From the General Secretary’s Desk

The ELRC is pleased to provide stakeholders with its April 2015 issue of the Labour Bulletin. It contains notes on recent case law of relevance to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

How to approach condonation applications

The ELRC receives countless condonation applications, of which many are unsuccessful. Not all representatives are always fully aware of what is expected of them in a condonation application. The result is that they do not provide sufficient information in the condonation application about vital issues, with the result that that condonation is refused. This article is an attempt to bring more clarity on how condonation applications should be prepared.

Provided that good cause is shown, the ELRC may permit an employee to refer a dispute late. In order to determine whether good cause is shown the factors that are relevant include the degree of lateness, the reasons for the lateness, the prospects of success, any prejudice, and any other relevant factors. These factors are not individually decisive, but are all interrelated.

However, if there are no prospects of success there is no purpose in granting the condonation application and it will have to be refused. Condonation will also be refused in absence of an acceptable explanation for the delay,

1 Clauses 17 and 51 of Annexure B of the ELRC constitution
2 Clause 50 of Annexure B of the ELRC constitution; Melane v Santam 1962 (4) SA 531 (A)
3 NUM v Western Cape Holdings Gold Mining (1994) 15 ILJ 610 (LAC) at 613B-E
4 Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) at 552
regardless of good prospects of success on the merits. 5

The degree of lateness

It is generally accepted that the longer the delay, the less the prospects are that condonation will be granted. An excessive delay requires an extraordinarily good explanation and not merely an acceptable explanation. 6 Where condonation is applied for after the date of referral, then the length of the delay should nevertheless be calculated from the date of referral and not from the date that condonation was applied for. 7 It constitutes a gross irregularity for a Panellist to calculate the delay from the date that the condonation application was received and not from the date that the referral was received. 8

Prospects of success

In considering prospects of success in a condonation application, it is not necessary for an applicant to prove on a balance of probabilities that he will in fact be successful in the main action. What is required is that the applicant must present evidence to show that the case, which is sought to be advanced, has some merit. 9 He must also provide sufficient information about the merits so that the Panellist who decides the application can determine for himself or herself whether or not there are prospects of success. Where an employee simply states that "there are good prospects of success", without explaining why, condonation will generally be refused. It is also not sufficient in unfair dismissal disputes relating to misconduct to simply state that the dismissal was "procedurally and substantively unfair" because there is then no basis for the Panellist who presides over the condonation application to determine for himself or herself whether indeed there are prospects of success.

The irregularities causing the alleged procedural unfair dismissal should be summarised so that the Panellist can determine for himself or herself whether a reasonable arbitrator may find that there was procedural unfairness. In relation to substantive unfairness, the employee should explain the charges against him, whether he is innocent and if so why, and if the sanction was allegedly too harsh, why it is too harsh. Only then can the Panellist who determines the application conclude whether a reasonable arbitrator may possibly find that the dismissal was substantively unfair.

The explanation for the delay

Most condonation applications fail because the delay is not satisfactorily explained. The affidavit of an applicant in a condonation application must explain the reasons for the failure to refer the dispute on time and that explanation must be sufficiently full to enable the Panellist deciding the application to understand how the failure to refer the matter in time came about and to assess the applicant's conduct and motives. 10 Furthermore, the explanation for the delay in a condonation application must cover the entire period of the delay in respect of which condonation is sought. 11 A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the arbitrator to clearly understand the reasons and to assess the negligence, if any, of the applicant in delaying the referral. 12 If the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out. 13 This will for example mean that any delay between the date of consultation with a union or attorney and the date of referral must be fully explained. It also means that the longer the delay, the more information must be provided about actions that were taken and exactly when they were taken, and explanations for delays between the actions. If this is not done, the inference invariably will be that the applicant and/or his union sat back doing nothing and that no explanation for such negligent inaction has been provided.

7 Arries v ELRC (C756/2013) [2015] ZALCCT (5 February 2015); Department of Finance v CCMA [2003] 9 BLLR 865 (LC)
8 ibid
9 Oldfield v Roth NO (1995) 16 ILJ 76 (LAC) at 80; Chetty v Law Society, Tvl 1985 (2) SA 756 (A)
10 Southern Life Association v CCMA [2001] 3 BLLR 375 (LC)
11 Rustenburg Transitional Local Council v Siele NO & others [1999] 12 BLLR 1341 (LC) par 13; SA Broadcasting Corporation v CCMA & others [2003] 5 BLLR 497 (LC) par 12; Lumka & Associates v Maqubela (2004) 25 ILJ 2326 (LAC) par 38; Van Wyk v Unitas Hospital and Another 2008 (4) BCLR 442 (CC)
12 Uitenhage Transitional Local Council v SARS 2004 (1) SA 292 (SCA) par 6
13 Uitenhage Transitional Local Council v SARS 2004 (1) SA 292 (SCA) par 6
It often happens in condonation applications that unions or attorneys are blamed for delays in referring a dispute. Where the representative who allegedly delayed the referral is an attorney, this excuse is not always successful. The reason for this is that our courts have held that where a client has left a matter entirely in the hands of his attorney, then the longer the delay and the less the client had done to ensure that the dispute is referred timeously by his representative, the greater the chances are that the ineptitude or remissness of the attorney will be imputed to the client. 14

Where the representative who delayed the referral is a member of a trade union who is a signatory to the bargaining council constitution that lays down the time frame that was not adhered to, the chances are even less than in the case of delay by an attorney that condonation will be granted. The reason for this is that the Courts have held that trade unions that are signatories to the constitution of a bargaining council must ensure that disputes of their members are referred within the time frames that they as trade unions agreed to. It would generally be more difficult for a trade union that is a signatory to the constitution to obtain condonation for a late referral of a time frame that the trade union has collectively agreed to. 15

Condonation applications in relation to individual unfair dismissal disputes are also more difficult to win than condonation applications in other disputes. The reason for this is that our courts have held that condonation applications in respect of individual dismissals, should not be granted too readily and that even a short delay will be fatal unless a good explanation for the delay is provided and unless refusal of condonation will result in a miscarriage of justice. 16

Prejudice

One of the factors to be considered is to balance the prejudice that the applicant will suffer should condonation be refused against the prejudice that the employer will suffer should condonation be granted. In relation to unfair dismissal disputes, employees generally claim that they will be without an income should condonation be refused. In other disputes they often also claim that they will suffer some form of financial prejudice should condonation not be granted.

The extent of any prejudice that employers will suffer should condonation be granted is generally linked to the degree of the delay. The longer the delay, the greater the chances are that witnesses may not be available anymore, or that if they are still available, that their memories would have faded and that relevant documentary evidence might have been misplaced or destroyed. The longer the delay therefore, the more the potential prejudice to the employer and the stronger the public interest will demand that condonation should be refused. Particularly where the witnesses are young children, the prejudice that condonation after a lengthy delay can cause to the employer, is significant. In promotion disputes long delays cause additional prejudice, not only to the employer but also to learners at the school, in that an arbitration award in a promotion dispute after a lengthy delay would generally cause instability at the school. In this case too public interest may demand that condonation be refused.

Adv. P Van Tonder

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A critical and analytical assessment of the potential benefits and problems of Conciliation / Arbitration as forms of Alternative Dispute Resolution (ADR) mechanisms

1. Introduction

Alternative Dispute Resolution (‘ADR’), a phenomenon recognised worldwide, can be succinctly and aptly described as “dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.” 17 (Emphasis added)

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14 Saloojee & another v Minister of Community Development1965 (2) SA 135 (A) 141 B-H
15 IMATU on behalf of Zungu v SALGBC (2010) 31 ILJ 1413 (LC)
16 SA Post Office Ltd v CCMA (2011) 32 ILJ 2442 (LAC)
Post 1994, ADR has been introduced in many facets of law in South Africa such as civil litigation, labour law and family law. This is evidenced by the creation of the small claims court, rent tribunal, CCMA and Bargaining Councils. In recent years ADR has been introduced in divorce matters in which the courts now prescribe ‘court annexed mediation’ in divorce proceedings, before the parties resort to litigation. The format of court-annexed mediation is similar to the “court annexed arbitration”, which is a prevalent feature in the American judicial system.

The focus of this topic will be limited to assessing the use of conciliation and arbitration, the primary forms of ADR provided for in the Labour Relations Act.

ADR has been used in other ‘first world’ jurisdictions (Europe, Australia and the United States of America) over a lengthy period of time and as an alternative to litigation in many facets of law thereby offering commentators an opportunity to objectively assess its advantages and limitations, specifically within these jurisdictions but also from a more generalised perspective.

These jurisdictions have always had well-developed socio-economic, political and legal order thereby justifying the use of ADR from a purely commercial sense in introducing a cheaper and expeditious means to dispute resolution as opposed to litigation. Admittedly, this reason would make ADR a viable option anywhere in the world, including South Africa as has been one of the reason for its use.

Post democracy, and given the unavoidable inheritance of past inequalities that prevail in the workplace, the quest for transformation and the need to provide equal access to justice to all employees, it is argued that the choice of statutory ADR became a necessary transformation ‘tool’ which makes it more beneficial as an alternative to litigation in South Africa than elsewhere in the world. It is therefore necessary to briefly trace the origins of the South African dispute resolution system to present day.

2. The Dispute Resolution system pre-1994

Pre-1994, the South African Industrial relations system had been a product of the apartheid Government. Employment laws and practices were designed to exclude Black workers from the mainstream of South African economy so much so that at some early point in our history, Black workers were even excluded from the definition of “employees”. This denied basic worker rights to the majority of employees, let alone affording them access to a speedy and cost effective dispute resolution mechanism. In 1956, the Labour Relations Act of 1956 (“the old Act”) was passed into law and operated up until the birth of our democracy.

The old Act, made provision for the Industrial Councils, Conciliation Boards, the Industrial Courts and the Labour Appeal Court, all of which had fallen under State control by the then Department of Labour.

Labour disputes were channelled through the use of Industrial Councils in industries where they existed and where not, the trade unions / employees could apply to the Director General of the Department of Labour to set up Conciliation Boards.

Failure to resolve disputes through structures of the Industrial Councils or Conciliation Boards would result in the dispute being referred to the Industrial Court/Labour Appeal Court. Given the adversarial nature of employer/employee relations during this time, it was obvious that the Industrial Councils and Conciliation Boards were ineffective and resulted in a large number of disputes being referred to the Industrial Court/Labour Appeal Court. In turn these courts prescribed rules which were highly legalistic, time consuming and above all, costly.

In summary, the old dispute resolution system failed because of two reasons:

(i) By design, the route of industrial councils, and/or conciliation boards,

19 It is acknowledged that The Arbitration Act 43 of 1965, has been in use in South Africa over many years, and provided for the use of arbitration as a form of ADR.

20 In a court-annexed arbitration, an arbitrator’s decision addresses only the disputed legal issues and applies legal standards. Those unhappy with the court-annexed arbitration can reject the non-binding ruling and proceed to trial. It is a hybrid of mediation and arbitration that involves the diversion of state trial court cases into arbitration. Source: (http://courtforms.uslegal.com)

21 The topic at hand specifically requires a critique on the potential advantages and problems of ADR. However it is necessary to reflect briefly on the industrial relations system before and after 1994 so that an objective assessment can be made, given that ADR has become statutorily entrenched in resolution of labour disputes in South Africa.
followed by the courts of law, proved time consuming and costly to the impoverished worker who had no financial means to access the courts of law that in any event, prescribed highly formalistic rules of engagement. To add to this, these forums lacked independence and were seen as nothing more than bastions of the apartheid system.

(ii) Viewed as apartheid entities, labour laws and its supporting institutions lacked legitimacy. It was difficult for the system to succeed when the(a) general worker population saw themselves as being forced to use these forums whilst in principle,(b) vehemently opposing their existence.

3. The Dispute Resolution system post - 1994: The advent of the new Labour Relations Act\(^{22}\) (LRA) and the use of ADR in labour dispute resolution (c)

The period post April 1994, South Africa had, as mentioned, inherited a failed industrial relations system. A new industrial relations system had to be devised that took cognisance of the following:

(i) By 1994 and in line with worldwide trends, there was a significant shift from litigation to the use of ADR modalities. As already elaborated in the introduction, the choice of ADR over litigation assured that disputes were resolved more expeditiously and cost effectively. It was imperative that South Africa also explored this model.

(ii) Our new democratic order had inherited the backlog-of cases as a result of a failed industrial court system. The new system had to ensure that the backlog was cleared as expeditiously as possible.

(iii) At the dawn of democracy, the glaring disparities and inequalities that prevailed in many a South African workplace would not have vanished overnight. With the advent of progressive labour laws, it was expected for a large number of workers to exercise their newfound rights and challenge cases of unfair dismissals and unfair labour practice. As much as workers would have earned their right to challenge the indiscretion of their employers, they still lacked the financial means to exercise that right.

In the circumstances, there was a dire need to overhaul the previous dispute resolution system in ensuring:

Workers themselves could lodge disputes and seek relief, free of any charge;

A dispute resolution forum which was *quasi-judicial* in its offering but at the same time, statutorily entrenched so that justice would not be placed beyond the reach of an impoverished employee;

The dispute resolution system provided must have little or no interference from the state in order to earn the respect of its users. This in turn would ensure its legitimacy.

3.1 The new Labour Relations Act

In 1995, the new Labour Relations Act\(^{23}\) was promulgated which by and large, factored all of the above considerations. The following are important provisions of the new Act:

Section 112, Chapter 7 – Dispute Resolution\(^{24}\) states, "The Commission for Conciliation, Mediation and Arbitration (‘CCMA’) is hereby established as a juristic person". This section clearly provides for the statutory establishment of the CCMA as a juristic entity in providing a dispute resolution service.

Section 113\(^{25}\) states, “The commission is independent of the State, any political party, trade union, employer, employers’ organisation, federation of trade unions or federation of employers’ organisations”. This section expressly specifies the independence of the CCMA thereby marking a significant shift from dispute resolution provisions in terms of the old Act, which ensured that they remained under state supervision and control.

Section 115 states, "(1) The Commission must (emphasis added)

\(^{22}\) Act 66 of 1995

\(^{23}\) ibid

\(^{24}\) Chapter 7 – Dispute Resolution – Act 66 of 1995.

\(^{25}\) ibid
(a) attempt to resolve through conciliation, any dispute referred to it in terms of this Act;

(b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute;

(i) if this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or

(ii) all parties to the dispute in respect of which the Labour Court has jurisdiction, consent to arbitration under the auspices of the Commission". 26

Section 115 expressly provides for the statutory role of the CCMA in dispute resolution. In terms of this provision, Parties are also given the opportunity to opt for the use of arbitration by consent in disputes otherwise founding jurisdiction in the Labour Court.27

3.2 Types of disputes dealt with under the auspices of the CCMA:

Disputes of Rights: The CCMA provides for individual disputes that relate to an unfair labour practice 28 and unfair dismissal disputes 29. Although unfair discrimination cases are referred to the Labour Court if conciliation fails the parties are at liberty to consent to arbitration under the CCMA 30.

Disputes of interest: Disputes of interest are generally decided by the use of force through strike action. However, section 64 of the LRA 31 makes it peremptory to attempt conciliation before resorting to strike action.

3.3 ADR processes under the LRA

Applicants are expected to lodge cases of unfair dismissal and unfair labour practices at the CCMA 32. All disputes must be referred to conciliation. Should conciliation fail to resolve the dispute, then the dispute would be referred to arbitration save in instances the Act clearly specifies the dispute must be referred to the Labour Court. Given the quasi-judicial nature of conciliation and arbitration processes, they are considered to be forms of ADR and can be described as follows:

3.3.1 Conciliation: Conciliation is a peremptory process in which a third party adjudicator (commissioner) would assist the Parties in resolving their dispute. Given the exploratory nature of proceedings, no legal representation is allowed. Like mediation 33 a conciliating commissioner does not have any decision-making powers. The commissioner would assist Parties to resolve the dispute. Other than each party being given an equal opportunity to present their version of events, there is no real formalistic structure for conciliation. It is the attitude of parties that essentially decide the form and substance of proceedings. It may sometime occur that the commissioner would hold side meetings with Parties in an effort to broker settlement. Conciliation proceedings are held on a without-prejudice basis, which means that Parties are encouraged to raise issues freely in attempting to find an amicable resolution to the dispute further enhancing its status as a forum in which a win-win situation could be achieved.

Parties are given sufficient time to reflect on their respective positions/mandates. Parties are made to feel at ease as there is no form of studious formalities associated to conciliation, other than all possible attempts being explored in a user-friendly manner in which all parties made to feel comfortable and can easily relate to.

3.3.2 Arbitration: In the event the Parties fail to settle the dispute through conciliation, the dispute is referred to arbitration. Arbitration is a process that requires third party intervention with decision-making authority. Parties are expected to present their cases and the

26 ibid
27 Disputes relating to unfair discrimination must be referred to the Labour court if Conciliation fails unless the parties consent to arbitration
28 Unfair Labour Practice disputes must be lodged within 90 days to the commission of the alleged offence.
29 Unfair dismissals must be lodged within 30 days of being made known to the dismissal.
30 Act 66 of 1995
31 Chapter 4 – Strikes and Lockouts – Act 66 of 1995
32 Every reference to CCMA must also include the dispute resolution provisions of Bargaining Councils.
33 The processes of mediation as well as facilitation have similar features to conciliation. Even though the LRA makes provision for Mediation and Facilitation through the CCMA, in practice, it is rarely used. Over years the practice has developed at the CCMA that it uses primarily Conciliation and Arbitration as forms of ADR.
The arbitrator makes a final and binding determination on a balance of probabilities. The arbitrator draws authority from sections 138 and 143 of the LRA. From these sections, it is clear that an arbitrator unlike a judge is expected to approach proceedings in a less formalistic manner. Arbitration proceedings are premised on the equity principle and for the need to achieve social justice as advocated in the preamble of the LRA. An arbitrator is expected to use the minimum legal formalities, determine the true nature of the dispute and rule. As such, an arbitrator is empowered to conduct proceedings, however s/he deems necessary even to the point of assisting an unrepresented party on how s/he ought to lead their case so as to avoid any potential prejudice.

All of the above denotes the highly flexible nature of arbitration proceedings. In addition, an arbitrator must issue an award within 14 days after hearing the dispute, which further entrenches the expeditious nature of proceedings. Built into the arbitration process is the provision for condonation of late dispute referrals. So too are provisions made for rescission and variation of awards if grounds for same are met.

1. Benefits of ADR

In taking a holistic approach to the value of using ADR in labour dispute resolution in the South African context as elaborated above, the following advantages of conciliation and arbitration as forms of ADR processes, must be considered:

(a) Flexibility of procedure - the process is determined and controlled by the Parties to the dispute;

(b) Lower costs and an expeditious resolution to the dispute;

(c) Less complexity in deciding the dispute;

(d) Parties sometimes have an opportunity to request for the use of a senior commissioner if they are of the opinion that the dispute involves complex issues and questions of law;

(e) In general, and in cases where Private arbitration is sought, Parties have a right to choose the arbitrator. (It could be useful to choose an arbitrator who has expertise in the area of a disputed issue);

(f) During conciliation, Parties are afforded an opportunity to assess and reflect on their respective positions and have sufficient time to amicably settle the dispute, thus saving time and money;

(g) Practical solutions tailored to parties' interests and needs (not rights and wants, as they may perceive them);

(h) Durability of agreements;

(i) The proceedings remain confidential and is not disclosed to the public domain unless it is taken on review and is finally determined in the form of a court judgment. When proceedings remain confidential, it sometimes helps in preserving the relationship between the Parties as well as protects the reputation of the Parties, which is sometimes important from a business perspective, especially for an employer.

2. Disadvantages / problems of ADR

Over time, the following disadvantages have been associated with the use of ADR:

(a) Judicial intervention is limited to the review function of the Labour court. As such, a party unhappy with the outcome of an award, may have limited grounds thereafter, to challenge the arbitrators finding and decision as would be the case in an appeal hearing.

(b) The process of conciliation can be rendered a futile exercise especially in cases where there are no prospects of settlement. For example, an employee charged with serious assault, theft involving large sums of money etc.

(c) Should a 'losing party wish to exercise their right and take the award on review,

34 Act 66 of 1995
35 ibid
36 Private arbitration under the auspices of a Private dispute resolution agency such as Tokiso or if Parties decide themselves for arbitration in terms of the Arbitration Act, No 43 of 1965.
the finalisation of the award could be significantly delayed. (More so if the dispute does end up in the Labour Appeal Court or even the Supreme Court of Appeal or the Constitutional Court). In this instance, it could be said that the processes of Conciliation / arbitration would have constituted a greater delay in finalising the dispute as opposed to referring it in the first instance to a court of law.

(d) Lack of enforcement— Should the losing party default in implementation (Employer). It would require additional adherence to due processes to enforce the award as an order of the court, thus further delay in the implementation of the award.

(e) Delaying tactics of an employer that could lead to the prescription of an award. Sometimes an employer would elect to review an award as a delaying tactic. Should the Employee not proceed to make the award an order of the Labour Court, within reasonable time, then there is a possibility that the award may prescribe leaving the employee party with no relief at all even thought the award would have been in his/her favour.

(f) Settlement sometimes lead parties to compromise their principles in pursuit of an expeditious settlement, which may give rise to precedent setting thus prejudicing the Employer in future cases of a similar nature.

(g) Lack of technical skills / adequate legal skills by commissioner – Given the informal nature of proceedings, it is not a requirement for arbitrators to be legally trained. Nor are they expected to possess expertise in any subject matter in dispute. This may limit the ability and competence of a presiding commissioner, especially in respect of possessing sufficient knowledge of the law, which is sometimes necessary especially when lawyers are used to represent parties in arbitration. This could give rise to many challenges by way of review applications, thus delaying the finalisation of the dispute.

(h) The erosion of the judicial system.

4. The future of ADR in labour dispute resolution in South Africa

It has been more than 15 years on, since the CCMA/ Bargaining Councils had come into existence. The significant and steady increase in the number of users of the CCMA, and its exponential growth in recent years bear testimony to the confidence and support for the use of ADR processes in the resolution of labour disputes.

Taking cogniscance of the disadvantages enumerated above, it is argued that any decision to return to the use of an outright formal litigation process or to effect material amendment to existing models of ADR to make them more legalistic ought not to be considered.

Broadly speaking, the disadvantages enumerated above can be classified into two categories:

4.1 Concerns that relate to the principle structure and model of conciliation and arbitration as forms of ADR, which are:

4.1.1 The extent to which the existing provisions of review of arbitration awards as opposed to appeal, constitute any prejudice as pronounced by the Labour Appeal Court in Herholdt when it held, “I would therefore tentatively venture that the time has come for the social partners and the legislature to think again. Justice for all concerned might be better served were the relief against awards to take the form of an appeal rather than a review. The protection granted by a narrower basis for intervention is, in all likelihood, fanciful - a chimera. (Bold emphasis added).”


To replace review provisions with one of appeal would constitute a material change to the system of labour dispute resolution and at the very least, strip the current ADR process of its quasi-judicial character. Entrenching an Appeal process would in a sense constitute a return to a highly formalistic process (a benefit to rich employers) that might lead to protracted delays as experienced in the past Industrial court set-up.

4.1.2 The erosion of the judicial system and its associated value to a society at the expense of reliance on statutory ADR systems
Carr and Jencks argue amongst other disadvantages of ADR (when referring to forms of private ADR) are that there is a danger posed by an erosion of the judiciary which may be reduced as an “after thought” by the Government thereby robbing it of its competence as well as the erosion on the ongoing collation judicial precedent. They further argue that opting for ADR there is a possibility that there is a loss of and reduction of information of the public welfare when stating: “As previously noted, one of the attractive features of private ADR is that certain things can remain private and confidential. However, this result in a significant amount of information that is difficult to track and lost to the public. Further, to the extent that public disclosures are made during the privatised process, they are often not tracked, memorialised and stored. There is already a scarcity of data information available to scholars who study private ADR and the court system. The privatisation of business disputes only adds an additional layer of fog that makes the meaningful study and analysis of such issues all the more difficult.

Moreover, if we are serious and sincere about protecting the public welfare, much of the information that is normally hidden by private ADR should be made available to the public…”

The argument of ADR eroding formal law and the threat to rob society of judicial precedent with respect might be exaggerated to some extent. In practice, there will always be sufficient disputes in any facet of law that is decided by the courts of law, thus sufficient opportunity for a growing body of judicial precedent.

At the expense of repeating the point, our system has opted for statutory ADR, which is now fused into our dispute resolution system incorporating the use of formal law. In recent years the body of jurisprudential law in labour disputes has exponentially grown as a result of an increase in Labour Court, Labour Appeal Court, Supreme Court of Appeal and Constitutional Court jurisprudence in labour disputes. If anything, this should perhaps point to some sort of need to amend existing legislation so as to curb the extent of judicial intervention, which was hoped for in the first place.

4.2 Associated concerns related to the functioning of ADR processes

It is argued that the problems / challenges which have been identified by and large relate to more problems which are associated to the provision of ADR such as the attitude of Parties to these processes and/or competence levels of commissioners. As such they do not point to the need to overhaul the existing models of conciliation /arbitration processes more than offer sufficient education and training to its users, who in turn will ensure the success of ADR in labour dispute resolution.

Mr Dolin Singh
ELRC Provincial Manager: KwaZulu-Natal

3. Questions & Answers

Dear General Secretary

Question:

I was working at the Department of Education during the years 1990 up to November 2000. I worked as Admin Clerk and I, together with my other fellow workers were underpaid from the former Department of Education. That was seen when the other Departments were merged with us in 1996. We kept trying to make the Management realise those salary imbalances but all that fell on deaf ears. I was the main man at the centre of the whole thing and later on the Department victimised me and put me through a series of hearings.

I was then dismissed in November 2000. Now I
focused on life's challenges and only came to think later on that the other fellow workers who I left when I got dismissed were paid their monies and are still in service of the Department.

I therefore would like CCMA to open up my case once again because I believe I was robbed and unfairly treated thus leading me to also lose my job. I was robbed of money for eight years and the difference between the notch I was on and the notch I was supposed to be on in line with my other co-workers. I therefore seek help in that context. I still hold a good record of my co-workers’ salary scales, as during those years and I believe if justice was to be practiced, I may also be paid my monies and re-instated.

Anonymous

Dear Anonymous

Kindly note that the ELRC has jurisdiction only where EDUCATORS employed in terms of the Employment of Educators Act are concerned. Your case will obviously fall within the jurisdiction of the GPSSBC, as it is clear that you were an Administration Clerk during the time of your dismissal. Furthermore, considering your date of dismissal you will probably have to apply for condonation for the late referral of your dispute.

The relevant contact details for GPSSBC are as follows: (012) 644-8132 / (012) 644-8100 for the necessary forms and assistance.

Ms NO Foca, ELRC General Secretary

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton.

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Editor: Ms NO Foca
Tel: 012 663 7446
FAX: 012 663 9604
E-mail: CindyFoca@elrc.co.za

Editor: Adv. P Van Tonder
E-mail: pvt@paarlonline.co.za

Edit, Layout and Design: Bernice Loxton
Tel: (012) 663 7446
Fax: (012) 663 9604
E-mail: media.pro@elrc.co.za