

ADR in settlement of labour dispute in Tanzania, South Africa, and Australia: a comparative survey

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Abstract

This article analyses labour dispute resolution by way of Alternative Dispute Resolution (ADR) in Australia, South Africa and Tanzania. It first examines the labour dispute resolution systems in these countries to establish whether they have achieved quick, cheap and informal labour dispute resolution mechanism. Drawing on both legal and institutional frameworks in the three countries, this article highlights insights from each country that can enrich dispute resolution system by way of ADR in other countries aiming at having effective, fast and cost effective labour dispute mechanisms for a sustained social and economic environment. The article advances comparisons of these systems. It explores the challenges affecting the established commissions in the resolution of labour law disputes that is the Fair Work Australia (FWA) which succeeded Australia Industrial Relations Commission (AIRC), the Commission for Conciliation, Mediation and Arbitration (CCMA), and the Commission for Mediation and Arbitration (CMA). The article also reveals the achievements of the said commissions/institutions in resolving labour disputes, envisaging how the schemes have attained quick, cheap, informal and non-technical mechanism in the resolution of labour disputes. The article makes a number of recommendations including the need to conduct training for commissioners; increasing the national budget to meet the costs of the commissions and to regulate the right of legal representation for the parties before the commission so as to achieve quick resolution of labour disputes.

Key words: labour dispute, Alternative Dispute Resolution, comparative survey.

Introduction

The article examines the resolution of labour disputes by way of Alternative Dispute Resolution (ADR). It focuses on tribunal based ADR under established commissions/institutions in Australia, South Africa and Tanzania. It further reflects the past century of ADR in labour dispute resolution in Australia and the past two

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decades of ADR in South Africa, critically assessing the route and the evolution of ADR in labour management matters. It posits that, owing to the disparities in the bargaining positions of the parties to the contract, conflicts are bound to arise.¹ Accordingly there is a general agreement that conflicts are inherent in the employment relationship or workplace.² The labour conflict requires management through processes other than normal litigation, and systems have been developed to have labour disputes resolved in a more flexible, simple, relatively cheap, less acrimonious and expeditious way.³ It therefore follows that ADR offers a means of bringing workplace justice to more people, at lower cost and with greater speed than do the conventional government channels.⁴

For thorough critical analysis insights, this paper is structured as follows; it starts by giving the reasons for comparing labour dispute resolution by ADR in Tanzania, South Africa and Australia. It further explores labour dispute resolution in these countries before and after the introduction of ADR. It later ruminates on the similarities and contrasts, challenges and achievements, such as they may be, in the daily working realities of the employees in Tanzania and compared countries. Ways to improve application of ADR in labour dispute settlement and conclusion wind up this paper.

Reasons for comparing Tanzania, South Africa and Australia

Australia is one of the developed countries and has a very long experience in resolving labour disputes by tribunal based ADR from early 20th century. The use of conciliation and compulsory arbitration in Australia originated from 1904. This inspired other countries including South Africa in which it established Commission for Conciliation, Mediation and Arbitration (CCMA) which drew its experience from the then Australia Industrial Relations Commission (AIRC). Therefore, the comparative analysis of ADR in Tanzania and other countries focuses on the question of global economic changes and seeks to ascertain as to whether the same contributes to the change in labour dispute resolution method.

Another justification is that South Africa and Tanzania are members of SADC. There have been important developments within the SADC countries to review their labour legislation and develop market policies that comply with the new social and economic environment. South Africa as the major economy in the region introduced

¹ Bosch, D *et al.*, the Conciliation and Arbitration Handbook: A comprehensive guide to labour dispute resolution procedures (2002) LexisNexis Butterworths, Durban (Book Review by B Maripe) in University of Botswana Law Journal, 2005, Vol. 2, No. 1, p.177.

² Ibid.

³ Ibid.

⁴ Zack, A.M., 'Can alternative dispute resolution help to resolve employment disputes?', International Labour Review, 1997, Vol.136, No. 1, p. 95.

ADR in 1995; therefore this article reflects the achievements and setbacks of ADR in South Africa and ascertains if applying the method in these countries will achieve the sustainable common market in the region.

The study is further justified from the experience of AIRC, now Fair Work Australia (FWA) and the South Africa CCMA as these institutions have experienced many challenges in the resolution of labour disputes by way of ADR.

Alternative Dispute Resolution

The concept of alternative dispute resolution (ADR) includes all dispute resolution mechanisms other than the formal process of adjudication in a court of law.⁵ ADR therefore, denotes a phenomenon other than a judicial determination, in which an impartial third party assists disputants in resolving issues between them.⁶ It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies 'mediation', a process by which a third party aids the disputants to reach a mutually agreed solution.⁷ Alternative Dispute Resolution helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively.⁸ Speaking of ADR Robert M Ackerman stated that:-

[S]ome speak of ADR only as an afterthought, an option to be resorted to only when the "preferred" approach of traditional litigation is just too expensive or somehow does not work. At the other extreme, some conceive of "appropriate" dispute resolution as applying only to non litigation alternatives, rejecting the possibility that controversies remain, for which the most effective resolution lies in the courtroom.⁹

ADR is necessarily used because it has been noted to offer a variety of flexible mechanisms best to match the dispute, as opposed to a rigid adversarial trial process, informality and not bound by strict procedural rules, time and cost effectiveness, focus on interests and restructuring of relationships. The application of ADR in

⁵Pretorius, P., Alternative dispute resolution, South African Human Rights and Labour Law Yearbook, 1992, No2, p.264.

⁶ Lewis, M and McCrimmon, L., 'The Role of ADR Processes in the Criminal Justice System: A view from Australia' ALRAESA Conference 4-8 September, 2005, Imperial Resort Beach Hotel, Entebbe, Uganda, p.2.

⁷ Shamir, Y., 'Alternative Resolution Approaches and their Application', UNESCO IHP, 43, p.2.

⁸Bendeman, H., 'Alternative Dispute Resolution (ADR) in the workplace-the South African experience' African Journal on Conflict Resolution, 2007, Vol.7, No. 1, p.139.

⁹Ackerman, R.M., 'ADR: an Appropriate Alternative?', Willamette Law Review, 1997, Vol.33, No.3, p.498.

resolving Labour disputes in Australia, South Africa and Tanzania is supported by the established institutions i.e. FWA, CCMA and CMA respectively.

The position of Australia

The Australian commonwealth is a federation of six states formed from the six original, self-governing Australian colonies.¹⁰ Federation took place under the authority of the Australian Constitutional Act 1900 and came into effect on 1 January 1901.¹¹ It is from this federation where Constitutional Act stated that when the simultaneous exercise of state and federal legislative power result in a clash of laws, federal laws prevail by virtual of a “supremacy clause”. In as far as the enactment of labour laws is concerned, federal government of Australia derives authority from section 51 (XXXV) of the Constitution, known as the labour head of power provision.¹²

The establishment of the Conciliation and Arbitration Commission early in the 20th century followed a period of considerable political, economic and industrial turmoil which included a series of major strikes and a period of economic stagnation that extended for twenty years from the early 1890s.¹³

In reaction to this experience, the legislation¹⁴ was adopted which contemplated the continuation of collective bargaining and substitution of arbitration for strikes, only as the last resort in resolving disputes in collective bargaining.¹⁵ This legislation was enacted by the federal government and provided for Australian system of Labour dispute resolution. Although this system has been often described as a system of compulsory arbitration, it is at best half-true.¹⁶ Part three of the Act established Commonwealth Court of Conciliation and arbitration with legal structure. The 1904 Act provided for the resolution of labour disputes by way of conciliation and/or

¹⁰ Mitchell, R and Rimmer,M., ‘Labour Law, Deregulation, and flexibility in Australia Industrial Relations’, *Comparative Labour Law Journal*, 1990, Vol. 12:, No.1, p.2.

¹¹ The Commonwealth of Australia Act is an Act of British Parliament. The Australian States federated under that Act were New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

¹² Aaron, B., ‘Union security in Australia and the United States’ (1984) 6 *Comparative Labour Law Journal*, 1984, Vol.6, (winter) p. 416.

¹³ Des Moore, D., ‘Better than the Australian Industrial Relations Commission’, summer 1999/2000 *Policy*, p.12.

¹⁴ The Conciliation and Arbitration Act of 1904. The legislation established the Commonwealth Court of Conciliation and Arbitration. (See Sykes, E.I., ‘Labour Arbitration in Australia’, the *American Journal of Comparative Law*, 1964, Vol.13, No.2, p. 217)

¹⁵ Summers, C., ‘Patterns of dispute Resolution: lessons from four countries’, *Comparative Labour Law Journal*, 1991, Vol. 12, (winter) p.169.

¹⁶ *Ibid.*

arbitration and notions of industrial equity and fairness became the basis.¹⁷ This reflected the sense of ADR since equity and fairness could be adopted even where the formalities were not followed.

However, by 1980s and even the preceding decade the tribunal was facing complaints from different groups who claimed that the commission had failed to achieve its goals. One of the factors which contributed to the failure of 1904 commission was that compulsory arbitration was never an exclusive legal code for regulating industrial relations in Australia.¹⁸ Federal and state governments introduced legislations to address special situations and crises.¹⁹ In additions, tribunals were not immune from government pressure and other state institutions.²⁰ After quiet a long debate over the qualities of compulsory arbitration a major independent review committee of the entire federal compulsory arbitration system was undertaken.²¹ The committee recommended for the redrafting of the Conciliation Arbitration Act, hence the Industrial Relations Act 1988 which established the Australia Industrial Relations Commission (AIRC). The AIRC was no longer the court but arbitral tribunal without judicial powers.²²

Workplace Relations Act 1996

The position of 1988 Act did not resolve some of the problems of the preceding Act. It was criticised of centralizing labour dispute resolution from the time of its inception in 1988. This was condoned by the AIRC in 1993 report that, the primary thrust of the principles of recent years has been the continuing application of the structural efficiency principle, the encouragement of improved efficiency and productivity and the devolution of prime responsibility for dispute outcomes to the immediate parties involved. The move towards the decentralisation of Australian industrial relations was largely prompted by the persistence of criticisms that the entrenched use of the formal tribunal system inhibited the development of a decision-making relationship between employers and employees.²³ This necessitated the need to enact the Workplace Relations Act (WRA) 1996. In this Act the core AIRC's authority were attacked directly by establishing objects which rested the primary responsibility for determining matters affecting the employment relationship with the

¹⁷ Mitchell and Rimmer (n10), p.5.

¹⁸ Ibid.

¹⁹ In 1949 for instance Federal State came with legislation to address coal strikes.

²⁰ Mitchell and Rimmer (n10), pp.3-4.

²¹ Australian Government Publishing Service, Report of the Committee of review on Australian Industrial Relations Law and System, 1985 (The Hancock report).

²² Mitchell and Rimmer (n10), p. 8.

²³ Van Gramberg, B., Exploring Avenues for the Growth of Private Alternative Dispute Resolution in Australian Workplaces, Working Paper Series, 9/2001, pp.5-6.

employer and the employee at workplace.²⁴ Section 3 (h) of the 1996 Act also limited the role of the AIRC to prevent and settle disputes by way of conciliation and where appropriate and within specified limits, by arbitration.

The statutory obligation of the AIRC under the Workplace Relations Act 1996 was that, when dealing with industrial disputes, it was required to use conciliation as its primary dispute resolution process.²⁵ Should conciliation fail, the matter may be dealt with by arbitration where legally mandated.²⁶ Though the commission was required to use conciliation, it was also free to utilise other means of dispute resolutions it considers appropriate.²⁷ This position however did not change the role of AIRC of resolving labour disputes by ADR.

Fair Work Act 2009

The WRA 1996 which limited the power of the AIRC received different views from the proponents interested in the resolution of labour dispute by way of ADR mechanisms. Most of them argued that this was the right time to end the ADR associated with tribunal or courts while some argued that it was the right time for the private ADR to be used in the resolution of labour disputes in Australia, it was further claimed that private settlement may create a motive for certain parties to continue to use the private system rather than the public formal system.²⁸ Negligent companies are able to hide their misdeeds at the expense of public standards of behaviour.²⁹ The situation was worsen by the amendment of the WRA 1996,³⁰ where employers were given more freedom to choose the form of industrial relation they prefer; the freedom to offer individualized Australian Workplace Agreements (AWAs) and the freedom to dismiss workers with less risk of exposure of unfair dismissal jurisdiction. This in turn reduced the scope of labour law in Australia by extending the opportunities for the employers to offer jobs with lower pay and poorer conditions and restricting the powers of AIRC to establish and enforce employment standards.³¹

²⁴ Workplace Relations Act, s.3 (b).

²⁵ Ibid, s.100.

²⁶ Ibid, s. 104; Mewett, H.F *et al.*, the Australian Industrial relations Commission: Adapting or dying? Working paper No. 82 Melbourne, November 2002.

²⁷ Workplace Relations Act, s. 110.

²⁸ Van Gramberg, B., 'The Rhetoric and Reality of Workplace Alternative Dispute Resolution', *Journal of Industrial Relations*, (2006), Vol.48, No.2, p.178.

²⁹ Ibid.

³⁰ The Act was amended by the Workplace Relations Amendment (Work Choices) Act 2005.

³¹ Hall, R., 'Australian industrial relations in 2005-the workchoices revolution' *Journal of Industrial Relations*, 2006, Vol. 48, No.3, p.293.

This led to the enactment of the Fair Work Act 2009, with the object to provide among other things, a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians by providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.³² The Act established Fair Work Australia (FWA).³³ From these changes therefore the functions which were formally performed by the AIRC were taken over by FWA.³⁴

In as far as labour dispute resolution by way of ADR, 2009 Act defined new position of the law which empower workplace dispute resolution. However, in the exercise of workplace dispute resolution, the established organs are supposed to get authority from the FWA. In addition to its powers in regulating industrial relations in Australia and overseeing the activities in the workplace, FWA have functions to mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the Federal Court of Australia Act 1976 or section 34 of the Federal Magistrates Act 1999, have been referred by the Fair Work Division of the Federal Court or Federal Magistrates Court to FWA for mediation.³⁵ In achieving the goals of ADR, FWA is supposed to be quick, informal and avoiding unnecessary technicalities.³⁶

The 2009 Act limited the powers of the Commission in as far as the use of ADR is concerned. Nevertheless, almost any action affecting the right of parties to an employment contract is under the control of the FWA. For instance, part 3-2 of Act No 28 of 2009 empowers the FWA to deal with unfair dismissal cases and if established, the commission may order the re-instatement, re employment or compensation of the employee so affected. Section 381 (1) (b) provides for the adoption of the procedure which are quick, flexible and informal; address the needs of both employer and employee; and to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement. In making decision and ordering of such remedies, FWA has to ensure that a “fair go all round” is accorded to both the employer and employee concerned. The expression “fair go all round” was used by Sheldon J in *re Lotyand Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

Also, FWA must approve all enterprise agreements entered between the employers and employees in the work place.³⁷ The law provides that, upon approval of enterprise agreement there should be the provision allowing the FWA or another

³² Fair Work Act , s.3.

³³ Fair Work Act , s. 575 (1); the composition of FWA is provided for under s. 575 (2).

³⁴ Ibid, s. 576.

³⁵ Ibid, s.576 (2) (c).

³⁶ Ibid, s.577 (b).

³⁷ Ibid, ss.186 – 192.

person independent of the employer, employees or employee organisations covered by the agreement, to settle disputes arising out of the agreement and in relation to the National Employment Standards.³⁸ Other areas where FWA is involved include the situation where employer and employee wants to vary the enterprise agreement;³⁹ termination of enterprise agreement;⁴⁰ making of bargaining orders;⁴¹ workplace determination;⁴² and industrial actions to mention a few.⁴³ Section 240 of the Act provides for the powers of the FWA to deal with bargaining disputes upon application by a bargaining representative.

The position as it exists in Australia at the present is that the resolution of labour disputes has to be done by the FWA which adopts quick, informal and less technical procedure. The current system unlike the position in the AIRC has left most of the issues regarding the relationship between the employer and employee to be dealt with in the workplaces upon authorization by FWA. The new system therefore intends to provide workplace relations laws which are fair for the working Australians, flexible for businesses, promote productivity and economic growth for Australia's future and takes into account Australia's international labour obligations.⁴⁴

The position of South Africa

South African labour relations have tended to provide a backdrop for other struggles such as racial supremacy or hegemony as well as, political liberation of the African masses.⁴⁵ In as far as labour rights disputes are concerned; there were no special adjudicative processes or forums to deal with labour rights disputes. In 1979 the apartheid government was pressured into recognizing black trade unions and this was complemented by the introduction of a right not to be subjected to an unfair labour practice (ULP).⁴⁶ There was a Special Industrial Court formed in 1979 established to resolve labour disputes arising from the introduced right of unfair labour practices.

Since the beginning of South Africa's political transition in the early 1990s, the country has become one of the world's most active arenas for experimentation with

³⁸ Ibid, s. 186 (6).

³⁹ Ibid, ss. 205-211.

⁴⁰ Ibid, ss. 222 and 226.

⁴¹ Ibid, ss.228 -239.

⁴² Ibid, ss.260-265.

⁴³ Ibid, ss. 266-268.

⁴⁴ Ibid, s.3 (a) on the objects of the Act.

⁴⁵ Cowling, M., 'Conciliation as a means for dispute settlement in labour disputes — the South African experience', ADR Bulletin, 2008, Vol.10, No.5, p.1.

⁴⁶ Ibid, p.2.

ADR systems.⁴⁷ These efforts have arisen out of a foundation laid in the early 1980s with the establishment of Independent Mediation Services of South Africa (IMSSA), an NGO originally devoted to expanding the use of ADR in the resolution of labour disputes.⁴⁸ IMSSA got popularity due to the failure of Special Industrial Court formed in 1979 to resolve labour disputes arising from the introduced right of unfair labour practices. The right resulted in a literal flurry of cases which made the special Industrial Court to fall into disrepute as a labour dispute resolution mechanism. Although it was initially intended to operate as a speedy, simple, cheap, efficient and non-technical forum, it was bogged down in the morass of delays and technicalities that characterize the ordinary litigation process.⁴⁹ The main reason for this was that it was staffed by lawyers who had not been exposed to any training in ADR techniques.⁵⁰ The explanatory memorandum which accompanied the Labour Relation Act 1995 summarized the shortcoming of previous statutory conciliation procedures as lengthy, complex and pitted with technicalities.⁵¹ Also lack of resources and poor remuneration and training all conspired to make the statutory conciliation services ineffectual. These factors encouraged workers and employers to resort to other methods to resolve disputes.⁵²

Commission for Conciliation, Mediation and Arbitration (CCMA)

The application of ADR in resolving Labour disputes in South Africa is supported by the establishment of 'the Commission for Conciliation, Mediation and Arbitration as a juristic person.'⁵³ The CCMA is independent of the State, any political party, trade union, employer, employers' organization, federation of trade unions or federation of employers' organizations.⁵⁴ It has jurisdiction in all the provinces of the Republic;⁵⁵ and may also accredit private agencies or bargaining councils to perform any or all of its functions.⁵⁶ The primary function of the CCMA is to conciliate and arbitrate disputes referred to it in terms of sections 133(1) (a) and (b) and 134 of the LRA and other labour statutes such as the Basic Conditions of Employment Act 75 of 1997 (BCEA), Employment Equity Act 55 of 1998 (EEA), the Unemployment Insurance

⁴⁷ Center for Democracy and Governance: '...promoting the transition to and consolidation of democratic regimes throughout the world.' Alternative Dispute Resolution Practitioners' Guide; Technical Publication Series, p. 1 http://pdf.usaid.gov/pdf_docs/PNACP335.pdf . accessedd 23 May 2012)

⁴⁸ Ibid

⁴⁹ Cowling (n45).

⁵⁰ Ibid.

⁵¹ Brand, J., 'CCMA: Achievements and challenges-lessons from the first three years', Industrial Law Journal, 2000, Vol.21, p.77.

⁵² Ibid.

⁵³ Labour Relations Act, s.112.

⁵⁴ Ibid, s.113.

⁵⁵ Ibid, s.114 (1).

⁵⁶ Grogan J Workplace Law 8th Edition Juta Academic, Cape Town 2005, p. 441.

Act 63 of 2001 (UIA), and the Skills Development Act 97 of 1998.⁵⁷ The CCMA also provides technical support to new dispute settlement institutions in a number of SADC countries.

Conciliation under CCMA

The law is to the effect that when a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.⁵⁸ The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral. However, parties may agree to extend the 30-day period.⁵⁹ In case of a dispute of unfair dismissal or dispute about unfair labour practice, the dismissed employee may only refer the same to the commission within 30 days of the date of dismissal if the party to the dispute does not fall in any of the council⁶⁰ with jurisdiction to resolve the dispute.⁶¹ The commissioner must determine a process to attempt to resolve the dispute, which may include mediating the dispute; conducting a fact-finding exercise; and making a recommendation to the parties, which may be in the form of an advisory arbitration award.⁶² This reflects the application of ADR in resolving labour disputes. There is no right of legal representation for the conduct of mediation before the CCMA.⁶³

Condonation for late referral

If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time period in section 191 (1) has expired.⁶⁴ A late request for arbitration may be condoned “at any time” on good cause. On the test for good cause the cases of *Melane v Santam Insurance Co. Ltd.*,⁶⁵ and *Softex Mattress (Pty) Ltd v PPWAWU*⁶⁶ provide for the grounds. Two of the most common reasons for late applications to the CCMA are, firstly, that the employee was awaiting the outcome of his or her appeal hearing before deciding

⁵⁷Du Toit, D., *et al* Labour Relations Law, A Comprehensive Guide, 4th edition LexisNexis/Butterworths 2003, p.87.

⁵⁸ Labour Relations Act, s. 135 (1).

⁵⁹ Labour Relations Act, s. 135 (2).

⁶⁰ The council referred here includes Bargaining Council established under section 27 of the Labour Relation Act and statutory councils as may be established as per part E of the Labour Relation Act.

⁶¹ Labour Relations Act, s. 191 (a) (i) & (ii).

⁶² Ibid, s. 135 (3).

⁶³ Ibid, s. 135 and the CCMA Rules for the Conduct of Proceedings, rule 7.

⁶⁴ Labour Relations Act, s. 191(2).

⁶⁵ 1962 (4) SA 531 (A).

⁶⁶ (2000) 21 ILJ 2390 (LAC).

whether to pursue the matter further and, secondly, the applicant approached the bargaining council when he or she should have approached the CCMA.⁶⁷

It is a commonly held misconception that an employee is entitled to wait until the outcome of his or her appeal hearing before taking further steps to challenge his or her dismissal.⁶⁸ This misconception probably originated in the jurisprudence of the previous Act where parties were obliged to 'exhaust internal remedies' before approaching the Industrial Court for relief.⁶⁹ The Code of Good Practice (Dismissal) Schedule 8 of the Act clearly revokes this practice where it states in clause 4(4), in relation to disciplinary hearings resulting in dismissal, that 'the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement'.

Arbitration before CCMA

Arbitration under section 138 of the LRA by the CCMA is more akin to expedited litigation with no pleadings because the essential elements of consensus and party autonomy are missing.⁷⁰ Reference of the case to arbitration is provided for under section 138 (1) of LRA. The regime of the CCMA supports ADR approach and in the case of *Dimbaza Foundries v CCMA*⁷¹ the court stressed the arbitrator's obligation to look after the interests of the parties. In *Klaasen v CCMA & others*⁷² the court set aside an award where the commissioner had not warned an unrepresented party of the risk he would run if he did not challenge evidence. The law requires the arbitrator to use less formality in determining disputes before the CCMA. In addition the commissioner may elect instead of resolving the dispute by way of arbitration, subject to the consent by the parties, suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.⁷³ The issue of legal representation to the parties before arbitration is refused under the Act⁷⁴ and the same has received judicial acceptance.⁷⁵

⁶⁷Olotu, M.T., 'A comparative study of dispute settlement and resolution in South Africa and Tanzania', LLM Dissertation, University of Cape Town, 2005, p.33 citing Van Neil, D., 'Avoiding late applications to the CCMA,' Industrial Law Journal 2000 Vol. 21, Nos.1-3, p.98.

⁶⁸ Ibid

⁶⁹ Ibid.

⁷⁰ Bosch *et al*, (n1), pp.15-18.

⁷¹ (1999) 20 ILJ 1763 (LC).

⁷² [2005] 10 BLLR 964 (LC).

⁷³ Labour Relations Act, s.138 (3).

⁷⁴ This is the position of the law after the repeal of ss. 138 (4) and 140 (1) of the LRA by Act No 12 of 2002.

⁷⁵ Netherburn Engineering CC t/a Netherburn Ceramics v Mudau (2009) 30 ILJ 269 (LAC).

The arbitration award

The LRA requires the arbitrator to issue the award within 14 days of the conclusion of the proceedings.⁷⁶ If the arbitrator grants the parties a time within which to lodge written post-hearing submissions the time runs from the end of that period, even if the parties do not in fact file any submissions.⁷⁷ Lateness in issuing the award is not in itself enough to establish a reviewable irregularity but it may be misconduct for the purposes of the arbitrator's own relationship with the CCMA.⁷⁸ In CCMA arbitration the parties also bear their own costs. Originally the LRA only permitted an arbitrator to order costs if a party or a representative acted frivolously or veraciously, by pursuing or defending a claim, or in its conduct during the proceedings.⁷⁹ However, the LRA as amended is to the effect that costs are allowed "according to the requirements of law and fairness".⁸⁰

Section 145 (1) provides for the right of the review of arbitration award. In *Carephone (Pty) Ltd v Marcus NO & others*⁸¹ the court held that in reviewing the decision of the commissioner the court considers the relevant facts and that is:-

Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?

The review of the CCMA arbitration decisions by the Labour Court may cause the failure to resolve labour disputes cheaply, expeditiously and without technicalities as the process may take long time to reach final decision.

The Position in Tanzania

The resolution of labour disputes in Tanzania also has a long history. The Employment Ordinance Cap.366 was enacted in 1955 and came into force in the year 1957. However, the Ordinance did not provide for the resolution of labour disputes by ADR.⁸² Other legislations were enacted after independence and these included the Security of Employment Act 1964 and the Industrial Court Act of Tanzania Act 1967

⁷⁶ Labour Relations Act, s.137 (1).

⁷⁷ However section 138 (8) of the LRA gives the Director the discretion to extend the period on good cause.

⁷⁸ *Waverley Blankets v CCMA* (2000) 21 ILJ 2397 (LC).

⁷⁹ Labour Relations Act, s. 138 (10) (a) & (b).

⁸⁰ *Ibid*, s.138 (10).

⁸¹ [1998] 11 BLLR 1093 (LAC), p.1103, para [37].

⁸² Part XI of the Employment Ordinance stipulated the procedures for the settling of differences and disputes between employees and employers arising from contracts of employment. This procedure was typically adversarial.

ADR was found in the Industrial Court Tanzania Act, since collective industrial disputes were resolved by way of negotiation and compulsory conciliation.⁸³

The government decided to review the labour laws and on the question of dispute resolution procedures, it was noted by the task force that, the procedures were lengthy and complex noting the situation where the Minister was responsible for deciding disputes involving termination of employment.⁸⁴ It was admitted that it was not feasible for a single person to decide such cases in a growing economy without causing hardships to the parties.⁸⁵ Moreover, it was not appealing in a market economy for labour disputes of this nature to be resolved at political level.⁸⁶ The Employment and Labour Relations Act 2004 (ELRA) and Labour Institutions Act 2004 (LIA) were then enacted. In as far as dispute resolution is concerned; these Acts introduced the method of resolving labour disputes by way of mediation and arbitration which is an alternative to adjudication.

Commission for Mediation and Arbitration

The LIA established the Commission for Mediation and Arbitration (CMA).⁸⁷ The CMA is an independent department of the government which is not subjected to the direction or control of any person or authority. The CMA is also independent of any political party, trade union, employers association, and federation of trade unions or employers' association.⁸⁸ The functions of the commission are provided for under section 14 of the LIA and among others the CMA has the functions to mediate any dispute referred to in terms of any labour law and determine disputes referred to it by arbitration subject to section 14 (1) (b) (i)-(iii) of the LIA.

Mediation under CMA

Mediation under CMA provides a good example of the ADR method of dispute resolution.⁸⁹ Mediation is a compulsory process in resolving labour disputes. Parties should try to solve their dispute under guidance of the mediator before going to

⁸³ Compulsory conciliation was provided for under section 4(3) of the Industrial Court Act, 1967. A negotiated agreement which was not operative or binding upon parties unless it is duly registered by the court was dealt with under sections 5 and 23 of the Act.

⁸⁴ Cornel K. Mtaki, the new labour laws in Tanzania: Implications for employers, employees and the economy, Paper presented at a Policy Dialogue Seminar on New Labour Laws in Tanzania at the Conference Hall of the Economic and Social Research Foundation, 12th September, 2005 at 6.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Labour Institutions Act, s.12.

⁸⁸ Ibid, s.13 (1).

⁸⁹ Employment and Labour Relations Act, s.86 (1) requires the dispute referred to the CMA to be in the prescribed form.

arbitration or adjudication.⁹⁰ In the cases of *Rita Akena v Tanzania Postal Bank*⁹¹ and *Bakari S Tifili v Security Group*,⁹² the labour Court stresses that all labour disputes have to be referred first for mediation regardless of the pecuniary jurisdiction of the CMA. The court in the former case further ruled out that if efforts to settle through mediation fail, that is when parties can refer the matter to the CMA for arbitration or the labour court for adjudication depending on the value of the subject matter.⁹³

The conduct of mediation is provided for by the rules enacted under section 15 (f) of the LIA, namely, the Labour Institutions (Mediation Arbitration Guidelines) Rules, 2007. The rules provides for four stages process in mediation starting from introduction, gathering information from the parties, exploring options and developing consensus and lastly conclusion.⁹⁴

Mediation under CMA is a confidential process and in that regard no evidence unless the parties states otherwise can be used in arbitration or labour court as against either party if mediation fails.⁹⁵ Mediator may not also be a witness in the dispute which he was a third party at the mediation stage.⁹⁶ The law is to the effect that the mediator shall resolve the dispute within 30 days of the referral or within any longer period to which the parties agree in writing.⁹⁷ However, despite the time limit in conducting mediation section 88 (8) of the ELRA provides that notwithstanding the failure to resolve a dispute within the 30 day period, the mediator shall remain seized of the dispute until the dispute is settled, and may convene meetings between the parties to the dispute in order to settle the dispute at any time before or during any strike, lockout, arbitration or adjudication.

The mediator shall decide the manner in which the mediation shall be conducted and if necessary may require further meetings within the 30 days.⁹⁸ Where the mediation fails to resolve a dispute within 30 days, a party to the dispute may - if the dispute is a dispute of interest - give notice of its intention to commence a strike or lockout.⁹⁹ If

⁹⁰ Ibid, s. 86 (3).

⁹¹ Labour Dispute No 32 of 2008, High Court of Tanzania Labour Division, Dar es Salaam, (Unreported).

⁹² Revision No 282 of 2008, High Court of Tanzania Labour Division at Dar es Salaam, (Unreported).

⁹³ See also the case of *Cable Television Network v Athuman Kuwinda and three others*, Labour Revision No 94 of 2009, High Court of Tanzania Labour Division, Dar es Salaam, (unreported).

⁹⁴ Government Notice Number 67 of 23 March 2007, rule 9 (1).

⁹⁵ Ibid, rule 8 (1) and (2).

⁹⁶ Ibid, rule 8 (3).

⁹⁷ Employment and Labour Relations Act, s.86 (4).

⁹⁸ Ibid, s.86 (5).

⁹⁹ Ibid, s. 86 (7) (a).

the dispute is a complaint, a party may refer the complaint to arbitration or to the Labour Court.¹⁰⁰

Section 87 (7), however, is silent as regards the time within which a party may refer a complaint to arbitration before the CMA or the Labour Court after the certificate of non settlement is issued by the mediator. This issue was dealt extensively by the Labour Court in the case of *Dr. Noordin Jella v Mzumbe University*,¹⁰¹ in which the dispute was referred to the Labour Court eight months after the failure of mediation. The court asked whether the silence of the law implies that a party is free to refer a dispute after any time he chooses. It further inquired on whether it is true that prescribing no time is in accord with the spirit of the ELRA that is to provide means of resolving labour disputes expeditiously. Quoting with approval the decision of the CA in the case of *Tanzania Fish Processors Ltd. v Christopher Luhangule*,¹⁰² the Labour Court concluded that ‘... [L]imitation is a material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to a court as he chooses.’

According to this ruling, reference for arbitration in the CMA or adjudicating to the Labour Court has to be done within a reasonable time depending on the nature of the case and circumstances surrounding it. However, there is no common meaning on what amounts to ‘reasonable time.’

The law provides for the power to extend period of mediating interest dispute,¹⁰³ and the discretion to dismiss complaint.¹⁰⁴ In mediation proceeding in Tanzania there is the right to legal representation.¹⁰⁵

Condonation

A party, who refers the dispute to the CMA out of time, has to apply for condonation by setting out condonation grounds. Factors to be stated in the application for condonation include the degree of lateness, the reasons for the lateness, prospects of succeeding with the dispute, any prejudice to the other party and any other factors of relevance.¹⁰⁶ The rules governing condonation nevertheless have some inadequacies; they neither provide clear procedures on what the mediator has to do after receiving

¹⁰⁰ Employment and Labour Relations Act, s.86 (7) (b) (i) and (ii).

¹⁰¹ Revision No 47 of 2008, High Court of Tanzania Labour Court, Das es Salaam, (Unreported)

¹⁰² Civil Appeal No 161 of 1994, High Court of Tanzania Labour Court, Mwanza (Unreported).

¹⁰³ Employment and Labour Relations Act, s. 87 (1).

¹⁰⁴ Ibid, s. 87 (3).

¹⁰⁵ Ibid, s. 86 (6)(a) and (b) and rule Government Notice Number 67 of 23 March 2007, rule 7(1).

¹⁰⁶ Labour Institution Act (Mediation and Arbitration) Rules GN No. 64 of March 2007, rule 11 (2) & (3).

condonation form nor prescribe at what time the mediator deals with the issue of time limit.¹⁰⁷

The interpretation of the Labour Court on the rules relating to condonation in the case of *J.W Ladwa v Peter Kimote*¹⁰⁸ is that it is not enough that the complainant employee files the condonation form. The CMA is enjoined to hear and grant an application for extension of time that is to condone the delay. On the time in which the CMA has to condone the delay, according to Justice Rweyemamu is when an issue of jurisdiction arises and the referring party proves that the CMA has jurisdiction.¹⁰⁹

The issue of proper time for condoning late referral was dealt also by the Labour Court in the case of *Masoya Magogoti v General Manager, Mufindi Paper Mills Ltd.*¹¹⁰ the argument before the court was whether the CMA can mediate a dispute before hearing the application for condonation. The court admitted that this issue is not clearly provided for in the labour statutes and regulations. The court went on to state that there is some confusion regarding the proper procedure to be followed when a referral is accompanied with an application for condonation. The Judge held that, mediation should proceed before the issue of late referral is decided.

Arbitration under CMA

The CMA uses arbitration as one of the ADR mechanism in resolving labour disputes. Unlike in mediation where there is part autonomy, arbitration under CMA process involves hearing where the parties present evidence and argument and the decision of the arbitrator is provided with reasons in a written award.¹¹¹ Arbitration award is binding on the parties and is enforceable before the court.¹¹² The Act provides that arbitration under CMA comes after the failure of settlement in the mediation process.¹¹³ The Commissioner can appoint an arbitrator before the dispute has been mediated.¹¹⁴

¹⁰⁷ Mtavangu, V., 'Commission for Mediation and Arbitration as a Quasi-Judicial Body for the Resolution of labour disputes in Tanzania: An examination of its efficiency and effectiveness' LLM Dissertation, Mzumbe University, Morogoro, 2011, p.55.

¹⁰⁸ Revision No 52 of 2008, High Court of Tanzania Labour Division, Dar es Salaam (unreported).

¹⁰⁹ KIOO Ltd v Kennedy Chalamila, Revision No. 147 of 2008, High Court of Tanzania Labour Division, Dar es Salaam, (unreported).

¹¹⁰ Complaint No. 43 of 2008, High Court of Tanzania Labour Division, Dar es Salaam, (unreported).

¹¹¹ Government Notice Number 67 of 23 March 2007, rule 18 (2) and (3).

¹¹² Ibid, rule 18 (4).

¹¹³ Employment and Labour Relations Act, s.88 (2) (a) and (b).

¹¹⁴ Ibid, s.88 (3) (a).

There are five stages as provided for under the rules. The arbitration starts by introduction; followed by opening statement and narrowing of issues; evidence; argument and award.¹¹⁵ The process of arbitration under CMA is simple as it follows the tenets of ADR in resolving labour disputes by observing fairness and quick disposal of disputes. In addition to that, arbitrator is obliged to deal with the substantial merits of the dispute with minimum legal formalities.¹¹⁶ Nonetheless, the Labour Court in the case of *China Railway Jiang Engineering Co. Ltd v Abdalah Ibadi and Salum Mtengevu*,¹¹⁷ stated that section 88(4) does not empower an arbitrator to ignore legal formalities which give these quasi-judicial proceedings basic attributes of legal proceedings. The court described legal formalities to include giving parties a right to fair hearing, calling witnesses and receiving evidence. Thus, the object here is that arbitration proceedings must be structured to deal with a dispute fairly, quickly and without much adherence to legal formalities.

Arbitration award

An arbitrator may make any appropriate award but may not make an order for costs unless a party or a person representing a party acted in a frivolous or vexatious manner.¹¹⁸ Within 30 days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons, signed by the arbitrator.¹¹⁹ An arbitration award shall be binding on the parties to the dispute and an arbitration award may be served and executed in the Labour Court as if it were a decree of a court of law.¹²⁰

The award by the CMA may be set aside by the labour court upon application by the party;¹²¹ and the Labour Court may set aside an arbitration award made under the ELRA on the grounds that there was misconduct on the part of the arbitrator or the award was improperly procured.¹²² In any arbitration hearing, a party to a dispute may be represented by a member or official of that party's trade union or employers' association or an advocate.¹²³

¹¹⁵ Government Notice Number 67 of 23 March 2007, rule 22 (2).

¹¹⁶ Employment and Labour Relations Act, s. 88 (4) (a) and (b).

¹¹⁷ Revision No. 61 of 2008, High Court of Tanzania Labour Division, Dar es Salaam (unreported).

¹¹⁸ Ibid, s. 88 (8) and (9).

¹¹⁹ Ibid, s. 88 (8) and (9).

¹²⁰ Ibid, s.89 (1) and (2).

¹²¹ Ibid, s.88(8).

¹²² Ibid, s. 91 (2) (a) and (b).

¹²³ Ibid, s. 88(7); Government Notice Number 67 of 23 March 2007, rule 21 (1).

Comparative analysis

Similarities

In Australia, South Africa and Tanzania there is Fair Work Australia, Commission on Conciliation, Mediation and arbitration and Commission for Mediation and arbitration respectively all involved in resolving labour disputes by applying ADR mechanism.

The FWA is not bound by the rules of evidence and procedure in relation to a matter before it.¹²⁴ The CCMA and the CMA commissioners are not supposed to use technicalities in deciding matters before them.

In the resolution of labour disputes by way of ADR, the arbitrators in South Africa and Tanzania and an FWA officer in Australia who have made an award may on application or on their own motion, correct in the award any clerical mistake or error arising from any accidental slip or omission.¹²⁵

The Fair Work Australia has the privileges and immunities of the Crown in right of the Commonwealth. At the same time the Commission for Conciliation, Mediation and Arbitration of South Africa and Commission for Mediation and Arbitration for Tanzania are independent of government, any political party, trade union, employers' association, federation of trade unions or employers' associations and the functions of both Commissions are the same.

There are similarities as between CCMA and CMA in as far as the time used in the resolution of labour disputes by conciliation, mediation and arbitration which is 30 days. The two institutions are also similar in the aspect of the extension of time in the reference of disputes to the commissions. In Tanzania however the extension of time is only on the dispute of interest.

There are other similarities especially between Tanzania CMA and South Africa CCMA on the following areas; that arbitration awards made by these commissions are reviewable by Labour Courts of the respective country; the parties right to suspend arbitration and prefer the dispute to be resolved by way of mediation; the enforcement of mediation agreement made under CMA and arbitration award made under CCMA to the labour court as if it is the decree of the court; the rule of fair hearing by serving the copy of the application filed before the CCMA and CMA to

¹²⁴ Fair Work Act, s. 591.

¹²⁵ Labour Relations Act, s.144, Employment and Labour Relations Act, s.90 and Fair Work Act, s. 602 (1) and (2) respectively.

the other part of the dispute. This is also the same in the disputes resolved under FWA.

Differences

The FWA deals with all aspects of industrial relations at workplace in Australia while the South Africa's CCMA and Tanzania's CMA are formed to conciliate, mediate and arbitrate labour disputes.

There is also a difference which relates to the right to legal representation. Legal representation to a person with a matter before FWA (including by making an application or submission to FWA on behalf of the person) may be made by a lawyer or paid agent only with the permission of FWA.¹²⁶ Legal representation is restricted in the CCMA when deciding labour disputes for the reason of achieving cheap, expeditious dispute resolution. In Tanzania however legal representation is allowed in both mediation and arbitration before CMA.

In addition, in unfair dismissal cases the FWA and the CMA has the power to order remedies of the reinstatement, re-engagement, and compensation of dismissed employee. In South Africa however, these remedies are vested in the Labour Court.

An FWA member has, in performing his or her functions or exercising his or her powers as an FWA member, the same protection and immunity as a Justice of the High Court. This is different from the situation on the status of the commissioners of the CCMA and the CMA. They do not have the immunities as the justices of the high court.

The FWA may deal with disputes other than by way of arbitration by mediation or conciliation and by making a recommendation or expressing an opinion while the CCMA and CMA are the commissions for mediation, conciliation and arbitration. Another difference between CCMA and CMA is that in South Africa the term 'conciliation' has been given a wide inclusive definition 'as a process which may include mediation, fact finding and a recommendation in the form of an advisory award.' On the contrary, Tanzania uses the term 'mediation' because of the possible confusion that may arise, given the role of the old conciliation boards established under section 11 of the Security of Employment Act, 1964 to perform what amount to an arbitral function as per sections 13 to 19 of the Act.

¹²⁶ Fair Work Act, s.596.

The FWA on application or on its own motion may vary or revoke a decision of FWA that is made under this Act.¹²⁷ In South Africa section 138(5) (a) of the LRA sets out the requirements that must exist before an arbitrator may dismiss a case. If the case is dismissed the referring party may challenge this ruling dismissing the case. The referring party will need to bring an application for rescission in terms of Rules 31 and 32 of CCMA Rules. If this application is successful then the commissioner may vary his decision. That procedure does not exist in Tanzania.

In Australia the review may be made by the FWA upon application by the minister; also the decisions of the FWA are appealable within FWA subject to the provisions of the Act.¹²⁸ In South Africa and Tanzania the decisions reached by the commissions are subject to review by the labour court.

There are differences in as far as disputes which may be arbitrated under the FWA, the CCMA and the CMA. The differences are based on the provisions of the statutes governing labour relations in these countries.¹²⁹ Besides, The CCMA and the CMA cannot acquire jurisdiction by agreement of the parties and cannot arbitrate disputes of interest unless they arise in essential services as was the position in the case of *SACCAWU v Speciality Stores*.¹³⁰ The same appears under section 88 (1) of the ELRA.

In South Africa and Tanzania, all labour disputes must pass through the CCMA or the CMA before going to the labour court. However in Australia the FWA is the body with powers to resolve labour disputes if it is provided for under Act No 28 of 2009. Other labour disputes in Australia are resolved by schemes established in the workplace.

Achievements and challenges

In the resolution of labour law disputes by way of tribunal based ADR there have been some achievements and challenges. In this part the study focuses mainly on the two countries with little reference to Australia since the case study analysed the law which came in force in 2010 January.

¹²⁷ Fair Work Act, s. 603 (1) and (2); however FWA must not vary or revoke any of the decisions under section 603 (3) of the Act.

¹²⁸ Ibid, ss. 604-607.

¹²⁹ Ibid, s. 595 (3) provides that the FWA may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if FWA is expressly authorised to do so under or in accordance with provisions of the Act. Disputes that may be arbitrated by the CCMA are provided for under Chapter III of the Labour Relations Act, ss. 24, 141 and 191(5) (a) (i) to (iii) and Basic Conditions of Employment Act, ss. 41 and 74. In Tanzania compulsory arbitrations disputes are covered under the Employment and Labour Relations Act, s. 88 (1).

¹³⁰ (1998) 19 ILJ 557 (LAC) 560E.

Achievements

Access to both the CCMA and the CMA the accessibility is easy. For instance the statistics by 2010 February indicate that there were 13,118 disputes referred to CCMA.¹³¹ This indicates that it has been easy for the people to apply for the services of CCMA.

There are no formal pleadings when applying for the dispute to be resolved under the three commissions, that is, FWA, CCMA and CMA. This has ensured that literacy and lack of skills and resources is not an entry barrier to the system.¹³²

Expedition, despite the problems encountered by CMA in Tanzania, the commission has managed to resolve many disputes at a speed rate when compared to the pace at which disputes used to be resolved under district courts and the Industrial Court of Tanzania. In the year 2009 it is reported that 2878 cases were referred to the CMA in which 1535 were settled in the mediation stage while 300 were resolved at the arbitration stage and the remaining were referred to the Labour Court.¹³³ The same has been reported in the case of CCMA where it was reported that disputes have been conciliated within weeks of being referred to the CCMA.¹³⁴ As of the FWA the commission has just started working in January 2010 and the dispute resolution regime promises for the expeditious resolution of disputes.

Challenges facing ADR in resolving labour dispute

Delay of cases; Instead of conciliation taking place within 30 days of referral as required by the LRA, this period is exceeded in busy regions like Gauteng. In Tanzania the situation is the same in busy cities of Dar es Salaam, Mwanza and Arusha. Furthermore, the waiting time for arbitration is recognised as a serious problem.¹³⁵ The problem is, however, that in practice the arbitration process has assumed a very legalistic and technical character, the process to finalise a dispute has become very time consuming and with the increasing role of labour lawyers, it has also become an expensive system.¹³⁶

Financial constraints in Tanzania have hindered the development of the commission's website where one may access information about its operation. Financial constraints make it hard for the CMA to perform its duties effectively in

¹³¹ [www.ccma.org.za/services/dispute resolution/settlement rate](http://www.ccma.org.za/services/dispute%20resolution/settlement%20rate). accessed 23/05/2012.

¹³² Brand, (n51), p.79.

¹³³ Personal interview with the Commissioner of the CMA one Amani Mwalongo on 13/04/2010.

¹³⁴ Brand (n51), p. 80.

¹³⁵ Ibid, p.83.

¹³⁶ Bendeman (n8), p.140.

terms of research and speedy determination of disputes. In addition the commission does not have office in all the regions.

Although legal representation is restricted in both Australia and South Africa, in Tanzania the same is not restricted hence a bar to achieve the goals for the establishment of CMA. The idea was to have only the disputing parties involved in the conciliation process, thereby keeping proceedings informal by virtue of their lack of legal training.¹³⁷

Another challenge is on the expedition of process. The reason for establishing the FWA, CCMA and CMA aimed at achieving the dispute resolution system which yields results expeditiously. However this being the reason behind any introduced ADR system it has been argued that the need to handle too many conciliations/mediations in a short time can result in superficial settlements which fail to address the underlying causes of conflict or the real needs of the parties.¹³⁸ The guidelines for the conduct of mediation, conciliation and arbitration under CMA provides for the four stage process. However, taking into account the need for result to be expeditiously delivered, it is likely that the mediators instead of searching for optimum solutions they deal with compromise.¹³⁹ Too much haste also encourages too much involvement by the conciliator in the substance of the dispute.¹⁴⁰ This undermines perceptions of independence and impartiality and ultimately compromises the legitimacy of the process.¹⁴¹ It also affects the degree to which parties are prepared to comply with settlements reached in conciliation. These failures in conciliation cause people to question its overall efficacy.¹⁴²

Furthermore, the use of the right to review to get justice is being exploited but the remedy of the review which may order the case to be determined afresh by the commission has undermined the importance of the use of ADR to achieve informal, expeditious and cheap dispute resolution scheme. For instance in the case of *Shoprite Checkers (Pty) Ltd v CCMA*¹⁴³ the employee was dismissed for misconduct after he was caught eating food (belonging to the company) at the end of November 2000, the case passed through numerous reviews between the CCMA and the Labour Appeal Court subsequently the case took more than seven years until 2009 when Supreme Court of Appeal gave its judgement by noting the failure of attaining cheap, expeditious and easy access to dispute resolution procedures under the LRA regime. The problem is not on the right of review but it is suggested that when exercising the

¹³⁷ Ibid, p.143.

¹³⁸ Brand (n51), p.86.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ [2008] 12 BLLR 1211 (LAC).

right of review the labour courts in both South Africa and Tanzania are supposed to be guided by the tenets of the introduction of these commissions so as to avoid a very prolonged process in determining rights of employees.

There have been some complaints about the quality of arbitration awards, a lack of logic and unacceptable levels of spelling and grammatical errors. For instance in South Africa some CCMA arbitrators are arbitrating without any formal legal training and experience and initially with only five days of substantive training on the LRA and five days training in arbitration process.¹⁴⁴ In Tanzania some commissioners are not conversant with labour laws and those with the general idea on labour laws or dispute resolution are not trained in resolving disputes by mediation and arbitration.

Lack of legal knowledge and training in conducting mediation and arbitration is evident in decision by the Commission. For instance rule 32 of the Labour Institutions (Mediation and Arbitration) Rules requires the arbitrator to keep record of arbitration proceedings but this has not been done by the arbitrators as was in the application between *W. Stores Ltd V George Wandiba and 2 others*.¹⁴⁵ Due to this problem been repeated in most of the matters before the CMA, the High Court in the review of arbitration award in the case of *Bidco Oil and Soap v Abdu Said and 3 others*¹⁴⁶ held that proceeding of arbitration are quasi-judicial proceedings, and should be based on a record properly kept for that purpose. This is a barrier to the development of jurisprudence in labour law.

Improving application of ADR in labour dispute settlement

The commissions (the CCMA and the CMA) need to conduct training which is effective and efficient rather than conducting a training of five days which at the end leaves the commissioners with little knowledge of ADR and its process. It may cause the denial of legal right to some people, as a result of wrong decision made by unqualified commissioners.

Governments budgets to the commissions have to be increased to enable them establish offices where they are not yet established. There is the need to improve the information technology for instance the CMA in which there is no website hence hindering the dissemination of information on the operation of the commission. The commissions should educate the public and provide necessary information about its functions.

¹⁴⁴ Brand (n51), p.89.

¹⁴⁵ Revision No. 26 of 2007, High Court of Tanzania Labour Division, Dar es Salaam, (unreported).

¹⁴⁶ Revision No. 11 of 2008, High Court of Tanzania Labour Division, Dar es Salaam, (unreported), p.6.

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The commissions should employ the commissioners who are acquainted with knowledge of labour laws. This will prevent problems associated with the poor arbitration awards as has been witnessed in both South Africa and Tanzania. Right to legal representation to be reconsidered in the CMA, the commission is supposed to allow the right to legal representation in special circumstances as in the position under the FWA and the CCMA. Language problem both before the CCMA and the CMA, the use of interpreters and for the case of Tanzania the commissioners should use Kiswahili.

The Labour Court which reviews decision of the CMA for the case of Tanzania and CCMA for the case of South Africa are supposed to consider factors which led to the establishment of these commissions. It is not good for the employee fighting his rights in these commissions to wait after 8 years to know his fate while the change of the labour laws in these countries aimed at achieving cheap, quick and expeditious dispute resolution mechanism that is, ADR hosted by the established commissions.

The Commissions in South Africa and Tanzania should make an effort to employ a sufficient number of commissioners in order to be able to resolve disputes as expeditiously as had been expected at the time of their establishment.

In Tanzania there is a need of establishing more tribunals in Dar es Salaam, rather than having one tribunal, due to the fact that many labour disputes tend to exist in that city beyond the capacity of the existing tribunal.

Conclusion

The study has found the resolution of labour disputes may be achieved by using ADR mechanism despite of economic development of the country. The use of AIRC in Australia which in fact inspired South Africa and later Tanzania has been seen obsolete and this is the result of the economic changes in that country. There have been advocates of private labour resolutions in Australia which led to the formation of Australia Workplace Agreements. It was later accepted by the government that there was a need to regulate workplace dispute resolutions hence the establishment of FWA by Act No 28 of 2009.

The changes in Australia labour dispute system still maintains the importance of cheap, quick and less formalized system of labour dispute resolution. This is the same as the memoranda which led to the enactment of LRA and ELRA in South Africa and Tanzania respectively. From these changes one may draw the conclusion that despite the economic changes which have impacted on the labour relationship still the need to use ADR in the resolution of labour disputes is very important. Importantly, the three countries have shown same features in the resolution of labour disputes by commissions which all emphasise quick, cheap, less technical and

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informal dispute resolution schemes. There are challenges and achievements but of importance is that the relationship between employer and employee has to be regulated and where disputes arise the good way to deal with them is to use the system which is less technical be it tribunal based ADR or private ADR.