

When is legal representation allowed at the CCMA?



One of the frequently asked questions that gets asked by employers is: ‘When is legal representation allowed at the Commission for Conciliation, Mediation and Arbitration (CCMA)?’

Rule 25 of the CCMA generally applies during arbitration and not only confirms the right to be represented by a legal practitioner but also restricts this right if the dispute concerns the fairness of a dismissal and where a party alleges that the dismissal relates to the employee’s conduct or capacity. With any other type of dismissal or dispute, legal representation is automatically allowed. However, ***legal representation at the CCMA is not allowed during conciliation proceedings.***

Are Legal practitioners allowed in the proceedings?

Yes, Legal practitioners are allowed in the proceedings if-

- the Commissioner and all other parties consent; or
- the Commissioner concludes that it is unreasonable to expect a party to deal with the dispute without a legal representative.

If the Commissioner deems it unreasonable to deny a party legal representation at the proceedings after considering all the factors, including the nature and complexity of the dispute and whether it would be in the best interest of the public, then such CCMA representation may be allowed.

This may also be the case where the Commissioner deems that a party would be unfairly disadvantaged because of the opposing party's ability to deal with a dispute should the party who requires legal representation have to argue against the opposing party without such representation.

What are the the top 4 factors considered by the Commissioner?

- **The nature of the questions of law raised:** In a broad sense this entails whether the dismissal was procedurally and substantively unfair.
- **The complexity of the matter:** This would depend on the reason for the dismissal and whether it can be related to misconduct. A matter becomes rather complex when witnesses and expert witnesses are called to testify, and large volumes of documents are exchanged.
- **The public interest:** Although we acknowledge that the CCMA should not be over-legalistic in deciding whether to allow a legal representative, the CCMA will always bear in mind that the Constitution provides for legal representation and will not lightly refuse legal representation.
- **The comparative ability of the applicant and the respondent:** A Commissioner will compare the ability of the applicant and that of the respondent to deal with their cases in a sufficient manner. If the Commissioner feels that either the applicant or the respondent will be unable to deal with his or her case sufficiently, he/she will rule that legal representation is allowed.

Be that as it may and notwithstanding the fact that parties to arbitration at the CCMA may apply for legal representation, there has long been dissatisfaction over the general restriction of a party's right to avail him/herself of legal representation.

In ***Law Society of the Northern Provinces v Minister of Labour and Others JS61197/11*** an application was brought against this general restriction based on-

- o section 23(1) of the Constitution of the Republic of South Africa (“the Constitution”), which provides that everyone has the right to fair labour practices. Arguably, the right to legal representation in arbitration disputes may form part of such general constitutional right;
- o section 33(1) of the Constitution which states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that the said rule was inconsistent with the requirements of the Promotion of Administrative Justice Act (PAJA).

The Supreme Court of Appeal (SCA) considered the history of Rule 25 as such and the limitation which it imposes. It was held that the fact that the rule distinguishes between different kinds of cases, does not render the rule irrational. Furthermore, it held that there is no unqualified constitutional right to legal representation before administrative tribunals. In the SCA’s view, the Law Society had failed to present any evidence that a litigant will be prejudiced in circumstances where legal representation is refused at misconduct or incapacity arbitration proceedings.

Accordingly, the SCA upheld the appeal and set aside the High Court’s order of invalidity. At the time of writing this blog, the matter had not been decided by the Constitutional Court.

SERR Synergy encourages all employers to have adequate representation for these proceedings. This will be a crucial factor in the case and will play a major role in the ultimate success at the CCMA. SERR Synergy’s **labour services (Labour Pro)** can assist employers with representation at the CCMA.

About our Author: Henri Klopper joined SERR Synergy in 2014 and holds the title of Gauteng Labour Manager. He completed his LLB at the University of Pretoria in 2010 where he also attended law school. Henri was admitted as an advocate of the High Court of South Africa.

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