the other side is unrepresented and has clearly no legal or human resources background.

The argument with regard to costs must also be considered carefully. It might be expensive to appoint a lawyer to represent you but what is the alternative? If you are a dismissed employee your line of income has in any case been taken away. If you are an employer you may have to pay compensation up to 12 months or you may have to reinstate the employee. On the one hand we have the cost factor, but on the other hand an attorney can assist the client to present all the necessary and relevant facts so that the commissioner can come to a finding that is just and fair.

The commissioners should make it clear to parties who have a right to representation, that that right may not be abused. A commissioner has the right to bar any representative from his or her proceedings if such a representative is disruptive or if he or she is using tactics
that are unnecessarily delaying the proceedings, but commissioners seem hesitant to use these powers.\textsuperscript{131}

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SUMMARY

1 GENERAL

The right to legal representation at disciplinary hearings and before the Commission for Conciliation Mediation and Arbitration (CCMA) is controversial and this issue has been in the past under previous dispensations debated in our courts since 1920.

2 DISCIPLINARY HEARINGS

The Labour Relations Act 66 of 1995 (LRA) is silent on the rights of an employee in an in house disciplinary hearing and therefore one has to rely on the common law, the Constitution and the legal position in other countries.

In terms of the common law an employee did not have an automatic right to legal representation in disciplinary hearings. This question was over the years the subject of various court cases and there were judges that stated that if the right to legal representation was unfairly refused and the chairman did not exercise his discretion in a proper way, such a hearing could be procedurally unfair.

Currently the position in South Africa is that legal representation is not a requirement for a fair hearing in disciplinary matters. An employee that faces disciplinary action can request
legal representation and the chairman of the hearing has the discretion whether to allow representation or refuse it.

In 1996 the Constitution of the Republic of South Africa, Act 108 of 1996 was promulgated with the commencement date 4 February 1997. In terms of this Act citizens of South Africa have certain constitutional rights. The question that arose was whether the refusal to legal representation in disciplinary hearings was unconstitutional. The Supreme Court of Appeal found in the *Hamata*¹³² case that such a limitation was not unconstitutional.

If one compares the legal position in South Africa with the position in the United Kingdom, it seems that the position in South African law is in line with the position in the United Kingdom. In the United Kingdom a person does not have an automatic right to legal representation, but in cases where an employee not only faces dismissal but will also be prohibited from practicing in his professional capacity, legal representation is allowed by the courts.

### 3 CCMA

Already in 1920 in the *Dabner*¹³³ case, Innes J stated that an employee is not automatically entitled to legal representation before a statutory tribunal. When the Industrial Courts were established under the Labour Relations Act 28 of 1956 legal representation was allowed, unless one of the parties objected thereto.

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¹³² *Hamata & Another v Chairperson Peninsula Technikon Internal Disciplinary Committee and others* (2002) 23 ILJ 1531 (SCA) at 1533. (non-employment matter)

¹³³ *Dabner v SA Railways and Harbours* 1920 (AD) 583.
At the time when the CCMA was established in terms of the Labour Relations Act 66 of 1995, legal representation was excluded in cases of conduct or capacity, in terms of section 140(1). A commissioner could only allow legal representation in certain limited circumstances, as will be discussed in detail.

In 2002 the Labour Relations Act was amended and in terms of these amendments section 140(1) was repealed. The CCMA promulgated rules in 2003 and in terms of Rule 25 a commissioner has a discretion to allow legal representation in cases of conduct or capacity. In terms of Rule 25 there are certain guidelines that a commissioner must follow in the exercising of his discretion.

The constitutionality of section 140(1) was tested in the Labour Appeal Court and although this section was repealed, it is still relevant as it is essentially the same as rule 25. The Labour Appeal Court found in the *Netherburn*\(^{134}\) case that the section was not unconstitutional and therefore the commissioners have the discretion to refuse legal representation in cases of conduct or capacity.

The position in South Africa is also in line with the positions in Australia and Namibia, as both these countries have legislation that are almost similar to our Labour Relations Act.

\(^{134}\) *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau NO & Others* (2009) 30 ILJ 269 LAC.
At the time of the writing of this dissertation the Law Society of the Northern Provinces has apparently filed a notice of motion testing the constitutionality of rule 25 in the High Court. The CCMA has filed papers to oppose the application, but this case is still pending.

There are basically two lines of thought with regard to legal representation; that of Paul Benjamin\textsuperscript{135} who believes that the unequal access to legal representation may be an injustice. He also argues that lawyers make settlement negotiations more formal and expensive. According to him legal representation tilts the balance in labour disputes unfairly towards the employer.

According to Gregory Fick\textsuperscript{136} the advantages of a lawyer representing a person in a labour dispute are often ignored. An attorney can interpret the relevant statutory provisions and concentrate on the relevant aspects of a party’s claim or defence as the case might be. Furthermore the attorney can bridge possible hostilities and therefore his role must not be underestimated.

4 Conclusion

These opposing views are discussed and compared with the current case law and the opinions of writers in order to determine what the correct legal position in South Africa should be.

\textsuperscript{135} Benjamin “Legal Representation in Labour Courts” (1994) ILJ 250.