

An Analysis of Commission for Conciliation Mediation and Arbitration Awards

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Abstract

This paper reports on research that involved the analysis of 873 Commission for Conciliation Mediation and Arbitration (CCMA) arbitration awards sampled from unfair dismissal and unfair labour practice cases for the years 2003 to 2005. The sample of awards was selected in proportion to the case load of each of the Provincial offices of the CCMA. This project follows an earlier study undertaken on the basis of the CCMA's Case Management System and attempts, in part, to test the availability of information to assess the operation of the CCMA as a dispute resolution institution.

Descriptive findings are presented in table format for each of the questions contained in the instrument that was used to capture information from the arbitration awards.

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Acronyms

CCMA	–	Commission for Conciliation Mediation and Arbitration
C A S E	–	Community Agency for Social Enquiry
SEIFSA	–	Steel and Engineering Industries Federation of Southern Africa
COFESA	–	Confederation of Employers of South Africa
GEMA	–	General Employers and Management Association
NEF	–	South Africa's National Empowerment Fund
UDES A	–	United Democratic Employer's Organisation of South Africa
NEASA	–	National Employers' Association of South Africa

Table of Contents

1.	Introduction.....	1
2.	Purpose of the Study.....	2
3.	Method.....	3
4.	The Sample of Arbitration Awards.....	4
5.	Arbitration Award Background Information.....	5
5.1	Details of Applicants.....	6
6.	Representation during the Arbitration.....	15
6.1	Employee Representation.....	15
6.2	Employer Representation.....	16
7.	Dispute Details.....	19
8.	Type of Dispute.....	24
8.1	Unfair Dismissals.....	25
8.2	Unfair Labour Practice.....	26
9.	Outcome of Dispute.....	28
10.	Processing Arbitration Awards.....	34
	Annex.....	35
	References.....	38

1. Introduction

The Commission for Conciliation Mediation and Arbitration (CCMA) Arbitration Award project aims to analyse the operation of the CCMA in relation to the adjudication of the two major categories of rights disputes, that is, disputes involving alleged unfair dismissals and unfair labour practices. Any dispute between an employee and an employer which involves an alleged unfair dismissal or unfair labour practice is first subjected to a process of conciliation. If the dispute is not settled at this stage, the applicant may refer it to arbitration by a CCMA commissioner.¹ The arbitration is final and binding and the arbitration decision is contained in a written arbitration award, drafted by a full-time or part-time commissioner of the CCMA.

The research involved the analysis of 873 arbitration awards sampled from unfair dismissal and unfair labour practice cases for the years 2003 to 2005. The sample of awards was also selected in proportion to the case load of each of the Provincial offices of the CCMA. This project follows an earlier study undertaken on the basis of the CCMA's Case Management System² and attempts, in part, to test the availability of information to assess the operation of the CCMA as a dispute resolution institution.

The following provides a summary descriptive analysis of the findings by each of the questions in the instrument that was used to analyse the arbitration awards. It also presents findings by year and by province for some of the questions. The research was undertaken by the Community Agency for Social Enquiry (C A S E) between July and October 2006. In addition, the report draws attention to the possible implications of the findings for debates concerning the future direction of the CCMA.

1 In sectors in respect of which a bargaining council has been accredited for arbitration, the arbitration will be conducted by the bargaining council concerned.

2 P. Benjamin & C. Gruen "The Regulatory Efficiency of the CCMA" (with Working Paper 06/110, Development Policy Research Unit UCT (available on: http://www.commerce.uct.ac.za/Research_Units/DPRU/Employment_Promotion_Program/WorkingPapers.htm))

2. Purpose of the Study

The purpose of the study is to analyse the operation of the CCMA in respect of rights disputes. Every year there are approximately 80 000 to 90 000 dismissal cases referred to the CCMA which constitute 80 percent of all referrals. The number that culminate in arbitration awards amount to roughly 11 000 per annum.³ Unfair labour practice cases are far fewer and constitute less than ten percent of referrals to the CCMA.⁴ There are roughly 8 000 unfair labour practice cases referred for conciliation per annum and approximately 300 result in arbitration awards. In undertaking a detailed analysis of arbitration awards, the study sought to highlight operational aspects of the CCMA and also qualitative aspects of the awards that are made by the CCMA.

In selecting a sample of arbitration awards across three years (2003-2005), an analysis of trends in relation to unfair dismissal and unfair labour practice cases was also made possible. The selection of arbitration awards from each of the provincial offices of the CCMA allows for some analysis of regional variation in the adjudication of rights disputes.

The arbitration awards take the form of written documents prepared by an arbitrator in terms of section 138(7)(a) of the LRA which requires an arbitrator to file an award with brief reasons. The awards provide detail on the applicant and respondent and on the claim presented by the applicant. Thereafter, the award summarises the evidence presented by the parties before outlining the actual award and the reasoning of the commissioner.

Through a reading and analysis of the awards, the study was concerned to capture information about applicants and respondents that is not available in the CCMA Case Management System. This information could provide a more detailed picture of the workers that bring cases to the CCMA and the employers that are the respondents as well as giving a clearer picture of the outcome of cases.

3 This figure excludes those arbitrations which culminate in a default award because the employer fails to attend or in which the case is dismissed because of non-appearance of the applicant employee.

4 CCMA Annual Report, 2004/2005. RP 54/2005.

3. Method

The research process involved studying a selection of arbitration awards and devising a structured questionnaire to capture information from the awards. Once a draft questionnaire had been finalised, it was pilot tested on 25 randomly selected awards. The pilot gave rise to a number of technical queries and suggestions for re-design of the questionnaire. Once these had been accommodated in a revised questionnaire, the questionnaire was converted into electronic format using Excel. A Guide to the Questionnaire was also developed, including a set of definitions of terms used in the arbitration process.

The questionnaire was divided into six sections, each of which contained a number of questions. The sections of the questionnaire were as follows:

- Background information
- Representation
- Dispute details
- Type of dispute
- Outcome of dispute
- Process

A team of researchers was involved in the pilot and subsequently in the analysis and data capturing from the awards which took place during August and September 2006. Once completed, the data from the electronic questionnaire was extracted into the statistical package, Stata. The data was then checked and analysed.

Parallel to the analysis of the arbitration awards, the CCMA extracted certain information from their Case Management System for each of the awards that was included in the final sample. This information was added to the final dataset.

4. The Sample of Arbitration Awards

A stratified random sampling strategy was used to draw the sample. The sample was first stratified by the CCMA office and further proportionally distributed to the three year time period covered by the study. The sample is thus representative of the CCMA office and the time period of the awarding year. A total of about 900 unfair dismissal cases were initially selected across the CCMA offices over the three year period while about 100 cases of unfair labour practice disputes were sampled. Table 1 summarises the distribution and overall error rates for the sample.

Table 1: Sample Detail

Issue	Total number of cases	Sample size	95% C.I. error rates
Unfair dismissal disputes	26 716	900	3.2%
Unfair labour practice disputes	495	100	8.8%

The final sample that was realised was 873 cases. A number of awards could not be used as they did not contain sufficient information to warrant inclusion. The provincial distribution of the final sample is shown in Table 2.

5. Arbitration Award Background Information

The final set of arbitration awards used for drawing the sample included a large number of awards for KwaZulu-Natal. Usually, the Gauteng office of the CCMA is the one with the highest case load, but due to a backlog that exists in the Gauteng office, this office is underrepresented in the study (Table 2).

Table 2: Distribution of Arbitration Awards by Province

Place of Arbitration	No.	Percent
KwaZulu-Natal	269	30.8%
Gauteng	229	26.2%
Northwest	113	12.9%
Western Cape	77	8.8%
Free State	45	5.2%
Mpumalanga	40	4.6%
Eastern Cape	35	4%
Northern Cape	9	1%
Limpopo	9	1%
Not Specified	47	5.4%
Total	873	100%

Table 3: Status of Arbitrators by Province

	Full-time	Part-time	Total
KwaZulu-Natal	16	225	241
Gauteng	19	175	194
Northwest	36	62	98
Western Cape	8	65	73
Free State	7	29	36
Eastern Cape	8	26	34
Limpopo	2	6	8
Mpumalanga	2	6	8
Northern Cape	1	7	8
Not specified	7	19	26
Total	106	620	726

The majority of arbitration awards (85,4 percent) covered by the study were issued by part-time arbitrators. This demonstrates the extent of the CCMA's reliance on part-time commissioners to meet its case-load (Table 4).

Table 4: Status of Arbitrator by Caseload

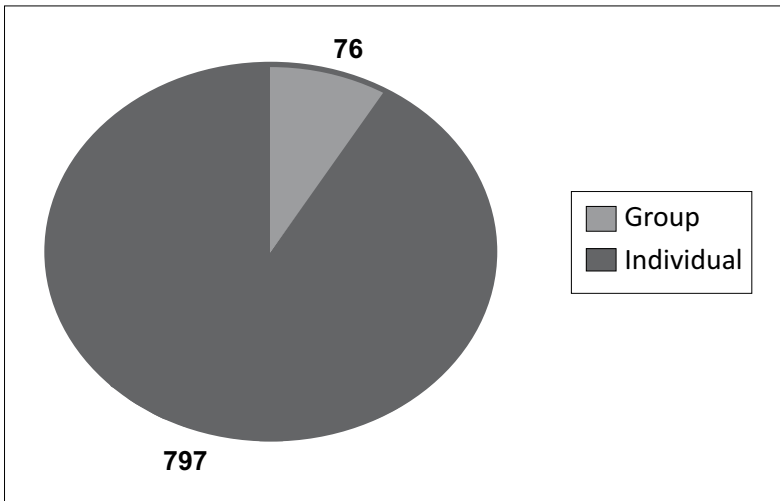
Status_of_Arbitrator	No.	Percent
Full-time	106	14.6%
Part-time	620	85.4%
Total	726	100%

5.1 Details of Applicants

Most of the applicants in arbitration cases are individuals and most are male (64 percent). Thirty six percent of applicants were female, compared to a female labour force participation rate of 49.6 percent.⁵ Group applications constitute a relatively small proportion of cases at just less than 10 percent of the total (Figure 1).

⁵ Male labour force participation is at 62.9 percent. Labour Force Survey, March 2006, Statistics South Africa, Statistical release P0210, 26 September 2006.

Figure 1: Individual versus Group Applications



The breakdown by population group (Table 5) shows that most applicants are African and Table 6 shows that the majority are in permanent employment. There are only a small proportion of applicants that are in part-time or temporary employment and less than one percent that are employed by labour brokers or third parties.

Table 5: Applicants by Population Group

	No.	Percent
African	558	80.1%
Other ⁶	139	19.9%
Total	697	100%

⁶ Other includes Coloured, Indian, White and persons whose population group could not be derived from the name of applicants in the award. Given the similarity between many names of coloured and white persons, the number of coloured applicants was possibly lower than the actual number, hence the combination under other

Table 6: Employment Status of Applicants

	No.	Percent
Permanent	570	86.6%
Part-time	18	2.7%
Temporary	12	1.8%
Labour broker/ 3rd party	6	0.9%
Other	52	7.9%
Total	658	100%

Since 2003, there has been a slight increase in the number of permanently employed applicants bringing cases to the CCMA and a decline in applicants that are in part-time, temporary or some other form of employment (see Table 7).

The small number of applications brought by employees of temporary employment services (labour brokers) is attributable to the fact that these employees are effectively denied any security of employment.

Table 7: Employment Status of Applicants, 2003-2005 (%)

	2003	2004	2005
Permanent	83.4%	89.2%	89.9%
Part-time	2.9%	2.6%	2.5%
Temporary	2.9%	1.6%	0%
Labour broker/3 rd party	1.6%	0.5%	0%
Other	9%	5.9%	7.5%

Table 8 shows the employment status of applicants by industrial sector, using the standard industrial classification. Given the small number of applicants in part-time or temporary employment, or employed by a labour broker, these categories were combined. The fact that there are a significantly higher portion of employees in “Other employment” in the community, social and personal services may be explained by the fact that there were a few contract cleaners, counsellors, lecturers and voluntary workers in this sector who were not in permanent employment.

Table 8: Employment Status by Sector

Sector	No. in permanent employment	Percentage	Other employment status	Percentage	Total No.
Agriculture, forestry	23	85.2%	4	14.8%	27
Mining	30	85.7%	5	14.3%	35
Manufacturing	54	93.1%	4	6.9%	58
Electricity, gas, water	1	100%	0	0%	1
Construction	24	88.9%	3	11.1%	27
Wholesale & Retail trade	157	90.2%	17	9.8%	174
Transport, storage & communication	25	89.3%	3	10.7%	28
Financial & business services	101	84.8%	18	15.1%	119
Community, social & personal services	38	73.1%	14	26.9%	52
Private households	70	87.5%	10	12.5%	80
Other	2	40%	3	60%	5
Total	525	86.6%	81	13.4%	606

Applicants were classified into three skill levels: skilled, semi-skilled and low-skilled. These skill levels followed the South African Standard Classification of Occupations (SASCO) according to which a skill level is defined as a function of the range and complexity of the set of tasks or duties involved. A particular skill level is measured by both formal education and experience. So, for instance, in the case of a skilled person education would typically last for three years or more from the age of 18 or 19 and lead to one or more degrees. Skilled applicants in arbitration cases typically involved persons such as: managers, sales consultants, account managers and, in a few cases, professionals such as microbiologists.

A semi-skilled person is one who has education of about five to six years duration starting at age 14 and leading to the award of a certificate or diploma, but not equal to a first degree. Education in this case usually involves a period of workplace training and experience. Examples from the award analysis would include: security guards, drivers, administrators, clerks, operators and artisans. Low-skill covers persons with primary education up to the age of 14 and also includes those without formal education. Low-skilled clients of the CCMA include domestic workers and gardeners, cleaners and general workers.

As can be seen in Table 9, most applicants are low-skilled or semi-skilled. Capturing accurate information on the skill level of applicants remains an area for improvement in the

administration of arbitration awards and largely account for the relatively large number of cases where information was not available.

Table 9: Skill Level of Applicants

	No.	Percent
Low-skilled	373	44.8%
Semi-skilled	259	31.1%
Skilled	88	10.6%
Information Unavailable	113	13.6%
Total	833	100%

The mean or average monthly income for the applicants who brought their cases to the CCMA was found to be R2709,42. This corresponds to the predominance of low-skilled applicants bringing cases to the CCMA. The lowest monthly income was R100 and the highest was R117 504,00. Table 10 shows the categorisation of applicants by six major income groups for the 635 cases in which income figures were available. All income information has been converted to a monthly income figure.

Table 10: Number of Applicants by Income Category

Monthly income	No.	Percent
R0-R1000	198	31.2%
R1001-R5000	373	58.7%
R5001-R10000	41	6.5%
R10001-R20000	14	2.2%
R20001-R30000	7	1.1%
R30000 and higher	2	0.3%
Total	635	100%

Ninety percent of cases are referred by employees who earn less than R 5000 per month. The picture of the earnings and skills level of applicants reflected in Tables 9 and 10 should help to correct the view often expressed that a disproportionately high number of cases are referred by high earning employees.⁷ Likewise, 76 percent of unfair labour practice cases are brought by employees who earn less than R 5000 per month and the majority of these employees (80 percent) are either low-skilled or semi-skilled (see Table 11 and 12).

⁷ For instance, the *Tokiso Review 2005/2006* (at page 32) states that “white collar workers from industries such as professional services, banking, parastatals, tourism, financial services etc account for about 40 percent) of referrals to the CCMA”.

Table 11: Unfair Dismissal and Unfair Labour Practice Cases by Income Category of Applicant

Income	Unfair dismissal		Unfair labour practice	
	No.	Percentage	No.	Percentage
R0-R1000	194	31.4	4	23.5
R1001-R5000	364	58.9	9	52.9
R5001-R10000	40	6.5	1	5.9
R10001-R20000	13	2.1	1	5.9
R20001-R30000	5	0.1	2	11.8
R30001 and above	2	0.0	0	0
Total	618	100	17	100

Table 12: Skill Level of Applicant In Unfair Dismissal and Unfair Labour Practice Cases

Skill Level	Unfair dismissal		Unfair labour practice	
	No.	Percentage	No.	Percentage
Low-skilled	355	52.6	18	40
Semi-skilled	241	35.7	18	40
Skilled	79	11.7	9	20
Total	675	100	45	100

Information sought on employers cited in arbitration awards included the name of the company, the sector to which it belongs, the status of the company (in terms of ownership) and the number employed by the company. Table 13 shows the distribution by sector. It is important to note that the CCMA uses a sector classification that does not correspond to the standard industrial classification (SIC) used by the national statistical agency, Statistics South Africa. It is, however, possible to develop a rough correspondence and this was attempted as part of the project by post-coding the information on sector to correspond with that of the SIC.

Table 13 shows that the majority of cases emanate from the retail sector, with the private security industry and the domestic sector being the second and third largest. Although it was not possible to capture information on the size of companies, it is possible to say that the cases in the retail sector arise from a broad range of shops, restaurants and other retail businesses. The larger retailers, such as Pick 'n Pay, Woolworths and Shoprite Checkers do feature in the arbitration awards, but they comprise less than ten percent of cases.

Table 13: Distribution of Employers by Sector

	No.	Percent
Retail	134	15.7%
Information not available	110	12.9%
Safety/security (private)	98	11.5%
Domestic	94	11.1%
Food/beverage	50	5.9%
Business/Professional services	47	5.5%
Building/Construction	44	5.2%
Agriculture or farming	38	4.5%
Transport	35	4.1%
Mining	30	3.5%
Other	28	3.3%
Manufacture/motor	23	2.7%
Public Sector	18	2.1%
Leisure/Recreation/Hospitality	18	2.1%
Cleaning	17	2%
Education	15	1.8%
Health	13	1.5%
Communications	11	1.3%
Distribution/Warehousing	9	1.1%
Maintenance/Services	7	0.8%
Clothing/textile	5	0.6%
Chemical/Waste	3	0.4%
Banking/Financial	3	0.4%
Total	850	100%

Table 14 shows the number of arbitration awards reclassified according to the standard industrial classification with the latest employment figures for the relevant sectors. This table confirms that the industry giving rise to the largest number of rights disputes is the largest sector in terms of employment, namely, the wholesale and retail trade. The second largest number of disputes for the three years of the study arises in the financial and business services sector. This sector is the fifth largest in employment.

Table 14: Employers and Employment by Industry⁸

Sector	Number of awards	Percent	Employment (thousands)	Percent
Agriculture, forestry & fishing	38	4.7%	1 318	10.6%
Mining	37	4.6%	399	3.2%
Manufacturing	85	10.6%	1 726	13.9%
Electricity, gas, water	2	0.3%	103	0.8%
Construction	38	4.7%	864	6.9%
Wholesale & Retail trade	215	26.7%	2 996	24.1%
Transport, storage & communication	38	4.7%	555	4.5%
Financial & business services	169	21%	1 194	9.6%
Community, social & personal services	78	9.7%	2 183	17.5%
Private households	97	12.1%	1 087	8.7%
Other/Unspecified	7	0.9%	28	0.2%
Total	804	100%	12 451	100%

Most employers are from private companies, although information on the status of the employers is often not available (see Table 13). Private individuals make up quite a large proportion of respondents and this corresponds roughly to the number of cases from private employers of domestic workers and gardeners.

The reclassification of arbitration awards in terms of the standard industrial classification makes it possible to give some preliminary indication of the rate of referral of disputes by employees in different sectors of the economy. A more accurate assessment of referral rates across different sectors would require that those sectors in which bargaining councils are accredited for arbitration are excluded. There are, however, some comments that can be made on the strength of the information contained in Table 14:

- a) Although 10.6 percent of employees are employed in agriculture, forestry and fishing, this sector accounts for only 4.7 percent of referrals to the CCMA. This may be explained by the fact that farm workers are often employed in rural areas with a difficult access to the CCMA and may have a low-level of awareness of their rights;

8 Table 12 shows the distribution of employers as per the arbitration awards followed by the official employment figure for the industry according to the Labour Force Survey, March 2006 (Statistical Release P0210).

- b) While employers in private household (domestic workers) constitute 8.7 percent of the work force (1 087 000) workers, they constitute 12.1 percent of referrals. This amounts to some 10 000 cases being referred to the CCMA annually by domestic workers. This is indicative of a high level of awareness of employment rights amongst domestic workers;
- c) While the wholesale and retail trade has the highest percentage of referrals (26.7 percent), this corresponds closely with the fact that 24.1 percent of the working population is employed in this sector;
- d) The sectors in which there is the greatest discrepancy between the number of awards and the size of the sector are community, social and personal services (9.7 percent of awards as against five percent of the labour force). On the other hand, financial and business services sector contribute 21 percent of awards while constituting only 9.6 percent of the total employed persons.

Table 15: Status of Employers

	No.	Percent
Private Company	403	46.8%
Information not available	248	28.8%
Private Individual	119	13.8%
Public Company	45	5.2%
Closed Corporation	24	2.8%
Parastatal	16	1.9%
Other	6	0.7%
Total	861	100%

In only eight arbitration awards was the number of employees specified. There is not sufficient information in the CCMA Case Management System to present the number of employees or firm size for the cases. The reason for this is that the majority of information introduced into this system is obtained from the employee at the time of instituting a dispute. In many cases, the employee does not know the total number of employees in the firm and so the CCMA does not regard this as a mandatory field of information. If information on this issue is to be obtained, it would be necessary for the CCMA to address this question to the employer party.

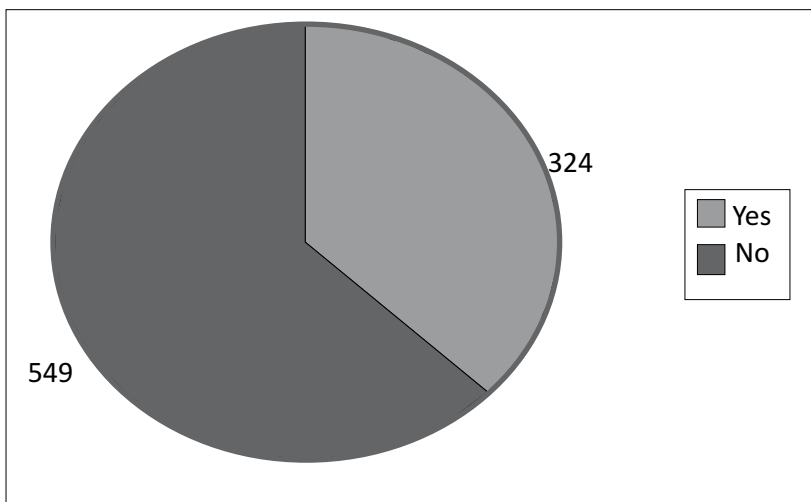
6. Representation during the Arbitration

The analysis captured information on whether the employee and employers party to the arbitration were represented and, if so, who represented them. As can be seen in Figure 2 and Table 16, in the majority of cases both parties are represented. Later sections of the report will present findings relating to the nature of representation and the outcome of the award.

6.1 Employee Representation

Employees were represented in approximately 62 percent (496 of cases). In the remaining 38 percent employees were either not represented or were represented by another employee who was an applicant. Representation by trade unions is the most common form of third party representation with trade unions representing their members in 34 percent of cases. Attorneys and advocates were also found to take a significant share of representation (14,6 percent)⁹. Other parties were generally names of individuals with no designation, or designations that did not fit the categories used in the analysis, such as, legal practitioner.

Figure 2: Nature of Employee Representation



⁹ In a number of arbitrations, representation was by more than one party, hence the higher total in Table 16 compared to the total number of arbitrations for which representation was reported.

Table16: Nature of Employee Representation

	No.	Percent
All or some of the employees/self	337	46.6%
Trade Union representative	246	34%
Advocate	22	3%
Attorney	84	11.6%
Fellow worker	0	0%
Other Party	34	4.7%
Total	723	100%

Representation varied considerably depending on whether it was an unfair dismissal or an unfair labour practice case. Generally, representation of employees is more common in unfair labour practice cases (Table 17). This can, in part, be attributed to the fact that legal representation is not restricted in unfair labour practice arbitrations.

Table 17: Employee Representation by Type of Case

	Unfair dismissal	Percent	Unfair labour practice	Percent	Total
No	308	38.30%	16	23.20%	324
Yes	496	61.70%	53	76.80%	549
Total	804	100%	69	100%	873

Although a very large number of different unions were recorded in the awards, some of the unions that were most commonly involved in representing members were: the National Union of Mineworkers (NUM); the Food and Allied Workers Union (FAWU); the South African Commercial Catering and Allied Workers Union (SACCAWU); South African Transport and Allied Workers Union (SATAWU) and Solidarity. A full list of unions cited in the awards and the number of arbitrations in which they appeared is attached as Annexure 1.

6.2 Employer Representation

In most cases, the employer was represented at the arbitration (458 or 52.5 percent of cases) and the most common form of representation for employers was a Human Resource representative (109 or 12 percent; see Table 18). This would suggest that these percent employer parties are larger firms that have a Human Resources department with capacity to engage in an arbitration process.

Table 18: Nature of Employer Representation

	No.	Percent
Other Party	211	41.1%
Human Resource Representative	109	21.2%
Director/Senior Manager	73	14.2%
Attorney	58	11.3%
Self	46	8.9%
Advocate	17	3.3%
Total	514	100%

Employer representation is also more common in unfair labour practice cases compared to unfair dismissal cases as can be seen in Table 19.

Table 19: Employer Representation by Type of Case

	Unfair dismissal	Percent	Unfair labour practice	Percent	Total
No	395	49.10%	20	29.00%	415
Yes	409	50.90%	49	71%	458
Total	804	100%	69	100%	873

The high number of arbitrations in which ‘Other Party’ was cited as the form of representation was further analysed and the details are contained in Table 20. This table shows that employers’ organisations are the second most common form of representation after the human resource representative and presumably provide representation for many of the smaller employers who appear in arbitration hearings. The acronyms appearing in arbitration awards for these employer organisations include the following: SEIFSA, COFESA, GEMA, NEF, CAEOSA, UDESA, OFER, SGDEO, SMIEO and NEASA (see the List of Acronyms for the full names of these organisations).

Table 20: Other Forms of Employer Representation in Arbitrations

	No.	Percent
Employer's organisation	81	44.8%
Individual name without title	58	32%
Legal adviser	10	5.5%
Consultant	5	2.8%
Employee	4	2.2%
Other	3	1.7%
Unspecified	20	11.1%
Total	181	100%

7. Dispute Details

In most arbitration awards, there is a statement regarding the nature of the claim in the early part of the award (see Table 21). Generally, claims put forward by applicants regard both substantive and procedural unfairness in their treatment. Table 22 shows the nature of the claim for unfair dismissal cases only. Claims in which the employee only alleges procedural unfairness are relatively few and these have declined slightly over the three years of the study (see Table 22).

Table 21: Nature of Claim in Unfair Dismissal Cases

	No.	Percent
Both	634	80.9%
Substantive unfairness	102	13.1%
Procedural unfairness	48	6.1%
Total	784	100%

Table 22: Nature of Claim in Unfair Dismissal Cases, 2003-2005 (%)

	2003	2004	2005
Both	78.7%	73.5%	84.5%
Substantive unfairness	11.6%	17.3%	10.9%
Procedural unfairness	9.6%	9%	4.4%

Tables 21 and 22 demonstrate that it is rare for an applicant not to allege that a dismissal is both procedurally and substantively unfair.

In 64 percent of cases, the process was conducted in terms of the con/arb provisions that allow the arbitration to commence immediately after the conciliation concludes. The holding of a preliminary hearing was reported in 22 percent of the awards that were studied. A condonation application was noted in seven percent of cases. A rescission application in terms of which, a party asks for an award to be set aside, was recorded in six percent of the awards.

The duration of arbitration is generally less than five days and in most cases lasts one day or less (see Table 24). The average number of days taken for arbitration hearings was 1.4 days (see Table 23).

Table 23: Duration of Arbitration

	No.	Percent
5 days and fewer	744	95.6%
From 6 to 10 days	16	2.6%
From 11 to 15 days	15	1.9%
16 days and over	3	0.4%
Total	778	100%

Table 24: Days taken for Arbitration in Cases where Duration is Less than Five Days

Number of days	No.	Percent
1 day	625	84.0%
2 days	87	11.7%
3 days	17	2.3%
4 days	11	1.5%
5 days	4	0.5%
Total	744	100%

Tables 23 and 24 confirm that the vast majority of arbitrations (84 percent) are conducted in one day and that a further 12 percent are conducted in two days. Very few arbitrations continue for between three and five days (four percent). As shown in Table 24, there appears to be a slight decrease in the time taken to complete an arbitration over the three years of the study.

Table 25: Duration of Arbitration, 2003-2005 (%)

	2003	2004	2005
5 days and fewer	93.5%	96.6%	98.7%
From 6 to 10 days	2.4%	2.1%	1.2%
From 11 to 15 days	3.2%	1.2%	0%
16 days and over	0.8%	0%	0%

The average number of days from the last hearing to the final award was 24.6 days.

It is reasonable to assume that the process leading up to an arbitration award could have a bearing on the duration of the arbitration. To test this, cross-tabulations were done on the various processes by duration of arbitration. Table 26 shows the results.

Table 26: Effect of Processes on Duration of Arbitration

Preliminary hearing	46%	54%	100%
Condonation application	71%	29%	100%
Conciliation ¹⁰	70%	30%	100%
Con/Arb	86%	14%	100%
Arbitration ¹¹	72%	27%	100%
Total	72%	28%	100%

Table 26 demonstrates that where a dispute is dealt with in terms of the con-arb process, the arbitration is more likely to be completed in one day than disputes in which a party objects to con-arb and the applicant is required to make a separate referral. If there is a preliminary hearing, this is also likely to increase the time taken to complete the arbitration. This is less likely to be the case with condonation applications as opposed to other types of preliminary hearings.

If there was a disciplinary hearing prior to dismissal, the duration of the arbitration was less likely to take one day compared to cases where there was no hearing prior to the arbitration (see Table 27). The most likely explanation for this is that where there is a disciplinary hearing and the employee challenges its fairness, evidence will have to be led about the conduct of the hearing.

Table 27: Effect of Disciplinary Hearing on Duration of Arbitration

Disciplinary hearing prior to arbitration	1 day	More than 1 day	Total
Yes	68%	32%	100%
No or N/A	89%	11%	100%
Total	81%	19%	100%

Income levels also play a role in affecting the duration of arbitration. Table 27 shows that the higher the income category, the more likely it is that arbitration will take more than one day. Again, this could reflect more complex and contested disputes for higher earning and presumably more skilled applicants.

10 This refers to conciliation of disputes where a party has objected to the dispute be dealt with as a con-arb.
 11 This refers to all arbitration in which there was no preliminary hearing.

Table 28: Effect of Income on Duration of Arbitration

Income category (monthly)	1 day	More than 1 day	Total
R0-R1000	92%	8%	100%
R1001-R5000	84%	16%	100%
R5001 and higher	64%	36%	100%
Total	84%	16%	100%

Table 29 confirms that the skill level of applicants effects the duration of the arbitration process. The duration of the arbitration process was significantly more likely to take only one day for low-skilled applicants. By contrast, almost a third of skilled applicants experienced an arbitration process of more than one day's duration.

Table 29: Effect of Skill Level on Duration of Arbitration

	1 day	More than 1 day	Total
Low-skilled	89%	11%	100%
Semi-skilled	72%	28%	100%
Skilled	66%	34%	100%
Total	80%	20%	100%

Another indication of the complexity of arbitration cases is the mode of representation of the applicants and respondents. Table 30 indicates that where there was self representation or representation by directors or managers within the company of employer respondents, the arbitration hearings were more likely to be resolved in a day. Conversely, almost half of all cases where the respondents had legal representation took more than a day for the arbitration hearings. The most likely explanation is that those cases in which the parties consent to legal representation are more complex cases which are likely to endure for longer than one day.

Table 30: Effect of Employer Representation on Duration of Arbitration

	1 Day	More than 1 day	Total
Self	94%	6%	100%
Director/Senior Manager	78%	22%	100%
Human Resource Representative	76%	24%	100%
Advocate	50%	50%	100%
Attorney	57%	43%	100%
Other Party	71%	29%	100%
Total	73%	27%	100%

The type of dispute does not have a significant effect on the duration of arbitration, although a slightly higher proportion of unfair labour practice cases take more than one day to resolve than unfair dismissal cases (see Table 29).

Table 31: Nature of Dispute and Duration of Arbitration

	1 day	More than 1 day	Total
Unfair dismissal	581	136	717
Percent	81.3%	18.9%	100%
Unfair labour practice	44	17	61
Percent	72.1%	27.9%	100%
Total	625	153	778
Percent	80.3%	19.7%	100%

Similarly, the nature of the claim has no significant effect on the duration of arbitration, as is evident in Table 32.

Table 32: Nature of Claim and Duration of Arbitration

	1 day	More than 1 day	Total
Both	82%	18%	100%
Procedural unfairness	72%	28%	100%
Substantive unfairness	75%	25%	100%
Total	80%	20%	100%

8. Type of Dispute

The majority of arbitration awards analysed concerned unfair dismissal disputes with unfair labour practice disputes constituting less than ten percent of cases (see Table 31).

Table 33: Type of Dispute

	No.	Percent
Unfair dismissal	804	92.1%
Unfair labour practice	69	7.9%
Total	873	100%

Table 34: Type of Dispute, 2003-2005 (%)

	2003	2004	2005
Unfair dismissal	90%	91%	97%
Unfair labour practice	9.6%	8.9%	2.6%

The proportion of unfair dismissal cases by province ranged between 70 and 95 percent and unfair labour practice cases between two and 28 percent. The highest incidence of unfair labour practice cases was found to be in the Eastern Cape and Free State and the lowest in Gauteng and KwaZulu-Natal (Table 33).

Table 35: Type of Dispute by Province

	Unfair dismissal		Unfair labour practice		Total	
	No.	%	No.	%	No.	%
Eastern Cape	25	71.4%	10 ¹²	28.5%	35	100%
Free State	36	80%	9	20%	45	100%
Gauteng	224	97.8%	5	2.2%	229	100%
KwaZulu-Natal	251	93.3%	18	6.7%	269	100%
Limpopo	7	77.7%	2	22.2%	9	100%
Mpumalanga	36	90%	4	10%	40	100%
Northern Cape	8	88.8%	1	11%	9	100%
Northwest	102	90.2%	11	9.7%	113	100%
Western Cape	70	90.9%	7	9%	77	100%
Not specified	45	95.7%	2	4.3%	47	100%
Total	804	92.1%	69	7.9%	873	100%

8.1 Unfair Dismissals

Disciplinary procedures prior to termination of service in unfair dismissals occurred in less than 40 percent of cases, although this is not entirely reliable as many awards made no mention of disciplinary hearings. It would be more accurate to say that 37 percent of awards in unfair dismissal applications made mention of there having been a disciplinary hearing. Interestingly, reinstatement was claimed in only 23 percent of cases (see Table 36).

Table 36: Was Reinstatement Claimed?

	No.	Percent
Yes	171	22.9%
No	533	71.3%
Not Applicable	44	5.9%
Total	748	100%

The most common reason for dismissal was conduct, with capacity being the second most common (see Table 36).

12 The number of unfair labour practice cases in the Eastern Cape appear higher than for the other provinces. Seven of these cases, however, were dismissed due to non-appearance of the parties or lack of jurisdiction so the real number of awards issued in ULP cases in the Eastern Cape is 3 or 4%, which is comparable to the ULP cases dealt with in other provinces.

Table 37: Reason for Dismissal

	No.	Percent
Capacity	80	10.6%
Conduct	469	62.1%
Operational requirement	73	9.6%
Constructive dismissal	18	2.4%
Dismissal disputed	29	3.8%
Expiration of contract	12	1.6%
Discrimination	2	0.3%
No reason given in award/inadequate information	72	9.5%
Total	755	100%

In the cases where capacity was cited as the basis for dismissal, the majority of cases involved performance issues (69). In seven cases, physical capacity was the basis for dismissal. The remaining cases involved reasons other than performance or physical capacity. As can be expected, the majority of dismissals are for a reason related to the employee's conduct. The fact that approximately nine percent are operational requirements cases indicates that a significant number of employees are taking advantage of the 2002 Amendment which allows individual retrenchment cases to be referred to arbitration or to the labour court.

8.2 Unfair Labour Practice

In the case of unfair labour practice disputes, very few had a grievance procedure prior to termination. A grievance procedure was followed in only seven of the 69 unfair labour practice cases (10 percent). The most common basis for an alleged ULP was promotion cases with suspension being the second most common (Table 38).

Table 38: Basis for Alleged Unfair Labour Practice?

	No.	Percent
Promotion	16	30.2%
Demotion	10	18.9%
Probation	0	0%
Training	0	0%
Provision of Benefits	8	15.1%
Suspension	10	18.9%
Failure to reinstate/re-employ	5	9.4%
Occupational detriment under Protected Disclosures Act	0	0%
Other disciplinary action short of dismissal	4	7.6%
Total	53	100%

9. Outcome of Dispute

Outcome of the dispute captured information on whether the award was in favour of the employer or the employee, the outcome in relation to the determination contained in the award, what the award was and on what basis it was made.

Thirty six percent of awards were in favour of the employer and in most of these cases the outcome was either that the dismissal was fair or that an ULP was not committed (see Tables 39 and 40).

Table 39: Award in Favour of the Employer

	No.	Percent
Yes	312	35.7%
No	561	64.3%
Total	873	100%

There were other categories for the outcome of the award available in the questionnaire which is why there is not an exact correspondence between the total number of awards in favour of the employer and the breakdown of this total by outcome in Table 40.

Table 40: Award in Favour of Employer by Outcome

	Dismissal fair	ULP not committed	Total
Employer	258	32	291
	88.7%	11%	100%

It is clear that most awards are in favour of the employee or applicant (see Table 41) and in most cases the awards concern procedural or ordinary grounds for finding a dismissal unfair. The proportion of automatically unfair dismissal is much smaller, at 10 percent of such cases with awards relating to ULPs being approximately five percent.

Table 41: Award in Favour of Employee

	No.	Percent
Yes	527	60.4%
No	346	39.6%
Total	873	100%

Table 42: Award in Favour of Employee by Outcome

	Dismissal unfair ordinary	Dismissal Unfair automatic	ULP committed	Total
Employee	440	56	28	524
	84%	10.7%	5.3%	100%

As is apparent in Table 43, awards were more likely to be in favour of the applicant where the applicant was employed as a low-skilled worker.

Table 43: Award in Favour of Employer and Employee by Skill Level

	Employer	Employee	Decision	Total
Low-skilled	26%	72%	1%	100%
Semi-skilled	40%	57%	3%	100%
Skilled	41%	53%	6%	100%
Total	33%	65%	2%	100%

Commensurate with the above findings, applicants earning less than R1000 per month were more likely to win their arbitration cases. In a few cases, awards were not made on jurisdictional grounds or for other reasons, hence the small discrepancy of one percent in the total number of awards (Table 44).

Table 44: Award in Favour of Employer and Employee by Income

	Employer	Employee
R0-R1000	10%	89%
R1001-R5000	24%	75%
R5001 and	36%	63%
Total	21%	78%

These findings may suggest that low-wage and low-skilled workers are more likely to be unfairly dismissed, or be the victims of unfair labour practices than skilled workers.

Over the three years there has been a slight increase in the number of awards in favour of employers and a concomitant decrease in awards in favour of employees (Table 45).

Table 45: Award in Favour of Employer and Employee, 2003-2005 (%)

	2003	2004	2005
Employer	33.4%	36.7%	39.7%
Employee	62.3%	59.3%	58%
No decision	4.2%	3.9%	2.1%

It would appear that representation in arbitrations improves the chances of an award in favour of either the employer or the employee. Table 46 shows the arbitrations in which employers and employees were represented and the outcome of the award. In 67 percent of cases where the employer party was represented the award was in favour of the employer, whereas in 58 percent of cases where the employee was represented, the award was in their favour.

Table 46: Effect of Representation on Outcome of Award

	Outcome in favour of employer	Outcome in favour of employee	Total
Employer represented	291	139	430
	67.67	32.33	100
Employee represented	218	305	523
	41.68	58.32	100

In looking at the effect of the type of dispute on the outcome contained in arbitration awards, it was found that the outcome was more likely to be in the favour of employees in unfair dismissal cases. Other types of awards, which were most common in unfair labour practice cases, typically involved the dismissal of the case, the removal of certain sanctions, such as written warnings, or order that employers take certain corrective action.

Table 47: Type of Dispute and Outcome

	Employer	Employee	Other awards	Total
Unfair dismissal	35%	62%	3%	100%
Unfair labour practice	42%	42%	16%	100%

Table 48 shows the outcome of the award according to the different categories used for analysing the awards.

Table 48: Outcome of Award

	No.	Percent
Dismissal was fair	260	31.7%
Unfair Labour Practice not committed	34	4.2%
Dismissal unfair - Ordinary	442	53.9%
Unfair Labour Practice committed	28	3.4%
Dismissal unfair - Automatic	56	6.8%
Total	820	100%

As is apparent in Table 49, only a quarter (23.6 percent) of applicants who won their cases of unfair dismissal were reinstated. Over three quarters (77 percent) of applicants received compensation only. However, an arbitrator is only entitled to order reinstatement if there is a finding that the dismissal was substantively unfair. A further factor is the information in Table 35 that states reinstatement was only sought in 171 (23 percent) cases.

Table 49: What was the award in dismissal cases?

	No.	Percent
Reinstatement without compensation	24	4.4%
Compensation only	419	76.5%
Reinstatement with compensation	105	19.2%
Total	548	100.0%

There has been no noticeable change in the nature of the award made over the three years of the study. Table 50 shows that there has been a slight decrease in the proportion of awards that give compensation only, while the actual number of such awards have declined slightly.

Table 50: What was the award in dismissal cases? 2003-2005

Year	Reinstatement without compensation		Compensation only		Reinstatement with compensation		Total	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent
2003	11	4.1%	208	79.4%	43	16.4%	262	100
2004	7	4.7%	110	73.8%	32	21.5%	149	100
2005	5	4.2%	90	75%	25	20.8%	120	100
Total	23	4.3%	408	76.8%	100	18.8%	531	100

In most cases (75 percent), awards refer to both procedural and substantive unfairness in unfair dismissal cases (Table 51). Reasons frequently given as the basis of the award other than procedural and substantive fairness are awards finding that there was no dismissal, that is, a finding in favour of the employer where there was a misunderstanding between the parties or the employee resigned or absconded (see Table 52).

Table 51: Basis for Award in Favour of Employee in Dismissal Cases

	No.	Percent
Procedural Unfairness	50	9.5%
Substantive Unfairness	55	10.4%
Both (procedural & substantive)	397	75.3%
Other	25	4.7%
Total	527	100%

The most significant finding was that in slightly more than three-quarters of dismissal cases in which there was a finding in favour of the employee, the arbitrator found that the dismissal was both substantively and procedurally unfair. This may tend to indicate that a high proportion of employers who are respondents in dismissal arbitrations have little knowledge of the requirements of a fair dismissal. A further explanation could be that many arbitrators require a standard of procedural fairness that is stricter than that prescribed in the Act and the Code of Good Practice.¹³ Table 52 details other grounds for an award and with the exception of the “Unfair labour practice”, essentially indicate reasons for the rejection of an application.

Table 52: Other Bases for Award

	No.	Percent
Application dismissed	11	6.5%
No dismissal found	35	20.7%
No unfair labour practice	6	3.6%
Procedurally fair	7	4.1%
Substantively and procedurally fair	69	40.8%
Substantively fair	29	17.2%
Unfair Labour Practice	7	4.1%
Unspecified	5	3%
Total	169	100%

It is uncommon for employers to be charged an arbitration fee and there is very seldom an award of costs (see Tables 53 and 54).

¹³ See Andre van Niekerk *Assessing Procedural Fairness: A Review of CCMA Arbitration Awards*.

Table 53: Was the Employer charged an Arbitration fee?

	No.	Percent
Yes	32	3.7%
No	813	94.4%
Not Applicable	16	1.9%
Total	861	100%

Little use is made of the arbitration fee provided for in section 140(2) of the LRA. This section was introduced as a sanction for employers who do not comply with the requirements for a procedurally fair dismissal. Likewise, as Table 54 shows, little use is made of costs awards.

Table 54: Was there an Award of Costs?

	No.	Percent
No	844	98%
Yes, against employee	8	0.9%
Yes, against employer	9	1.1%
Total	861	100%

10. Processing Arbitration Awards

The final part of the analysis focused on references contained in the awards and the actual length of awards. In awards relating to claims of unfair dismissal, 25 percent made reference to the Code of Good Practice on Dismissals. The fact that only a quarter of awards refer to the Code of Good Practice may be indicative of the fact that the Code has not been updated in the manner that was envisaged in the initial design of the Act.

Table 55: Does the Award refer to the Code of Good Practice on Dismissals?

	No.	Percent
Yes	201	25%
No	580	74%
Not Applicable	8	1%
Total	789	100%

A small proportion of awards made reference to court decisions (13.4 percent) and an even smaller proportion referred to other arbitration awards (three percent). The most common reference cited in awards was, not surprisingly, to the Labour Relations Act.

Finally, the majority of awards (74 percent) are less than five pages long and the average length of an award was 13 pages.

Annex

10.1 Annexure 1: Trade Unions Involved in Arbitrations

Trade Union	No.
AMCU – Association of Mineworkers and Construction Union	1
ATUSAW – Associated Trade Union of South African Worker	1
AWTU – Allied Workers Trade Union	1
AZAWU – Azanian Workers Union	1
Amalgamated Poultry Security & Allied Workers Union	1
BBBWU – Batho Bohle Bakopane Workers' Union	1
BCAWU – Building, Construction and Allied Workers' Union	1
BMEAWU – Building, Motor, Engineering and Allied Workers' Union	1
CGIWUSA	1
CPU (initially) – Commonwealth Press Union	1
CSWU	1
CUSA – Commercial Workers Union of South	1
CWU – Communication Workers Union	4
Cape Peninsula's Employees' Forum	1
Council of Working Men and Women of SA	1
DUSWO – Democratic Union of Security Workers	4
ECCAWUSA – Entertainment, Catering, Commercial & Allied Workers Union of South Africa	1
ELISA – Education and Labour Institute of South Africa	2
ESWUSA	5
FAWU – Food and Allied Workers Union	9
FEDCRAW – Federal Council of Retail and Allied Workers	2
FHCGWU/he represented himself	1
FOCSWU – Food, Cleaning and Security Workers' Union	1
Farm & General Workers Union	1
GIWUSA – General Industries Workers Union of South Africa	2
GWA – General Workers Association	1
HARWUSA – Hotel and Restaurant Workers Union of South Africa	1
HOSPERSA – Health & Other Services Personnel Trade Union South Africa	1
HOTELICCA – Hotel, Liquor, Catering Commercial & Allied Workers Union of South Africa	3
Hospitalities & Industrial Allied Workers Union	1

IEA – International Energy Agency	1
JSTU	1
KAWUSA	6
KWU – Kentron Workers Union	1
LVWTU	2
MEAU	1
MEGWU – Managerial and. General Workers Union	1
MEWUSA – Metal and Electrical Workers Union of South Africa	1
MOSSAWU – Motor, Steel, Security and Allied Workers' Union	2
MUDWUSA – Miners and United Democratic Workers Union of South Africa	1
MWU – Millenium Workers' Union	1
MEWUSA – Metal and Electrical Workers Union	1
NACBAWU – National Construction Building & Allied Workers' Union	1
NACUSA – National Canvas Union of South Africa	1
NASU - Mr Ntshangase	1
NASUWU – National Security and Unqualified Workers' Union	5
NEHAWU – National Education Health and Allied Workers Union	1
NUCCAW – National Union of Commercial Catering and Allied Workers	1
NUFAN	1
NUFAWUSA	1
NUFBWSAW – National Union of Food Beverage, Wine, Spirits and Allied Workers	2
NUM – National Union of Mineworkers	12
NUMSA – National Union of Metalworkers of South Africa	7
NUPSAW – National Union of Public Service and Allied Workers	1
NUSFRAWU	1
NAWUSA – Amalgamated Workers' Union of	1
NETU – National Employees Trade Union	2
NULAW – National Union of Leather and Allied Workers	1
NCUSA – National Consultative Union of South Africa	1
OCGAWU – Oil Chemical General and Allied Workers Union	1
OLA – Organisation for Labour Affairs	1
Organisation of Labour Affairs (OLA)	1
PROTUSA – Progressive Trade Union of South Africa	5
PTWU – Professional Transport Workers Union of South Africa	1

PETUSA – Professional Employees Trade Union of SA	1
RAWU – Retail and Allied Workers Union	3
SA Health & Care TU – South African Health and Care Trade Union	1
SAAPAWU – South African Agricultural Plantation and Allied Workers Union	3
SACCAWU – South African Commercial Catering and Allied Workers Union	24
SACU – South African Communications Union	1
SADU – Die Suider-Afrikaanse Doeane-Unie	1
SAFRAWU – South African Food, Retail and Agricultural Workers’ Union	1
SAGAWU – South African General Allied Workers Union	1
SAHCTU	3
SALBAWU- Dr. J.J. Moller	1
SAMWU – South African Municipal Workers Union	2
SASU – South African Students Union	4
SATAWU – South African Transport and Allied Workers Union	16
SATMAWU – South African Tourism Municipality and Allied Workers’ Union	1
SAUSCAW – South African Union of Security, Commercial and Allied Workers	1
SAWCRAWU – South African Wood, Commercial, Retail & Associated Workers Union	1
SAWTUSA – Security and Allied Trade Union of South Africa	2
SDTU – Society Development Trade Union	1
SOSCWU – Social, Security and Commercial Workers’ Union	1
STEMCWU – Steel Mining and Commercial Workers’ Union	1
Solidarity	7
TAGWU – Tourism and General Workers Union	1
TAWUSA – Togetherness Amalgamated Workers’ Union of South Africa	4
TSAWU – Transport Security and Allied Workers’ Union of South Africa	3
UASA – United Association of South Africa	4
UPSWU (Mr Herman Malatji) – United Private Sector Worker’s Union	1
UPUSA – United People’s Union of South Africa	3
WESUSA – Workers’ Equally Support Union of South Africa	3

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