

Mediation in Labour Relations

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Alternative Dispute Resolution (ADR)



- Costs of labour disputes are often high – for Companies, Workers & Economy - many countries have thus tried to find ways to prevent and/or resolve them speedily – experience has also led to promotion of ADR (Conciliation, Mediation, Arbitration);
- Conciliation/mediation before the parties can access Judicial resolution growing in many countries; it can be judicial based or non-judicial based;
- Mediation is seen as fast, flexible & cheaper option compared to legal adjudication (high legal costs, over-burdened courts & delays in disputes resolution machinery);
- Parties often prefer Mediation to Arbitration since final outcome (solution of the dispute) remains in the hands of the parties to a much greater extent than in arbitration;

Mediation: What is it?

- It's a voluntary dispute resolution process in which the parties to a dispute themselves decide what issues to address and what the outcome will be – in this process parties invite a neutral third party, the mediator, to help them in their negotiations to reach a settlement.
 - Law Mandated Mediation: Compulsory process where a Mediator appointed by the state seeks to help the parties-in-dispute to reach an agreement through reconciliation, settlement, or compromise.
- The purpose of mediation is not to judge guilt or innocence, but to help parties ... get at the root of their problems and devise their own solutions to them.
- Mediation works if the parties have the motivation to resolve the dispute!

Role of Mediator



- Mediator ASSISTS, Does Not Decide! Mediator Does Not Arbitrate;
- Should not tell the parties how to fix their problem; Should not apply pressure on the weaker party, or push settlements that are not in the best interests of the parties in order to register a success in their record;
- Please remember: Parties control the content but mediator controls the process;
- Should act as neutral manager of negotiations to help parties to identify & articulate their interests, needs & priorities and seek acceptable solutions; Outcome depends on Parties;
- Maintains confidentiality;

Neutrality and impartiality necessary for parties confidence in Mediator - but difficult to achieve because Mediators are human beings with a background and previous experiences;

Methods & Approaches to Mediation



- No legislative regulation of methods of mediation – Best practice standards are being developed by Mediators Associations which allow for freedom for procedures & approaches to respond to the specific conflicts;
- Many approaches to Mediation – some of these are:
 - *Settlement mediation* – mediator works to bring the parties off their positions to a compromise;
 - *Facilitative mediation* - mainly promotes communication between parties to help identify interests, needs & highlight areas for trade-offs & compromise for mutually acceptable settlement of the immediate dispute - does not propose solutions to the parties;
 - *Evaluative mediation* - mediator not only fosters communication but can also propose solutions based on assessment of parties positions according to legal rights & entitlements;
 - *Therapeutic mediation* – mediator seeks to focus on dealing with the underlying causes of the problem with a view to improving future relationships between the parties;

Practitioners often mix these approaches depending on the nature of conflict and the parties;

Labour Disputes Mediation



- It is mainly problem solving mediation whose primary goal is settlement agreement;
- What mediator has to aim for is – to turn adversarial, win-lose negotiation into problem-solving negotiation to enable parties to achieve the best possible outcome – that satisfies their interests;
- How Mediator should do this?
 - Helps parties to talk to each other in way that clarify the issues, establishes a working relationships and guide the parties towards compromise & collaboration to find resolution;
 - help parties identify their interests/needs (behind their positions/demands) and create options for joint gains for both;
 - Should focus on future as talking about past focuses discussions & emotions on blame;

Stages of mediation process



"There is no set way to mediate, lot depends on the case, situation and issues involved."

- *Introduction & commencement:* information of the parties, process, objective of mediation (resolution, not investigation), roles of the participants;
- *Gathering information for clarification of the negotiation subject matter, the issues and the conflict:* Joint & Private sessions with parties to build mutual understanding on what the disagreement is about and what needs are not being met on both sides of the conflict;
- *Clarifying interests:* Joint & Private sessions with parties to discuss what each party would like to see happen and find a commonality of interest on both sides as a starting point for a shared outcome of the conflict;
- *Developing solutions:* Discuss, listen & brainstorm with both sides the ways they can achieve the solution and what problems may prevent a resolution. Both parties need to come to a conclusion on the best resolution and the responsibility each party has in maintaining the solution.
- *Conclusion by settlement:* settlement agreement is recorded and legally implemented

What Competencies a Mediator Needs?



Skills-based competencies:

- **People Management Skills**
 - Creates and maintains an environment conducive to conciliation/mediation
 - Builds understanding using a range of communication skills
- **Process Management Skills**
 - Establishes and maintains a safe and effective framework for the process
 - Works through the phases of the mediation in an effective & systematic manner
- **Problem Management Skills**
 - Empowers the parties to determine the content and outcome of the dispute
 - Explores content, assists parties to generate options & facilitates negotiation

knowledge-based competencies: such as of mediation process, conflict management, negotiation skills, principles of dispute resolution, law, ILO conventions & recommendations, etc.

Mediation: Before you Start



- Understand the basis on which you are conducting a mediation – is it voluntary? Or mandated by labour law? What needs to be resolved and the relevant law.
- Is this an individual/multi-party or collective dispute?
- Who should be involved? A pre-mediation meeting might be considered to clearly identify the relevant people to be involved [Knowledge & authority of those participating];
- Consider if an agreed facts document can be produced.
- Where is the best place to conduct the mediation?
- Is it a rights based dispute or an interest based dispute? Explain the difference and deal with how the two can be integrated in the solution finding phase.
- Where is the process likely to end up if the matter is not resolved.

Beginning the Process (Joint Session)

- 1st Meeting - very important to set the stage (create the right environment of authority and constructive participation; seek to promote trust in both you and the process);
- Explain objective of mediation (resolution of conflict, not investigation); make it clear that it is the parties that are the main players and you are there to help them reach solutions; Important to remind the parties that it is not You - the Mediator that they are trying to persuade but the other side in the dispute;
- Describe the process of mediation & agree on ground rules (no interruptions; note-taking; Complainant speaks first, then Respondent, confidentiality, respect for each other, etc.); describe joint & private sessions; agree on time limits or other constraints on the process; agree to disagree on specific issues, if needed, etc; Explain & sign Mediation Agreement;
- If there is an agreed facts document briefly confirm its contents.

The Process



- **Hear the parties stories:** Ask each side to give an opening statement describing the circumstances leading to the filing of the complaint, what they see as the problem and the outcome that is sought from the mediation. Ask questions only if necessary for clarification; Take notes; identify issues, including positives;
- After hearing both sides, ask questions to both parties to clarify & define the issues. Use neutral language; avoid any perception of bias; If needed - allow Complainant and Respondent to ask each other questions, assess Parties' attitudes towards each other. At this stage - DO NOT ASK WHAT COMPLAINANT WANTS. Inform both parties of subsequent steps: private confidential sessions beginning with Complainant & followed by joint session(s).
- At this time, the first meeting can end or take a short break and request both parties to wait; examine the initial findings and map-out your strategy/approach for private sessions with the parties;

The Process



- **Separate private sessions with Parties:** Aim is to gather further information; Allow venting; understand needs behind the position taken, ASK WHAT COMPLAINANT WANTS, explore options for settlement; discuss priorities & trade offs; Summarize your understanding of what has been said so far. During separate private session with respondent, inform of what Complainant wants;
- **Joint Sessions (Mediator assisted negotiations by two parties for exploring settlement):** During the negotiation process, a series of private confidential sessions may be necessary. Aim is to explore options for settlement where both parties get as much as possible; Encourage the parties to think of their BATNA – Best Alternative to a Negotiated Settlement - if negotiations fall through; Assess the productivity of the process - continue or end negotiations.
- If settlement can be reached, prepare the agreement, have parties review and sign the agreement. Make a copy for each party, submit the original to your office; IF NO AGREEMENT POSSIBLE, end negotiations and submit failure of mediation to your office;

Summarizing: Process & Mediator's Role



Mediator's skill lies in using the process to -

- separate out emotions;
- move from positions to interests
- channel communication between the parties (asking questions or rephrasing one party's issues/concerns in a way that other party can hear it - more on this later);
- provide a reality check;
- initiate brainstorming & generation of options in order of preference of the parties;
- create opportunities to see the other side – this should be done in later stages;
- identify the signs that could help in moving towards agreement (shared interests? Positives in the relationship in the past? Genuine misunderstandings? Willingness to talk and trade off in the interest of maintaining relationship? Etc);

Process is fine, but it is not enough



For the process to work well, Mediator should also focus on :

- **Preparation**/Research - gather as much information as you can about issue; makes it easier to ask questions in a timely way rather than having to come back at a later stage;
- How to **balance power relationships**? If one party is supremely confident then it is difficult to suggest compromise. What can be done to shake the over-confidence?
- **Listen** to the each side, not just hear what they are saying - People often talk about other matters than what you think the problem is - this can be a clue to what they want or feel;
- Broaden the issue - **If you do perceive other interests, broaden the discussion**. Search out the possibility of mutual gain.
- **Invite solutions** – ask each one separately “where do you see the solution lying?” this could open up discussion.

Most common criticisms of Mediation



- Mediation is about finding a settlement acceptable to parties– its not about ensuring justice; Mediation often not in line with the purpose of the Employment Law (ex. successful mediation requires compromise & in case of rights disputes this often tends to curtailment of rights);
- mediation is often about dealing with symptoms of problems rather than the core issue or cause; as a result employers are often encouraged to pay money to make the problem go away;
- Unevenness in the skills of mediators; mediators, regardless of accreditation training, tend to mediate in a way that reflects their previous training whether as lawyers, MoL officials, engineers, social workers, psychologists or academics;
- Standards for mediation practice differ widely; there are no legally enforceable standards of practice and eligibility to serve as a mediator;