



ALTERNATIVE DISPUTE RESOLUTION (ADR) AT THE WORKPLACE:
The Foundations of Sound Human Capital for the 21st Century and Beyond

By

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1 Introduction

Among the resources employed in wealth production in its diverse range of goods and services, human capital stands out as the most important. All other factors and resources are dependent on its efficiency, adequacy and integrity. It is the one resource that, if ill managed, would send entire enterprises tumbling down. It is human capital that determines the growth and success of institutions. It is the one resource that requires prudence, efficiency and commitment to lend value to others. Indeed, an ailing pool of human capital is the genesis of failed institutions. For this reason, it must be well managed and nurtured to the ends of optimizing productivity, growth and prosperity.

It is true to say that human resource management personnel and other senior managers are entrusted with the most sacred resource. It is for this reason that the workplace should be viewed as the one place at which peace and harmony must reign supreme. Yet, the workplace is often riddled with conflicts and disputes as are all other scenes of human interaction. Why? It is the nature of women and men to hold fast their competing interests in conflict, which explains why conflicts are an integral part of human society. Accordingly, the need for human resource and other senior managers to train and acquire workplace mediation skills cannot be overemphasized.

2 The Nature of Conflicts

To understand the rightful place of ADR in the labour industry, one must appreciate the appurtenant notions of conflict, effective conflict management and dispute resolution. It is in

relation to these notions that the principles of fairness of process and quality of outcomes play a critical role in determining the degree of access to effective systems for conflict management and adjudication of competing claims.

Conflicts and disputes are as old as the human race. They are a common feature of social and legal relations, which are characterised by conflicting interests and competing claims for incompatible needs and entitlements. The terms “conflict” and “dispute” are often used interchangeably. Both terms denote disagreement over incompatible interests. In lexical terms, a conflict has been defined as “a serious disagreement or argument... a prolonged armed struggle...an incompatibility between opinions, principles....”¹

Arbetman and others accentuate the fact that “conflict is a natural part of everyday life, a possibility in every encounter.”² For instance, conflicts among the low-level workforce, between staff and management, between management and unions or employees’ associations, are issues of everyday experience. Because of its inevitability, it is important to consider how best to handle conflicts in our day-to-day life. Understanding the social dynamics and progression of conflicts into full-blown disputes helps us to adopt appropriate mechanisms for conflict management and (ultimately) dispute resolution, whether in judicial proceedings or out of court through alternative dispute resolution mechanisms in which we are presently interested.

Simply defined, a conflict is the fruitage of competing claims. Conflicts arise as each individual seeks to defend his or her rights and interests. To address these conflicts, suitable institutional frameworks must be established to ensure effective management of conflicts and the realisation of competing claims and interests. To this end, conflicts have been dealt with in a variety of ways, all of which are intended to generate quality outcomes, ranging from conflict transformation, conflict management and conflict resolution. The question is, to what extent has the labour industry in Kenya embraced tested market mechanisms for effective management and resolution of conflicts at the workplace?

3 Understanding ADR

3.1 The ADR Spectrum

The ways individuals or groups of individuals manage, process or resolve disputes are, generally speaking, either consensual, adjudicative or legislative in nature. In other cases, though, what is commonly referred to as “hybrid” processes combine features of these approaches. These approaches include negotiation, mediation or conciliation, facilitation, adjudication, arbitration and litigation.

1 Pearsall (ed) *The Concise Oxford Dictionary* (10th edn Oxford University Press New York 1999) p.299.

2 LP Arbetman, ET McMahon and EL O’Brien *Street Law: A Course in Practical Law* (5th edn West Publishing Company Minneapolis/St. Paul 1994) p.41.

Negotiation is a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict. On the other hand, mediation is a process in which an impartial third party helps disputants to resolve a dispute or plan a transaction, but does not have the power to impose a binding solution. The term "conciliation" has often been used interchangeably with "mediation." In Canada, the term "conciliation" generally refers to a process of dispute resolution in which "parties in dispute usually are not present in the same room. The conciliator communicates with each side separately using "shuttle diplomacy." The term "mediation," by contrast, is generally used in Canada to describe third-party intervention in which the parties negotiate face to face. The distinction between "mediation" and "conciliation" often breaks down, since in "mediation" separate caucuses are often held with the parties, whereas in "conciliation" some face-to-face meetings may be held.

Facilitation may be described as a process by which a third party helps to coordinate the activities of a group, acts as a process facilitator during meetings, or helps a group prevent or manage tension and move productively toward decisions. The facilitation role can be placed on a continuum from simple group coordination and meeting management to intensive multi-party dispute mediation. The term "adjudication" (including courts, tribunals and binding arbitration), usually applied in case management, is a term that may include decision making by a judge in a court, by an administrative tribunal or quasi-judicial tribunal, a specially appointed commission, or by an arbitrator. An adjudicator determines the outcome of a dispute by making a decision for the parties that is final, binding and enforceable. The parties present their case to the adjudicator (or tribunal, commission or arbitrator), whose role is to weigh the evidence and make a decision that is final, binding and enforceable. Adjudication processes are determinative in nature.

Arbitration differs from courts and quasi-judicial tribunals in a number of respects. For example, most arbitral proceedings are voluntary in the sense that both parties agree to submit the dispute to arbitration, and the parties often agree on the selection of the arbitrator and the procedural rules. Generally, rules of evidence and procedure are more relaxed than the rules of court. Arbitration may also be ordered by a court or be compelled by a statute. In such cases, the arbitrator is usually appointed by a judge or government official. An arbitrator has limited jurisdiction that is strictly determined by the construction of the relevant arbitration agreement.

3.2 The Overriding Objectives of ADR

Alternative dispute resolution mechanisms seek to provide effective platforms for conflict management and resolution of disputes with particular emphasis on

- (a) equality of opportunity and the balancing of powers as between the parties;
- (b) expedition;
- (c) proportionality (i.e., cost-effectiveness);
- (d) party autonomy (in the sense that the process is party-driven);
- (e) fairness of process (which is guaranteed by simplicity of procedures); and
- (f) need satisfaction (where all feel that their needs and interests have been addressed and met) in the resolution of competing claims.

3.3 The Scope of Workplace Mediation

The nature of mediation helps us to understand the value and scope of workplace mediation. mediation brings people together to proactively resolve their disputes. It is a confidential, usually voluntary, process of shared decision making in which one or more impartial persons, called mediators, assist people, organizations and communities in conflict to work toward a variety of goals. Mediation is a way to resolve disputes without filing a “formal complaint” or lawsuit. It provides a private forum in which the disputing parties discuss the dispute, feel that they are being heard, gain insight and understanding into the feelings and perspective of the other party. They work together in exploring and developing possible ways towards resolving the dispute.

Workplace mediation is essentially a meeting between two or more parties who are experiencing conflict, with the aim of the meeting to lead discussions to find resolution. The chair of the meeting should be somebody independent to the issues being discussed and preferably independent to the parties in the mediation.

Workplace Mediation is a confidential, informal and voluntary process whereby an impartial mediator facilitates communication between those in dispute to assist them in developing mutually acceptable agreements to improve their future working relationship. Mediation can be effective in both union and non-union settings and at all levels of the organization.

Workplace mediation is not a fault-finding process designed to determine facts and make findings on exactly what happened and make a ruling on who is right or wrong. Sometimes the parties in a workplace mediation want for someone to be labelled right and the other person to be labelled wrong. If one or more parties is looking for a process that clears their name and labels the other person as wrong or at fault, then a workplace investigation should be conducted rather than a workplace mediation. However, an investigation should only be conducted where there is reasonable grounds to believe that a workplace policy has been breached. Accordingly, the workplace mediator should not try to uncover the truth about actions and behaviours that occurred before, during and after the incidents in issue.

The primary role of the workplace mediator is to help the parties find agreement on the future and not past workplace interactions. His or her role is to guide the parties in identifying those changes in their interactions and behaviours which are necessary to support and help them to work safely, respectfully, professionally, and productively in the future. Notably, workplace mediation is a voluntary process. Parties may choose not to participate. They may submit to the process and withdraw at any time.

3.4 The Objective of Workplace Mediation

The primary goal of workplace mediation is to leave the parties better able to work together. It becomes necessary, therefore, to give management the opportunity to learn about mediation

and acquire best practice skills for conflict prevention, management and resolution. The aim is to ensure that they will be able to, among other things,

- (a) identify workplace conflicts at their different stages, distinguish the stages used in the formal mediation framework, and adapt these for use in their institutions;
- (b) use conflict resolution skills effectively to settle a variety of internal disputes;
- (c) facilitate agreement on complex business issues and influence positive change in their working culture;
- (d) promote conflict prevention and resolution within their organisation's employment framework;
- (e) establish 'internal' mediation schemes and conflict resolution practices; and
- (f) recognise, source and incorporate neutral intervention and external mediation services as appropriate.

3.5 Key Players in Workplace Mediation

Effective workplace mediation and training of personnel in communication and conflict management skills guarantees the effective application of best practices in the context of up-to-date human resource and people management issues. To this end, workplace mediation training or skills development is critical to individuals with strategic or operational management responsibilities in all sectors and professions. Indeed, mediation skills form part of an essential management tool-kit for

- (a) business Directors and those in leadership positions;
- (b) human Resources Directors and senior managers;
- (c) change Directors and senior managers;
- (d) trade Union leaders and officers;
- (e) in-house employment lawyers; and
- (f) professionals dealing with difficult and sensitive people issues.

4 Common Issues for Workplace Mediation

4.1 Work/Performance-Related Conflicts

If left unresolved, problems between employees can fester and grow into bigger issues that not only negatively affect the employees who are directly involved, but also impact others around them. Employers who provide mediation as an avenue that employees can use to resolve their disputes in a confidential, impartial and nonjudgmental way serves to empower employees to positively change their workplace relationships and interactions. Others include performance

Issues. Employee performance can deteriorate for an array of reasons, including the style of communication, personal interactions, misperceptions, and misunderstanding regarding roles and responsibilities. Mediation offers an alternative, and likely more productive, forum in which to discuss such difficult issues outside of the standard performance review process.

Complaints of harassment are yet another source of workplace conflicts that negatively impact on performance. Applying the mediation process as the first step in dealing with complaints of harassment is very effective, particularly where the complaint is based on a misperception or misunderstanding of what is acceptable workplace behavior. In such cases, mediation serves to open communication between the parties, help clarify what is acceptable workplace behavior, and foster a healthier understanding between co-workers.

Termination of employment is invariably difficult to deal with. Termination affects the employee in question, the employer, and often other employees. Mediation can help the employee feel they have fully shared their feelings and concerns regarding the termination in a circumstance in which the power lies ultimately with the employer. Mediation can offer an opportunity for a “peaceful parting” and allay employers’ worries of potential litigation. No employer enjoys the prospect of needless litigation over a labour dispute in the Industrial Court.

4.2 Private Issues that Impact on Performance

In their private life, employees may be involved in disputes that negatively impact on their performance at the workplace. Even though such disputes are not work-related, marital, inheritance, commercial and other disputes of a personal nature, if unresolved, erode an employees’ morale and results in poor performance. For this reason, an employee relations toolkit should provide for advisory services and (possibly) recommendation for referral to trusted ADR practitioners. Such intervention serves to benefit both the employee and his or her employer on account of time saved from costly and time-consuming litigation, not to mention the emotional toll taken by such proceedings on the employee.

5 Who Should Mediate

The most effective workplace mediator is one who is duly certified on completion of a mediation training through a recognized mediation training program. Certified mediators are trained in the essential skills of communication, impartiality and neutrality, and have a thorough understanding of the mediation process. However, there are options, such as nominating someone internally who is (or is willing to become) a certified mediator. It should be borne in mind, though, that a home-grown mediator stands the risk of being partial or conflicted with respect to the rights and interests of his or her colleagues. Otherwise, there might be no option but to appoint an expert externally.

6 The Benefits of Workplace Mediation

There are innumerable reasons why employers should add mediation to their employee relations toolkit. This is because virtually any difference that arises in the workplace can benefit from mediation if the parties are willing to deal directly with each other where the employer provides the much-needed resources for mediation. Indeed, over time, a workplace in which mediation is the preferred or presumed dispute resolution mechanism is likely to become a workplace in which colleagues and coworkers need less assistance in resolving their differences. Mediation helps them to become natural collaborators. There are certain types of workplace conflicts for which any institution would be well-advised to procure external mediation services.

At a minimum, the benefit of using mediation as a first step in addressing and resolving workplace disputes gives each party better understanding of the issues in contention in a confidential, impartial, non-judgmental and private atmosphere. Mediation offers the parties the opportunity to resolve their dispute expeditiously. It empowers each party by providing them a voice and role in determining the outcome. In cases where mediation does not result in agreement, and the parties resort to court litigation, they will nonetheless have a good understanding of the nature of the dispute and the facts surrounding it.

Mediated disputes that end in agreement have endless benefits. The parties are encouraged to have a positive attitude towards collaborative resolution of workplace disputes in a quick, cost-effective process. In addition, mediation has the long-lasting effect of providing the employees who participate in the process valuable tools for future dispute resolution. At its core, mediation is a confidential and voluntary process in which the parties have an active role in the control and resolution of the dispute. When an agreement is reached, the parties move forward with a sense of completion, ownership of the outcome, and, most importantly, the satisfaction in the feeling that they are winners at resolving their problems. This is an especially meaningful experience in the workplace because employees often feel that they do not hold a significant amount of power.

Workplace Mediation offers important benefits to employers and employees alike. It provides creative and mutually satisfactory resolutions. When a dispute is mediated shortly after it arises, the chances of optimal resolution are greater because the parties' differences have not had a chance to fester, the situation is generally more fluid, and the parties have more options open to them. Mediated agreements work better and last longer than authoritatively imposed resolutions in view of the fact that those involved have a stake in the outcome. Moreover, mediation fosters mutual respect by facilitating improved communication. It mends and preserves frayed working relationships despite the pain and anger experienced by the parties. The primary goal of workplace mediation is to leave the parties better able to work together.

7 Conclusion

Without doubt, mediation is an invaluable component of employee relations toolkit. Yet it is least known in developing economies like Kenya. In developed jurisdictions, workplace mediation has taken root with tremendous gains. The question is, how prepared are you to embrace workplace mediation? At the very least, it is important to bear in mind the fact that many disputes arise out of failure by the parties to communicate, understand or consider the needs and interests of the other. Most people fix their attention on the question as to who is right or wrong. Consequently, they become blind to the possibility that both may have a legitimate point of view. The mediator's primary task is to open communication lines between them to appreciate the reasons for the entrenched positions that each has taken. This helps the parties to understand the corresponding views, needs and interests.

The mediation process offers the opportunity for the mediator to encourage the disputants to look at the dispute through different lenses and ask themselves

- (a) What do they think will work as a practical solution?
- (b) What do they think will be fair?
- (c) What do they think will best honour and promote a good working relationship?

As the parties gain a comprehensive understanding of the situation, their ability to work together toward resolution (and after resolution) increases. The quick and lasting gains of mediation may be summed up as:

(a) **Recognition and Understanding**

When employees feel that they have been heard and have the opportunity to hear and understand the other party's point of view, the opportunity for amicable settlement is heightened.

(b) **Self-Empowerment**

The workplace is usually the kind of environment in which employees feel that they are always being told what to do. Mediation offers employees the opportunity to contribute to the outcome of the mediation process.

(c) **Timeliness and Speed**

Mediation takes place expeditiously and within a short period of time (often just a few hours). In contrast, a formal complaint filed with a regulatory agency or court can take years to resolve.

(d) **Cost Effective**

Mediation is cost effective not only financially, but also in relation to human capital and time. It saves the parties from the emotional distress associated with costly, time-consuming and nerve-wrecking litigation. Moreover, the Mediator's fees are usually a fraction of the costs of the legal fees associated with a protracted conflict and litigation.

(e) **Confidential**

Once a lawsuit is filed, it becomes a matter of public record. In contrast, by their very nature and contract, mediations are confidential regardless of whether they take place prior to or after a lawsuit has been filed. In effect, communications exchanged in the mediation are inadmissible in evidence and are confidential.

(f) **Durability of the Mediation Agreement**

Studies have shown that when disputing parties voluntarily reach a mediated agreement, they are more likely to respect and adhere to its terms because they mutually generated the outcomes, which they own as opposed to the decision contained in a judgment imposed on them by a court or regulatory agency.

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