

EMPLOYMENT DISPUTE MEDIATION

A Paper Presented By

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PREFACE

I consider it a great honour and privilege to be called upon to be part of this intellectual gathering of jurist, lawyers, academia and stakeholders in labour dispute settlement in Nigeria. A great debt of inestimable gratitude is owed the Nigeria Institute of Advance Legal Studies and the Management team which is presently organized under a high resourceful intellectual, the Director General, Prof. Muhammed Tawfiq Ladan for finding me worthy to make this presentation.

In all sense of humility, I wish to state that the content of this paper has by no means addressed all the areas under review, it is only aimed at stimulating your minds, as I look forward to your intellectual contributions to further enrich the paper after this presentation.

INTRODUCTION

This paper seeks to examine contextual understanding of the role of mediation in facilitating the settlement of employment disputes which may arise in the work place. Mediation is an alternative disputes resolution mechanism which is non-binding, informal confidential and facilitated by a neutral third party who actively promotes amicable settlement of disputes. The idea is that the parties to

the disputes arrive at their own solution, with the help of a mediator, without the matter going for adjudication. Workplace mediation has helped in resolving disputes such as employment discrimination, workplace harassment; wage and overtime disputes and termination issues. However, this may not be completely legally binding on the parties.

Mediation has played a pivotal role in bringing workplace justice to the people at lower cost and with great speed than conventional mode of dispute settlement.¹ The Gibbon S. Review of workplace Dispute Resolution published in March, 2007, encouraged the adoption of mediation in the workplace as a means of settlement of disputes. The reviewed paper, sought to encourage employers of labour to adopt early stage of dispute settlement at the workplace using third party facilitator. This system has been adopted in other jurisdiction to resolve employment disputes. For instance, in the United Kingdom (UK) work place Alternative Dispute Resolution(ADR) seems to be increasingly used as a means of bringing employers, employee and trade unions together to resolve disputes without having to resort to litigation.²Mediation has also been used by the Chinese government as a means of controlling labour conflicts since the founding of the People's Republic of China (PRC), but the extent and scope of its employment has varied with the changing socioeconomic and institutional

¹A Broughtun and A. Cox (2012), public sector employers attitudes to use of ACAS collective conciliation; ACAS research publication.

² R. G. Silberman, S. E. Murphy & S. P. Adams (1993) Alternative Dispute Resolution of Employment Disanction claims, La. L. Rev.54 R 533.

contexts.³ The government has promoted and modulated mediation at different times depending on the problems it faces and wants to tackle. In the early years of the PRC, mediation was the primary method used to solve labour conflicts and stabilize labour–capital relations.⁴

The objectives of alternative dispute resolution include: reducing delays, costs and congestions in court; enhancing adequate participation by parties in the dispute resolution process and facilitation of access to justice by the parties.⁵ Some of the advantages of ADR are evident in its less adversarial nature which promotes continued business and personal relationships between parties, its less expensive form as compared to litigation in the regular courts,⁶ and its less formal and more sensitive nature to the concerns of the parties and to peculiar employment situations.⁷

Mediation is one of the most common ADR method used to resolve workplace disputes in Nigeria. Hence, many employer organizations have made pre-litigation arrangement such as mediation, peer review, ombudsman, while others have dedicated considerable resources over the past decades to constantly improve options for disputes prevention and resolutions.

DEFINITION OF TERMS

³ Fu, Hualing, and D.W. Choy. 2004. “From mediation to adjudication: settling labor disputes in China.” *China Labor* 3, 17–22.

⁴ *Ibid*

⁵ O D Amudneazi and P U Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure* (Wildfire Publishing House 2013) 198.

⁶ *Ibid.*,198-199

⁷ *Ibid.*

Employment: Employment is an agreement whether oral or written, express or implied whereby one person agrees to employ another as a worker and that person agrees to serve the employer as a worker.⁸

Disputes: An argument or disagreement, especially an official one between, for example workers and employers or two countries with a border.⁹ A bitter/long-running dispute, Pay/legal/trade dispute, They have been unable to settle/resolve the dispute over working conditions; The unions are in dispute with management over pay.¹⁰

Mediation: Mediation is the voluntary process for resolving disputes with the assistance of a neutral third party who facilitate dialogue between disputing parties and helps them privately and collectively to identify the issues in dispute, reach settlement of the dispute and mutually accept the settlement.¹¹

Origin and History of Mediation

The word mediation was first published in French encyclopedia in 1694.¹² It was identified in the thirteenth century, to describe a human intervention between two parties. The word is derived from Latin word *mediare* which means to

⁸Section 91 of the Labour Act 2004. Cap L1, Laws of the Federation of Nigeria 2004.

⁹Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/disputes>>accessed 11 October 2019.

¹⁰Ibid

¹¹<https://gettingthedealthrough.com/zarea/54/jurisdiction/18/mediation-nigeria>> 11 October 2019. G. Omoaka, S. U. Nweke – Eze, Ojunugiva Ichaba and O. Odunsi Mediation. Published 2019 by A. Miranda, Templars.

¹²Origins of Mediation and the ADR tools.

https://www.adacademics.edu./g611797/theorigin_of_mediation_and_the_ADR-tool>accessed 13 October 2019

halve; to be in the middle. It is therefore possible to state that this is derived from the well-known but untrustworthy and scarcely verifiable “Wikipedia” that the activities of mediation dates back to the ancient times.¹³

According to historians, mediation dates to the Phoenician commerce which is suppose to have been found in ancient Greece where the non-marital “mediator was known as proxenetes and also in the Roman Society. The Roman called mediators with various names such as internuncios, medium, intercessor, phlantropus, interpolator, conciliator, interlocutor, interpretes and finally mediator.¹⁴ In some tradition during the Roman era, the mediator was a scared personality which was adored and reverence and culturally refers to as the “Wiseman” or Chieftain.¹⁵

In Nigeria, with the advent of colonialism, the political and administrative activities of the British government led to the introduction of a more formal, voluntary employment relations practice derived from the Anglo-Saxon model of industrial relations.¹⁶ Within this framework, workers and employers are seen to be in the best position to deal with situational factors, such as conflict, that tend to arise within the workplace.¹⁷ The state is not expected to intervene

¹³*Ibid*

¹⁴*Ibid*

¹⁵*Ibid*

¹⁶ George, O. J., Owoyemi, O., & Onokala, U. (2012). Evolution of Employment and Industrial Relations practice: The Nigerian Experience. *International Journal of Business and Social Science*, 3(12).

¹⁷ Lovejoy, P. E. (1974). Interregional monetary flows in the pre-colonial trade of Nigeria. *The Journal of African History*, 15(4), 563-585.

directly in dispute settlement procedure, although it is required to establish the legal framework needed for voluntary negotiations and collective bargaining.¹⁸

NATURE OF MEDIATION IN NIGERIA

The concept of mediation as an ADR mechanism is relatively new in Nigeria. It however existed informally before the colonial period with other dispute resolution mechanisms within the traditional and cultural societies. For instance, many traditions have a gathering of elders, family heads, chiefs or emirs who assist in resolving dispute through mediations. In the case of *Okpuruwu vs Okpokam*, the Honourable Justice Ogunade JCA (as he then was) observed thus:

“In the pre colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become embedded in the System that they survive today as customs.”¹⁹

In Nigeria mediation is gradually gaining prominence and been adopted as an alternative to litigation. It is seen as a quick, relatively non-adversarial and objective process for resolving disputes when compared to legal proceedings. Mediation places emphasis on sustaining mutual relationship that exists between the disputing parties.

¹⁸ Dike, K. O. (2008). Trade and politics in the Niger Delta. 1830-1885. New York. ACLS history e-book project.

¹⁹(1998)4NWLR pt 90 554 at 586

In Nigeria the Trade Dispute Act marked the first formal process of managing dispute.²⁰ Trade dispute is any disagreement that exist between employers or among employers and employees connected with employment, non-employment and physical conditions of work.²¹ The 1976 Trade Disputes Act was repealed in 2004 and under the terms of the 2004 Trade Disputes Act, the first stage in the process of resolution of trade dispute is for the parties to explore internal procedures made available within the organization. If and when this initial attempt fails the next alternative is when the parties jointly agree on the appointment of a neutral and impartial third party known as the mediator. The Act provides that the first process in resolution of trade dispute is for the parties to explore internal procedure for the settlement of disputes. But when the procedure fails the disputing parties may jointly agree on the appointment of a neutral and impartial third party known as a mediator. Mediators are professional trained labour officers from the Ministry of Labour and productivity; their appointment to preside over mediation meeting is predicated upon the agreement of both parties to the disputes.

In Nigeria, mediation is the first ADR method to be adopted in the resolution of trade dispute if the parties fail to explore internal procedure for the settlement of disputes. The parties are expected to complete the trade dispute

²⁰ I.A. Yemisi. Alternative Dispute Resolution and Collective Conciliation in Nigeria: A Review of Contemporary Literature. <https://www.researchgate.net/publication>. Accessed 14 October, 2019.

²¹ Akume, A. T., & Abdullahi, Y. M. (2013). Challenges and Prospects of Effective Industrial Conflict Resolution in Nigeria. *Journal of Social Sciences*, 36(2).

form which allows them to officially declare a trade dispute.²² The process of mediation is considered before conciliation and arbitration in Nigeria. This is so because it gives the disputing parties the opportunity to re-evaluate the issues in disputes and seek the assistance of a neutral third party facilitator who is a mediator. The Trade Dispute Act makes it paramount for disputing parties to embark on the process of mediation within seven days of the date which the dispute arose. Where the mediator fails to achieve settlement within seven days of his appointment as a mediator, the dispute is reported in writing by the mediator. The disputing parties are also expected to file the trade disputes/form which is forwarded with the report of the mediator to the minister of Labour and productivity. The completion of the Trade dispute form allow parties to proceed to the next stage of resolution which is conciliation. It is imperative to state that the Trade Dispute Act 2004 allows the Minister of Labour and productivity to apprehend a dispute even before it is reported by the parties or the mediator.

Mediation in Nigeria has further metamorphosed into a more structured process outside the provision of the Trade Disputes Act. Mediation as a means of settlement has now be encapsulated into the constitution of Nigeria to facilitate quick and efficient settlement of labour dispute.

Mediation in Employment Dispute in Nigeria

²² I.A. Yemisi. Alternative Dispute Resolution and Collective Conciliation in Nigeria: A Review of Contemporary Literature. <https://www.researchgate.net/publication>. Accessed 14 October, 2019.

Mediation as alternative dispute resolution mechanism is used to address conflict which may arise as a result of termination of employment relationship, complaint of discrimination at work place, workers compensation, wage, occupational safety disputes, breach of terms of contract, violation of administrative policies and similar matters between co-workers, between employee and superiors. It has also been used to resolve disputes between work groups or trade unions or employee in the one hand and management on the other. Mediation can be used at any stage of a dispute; it is however recommended that mediation should be used at early stage to avoid escalation or even a way of preventing a dispute. Mediation can also be used after a dispute has been formally settled in order to re-establish interpersonal relationship.

Employment law is one of the fastest developing areas of conflict²³. The Nigerian legal system have advanced and expanded the frontiers of ADR as an alternative dispute resolution mechanism in the settlement of labour disputes.²⁴

One of the most outstanding innovations in the jurisprudence of labour law practices is the inclusion of ADR as a labour dispute settlement mechanism in our constitution which is contain in the Section 254C (3) of the 1999 Constitution (as amended by the Third Alteration Act, 2010).

²³ Resolving disputes through employment dispute by Michael Robert.
<https://www.mediate.com/articles/robert57>fm>> accessed 14 October, 2019

²⁴ <https://www.nigeria.lawguru.com>. accessed 15 October, 2019.

By Order 24 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017.²⁵

The President of the Court or a Judge of the Court may refer for amicable settlement through conciliation or mediation any matter filed in any of the Registries of the Court to the Alternative Dispute Resolution Centre (hereinafter referred to as the Centre) established within the Court premises pursuant to Section 254C (3) of the 1999 Constitution (as amended by the Third Alteration Act, 2010) and Article 4(5)(a)–(e) of the Instrument of the Alternative Dispute Resolution Centre.

7. (1) Where parties to any mediation or conciliation process are unable to settle their dispute amicably, the Director of the Centre shall submit a report to that effect to the President of the Court or the Judge of the Court who made the referral without the record of the mediation or conciliation session(s).

(2) Where the matter was not resolved by the Centre, the matter shall be remitted to the President of the Court or the Judge who referred the matter within five (5) working days, to be set down for adjudication in accordance with the Rules of the Court.

8. Where parties are unable to settle their disputes through the mediation or conciliation process, the Court may set the matter down for hearing and determination on its merits, and the procedure laid down for trial of cases under the Rules of Court shall be followed for the determination of the matter.

The provision empowers National Industrial Court of Nigeria to establish an Alternative Dispute Resolution Centre within the premises of the court. These provisions lay credence for alternative approaches for amicable settlement of labour, employment and industrial disputes.

Article 4 of the National Industrial Court of Nigeria Alternative Dispute Resolution Centre Instrument 2015 specifically provides that:

²⁵ National Industrial Court of Nigeria (Civil Procedure) Rules 2017.

“The mandates and functions of the ADR Centre shall amongst other things be the application of mediation or conciliation technique in the settlement of disputes between or amongst parties,

- 1). To enhance and facilitate quick, efficient and equitable resolution of certain employment, labour and industrial relations disputes within the jurisdiction of the Court;
- 2). To minimize, reduce, mitigate and eliminate stress, cost and delays in justice delivery by providing a standard ADR framework for fair, efficient, fast and amicable settlement of disputes;
- 3). To assist disputants in the resolution of their disputes without acrimony or bitterness; etc.

This system affords disputants the opportunity to adopt mediation, conciliation and neutrals in the settlement of employment dispute which shall be less costly, speedy and more effective and efficient in the settlement of labour dispute. By Order 2 (2) of the National Industrial Court of Nigeria (NICN) Alternative Dispute Resolution (ADR) Centre Rules, 2015, ADR Centre “means the Alternative Dispute Resolution Centre. This was established by the Court pursuant to Section 254(C)(3) of the 1999 Constitution (as amended) and by virtue of Article 2(1) of this National Industrial Court of Nigeria (NICN) ADR Centre Instrument, 2015. Conciliation means bringing two opposing sides together to attempt settling the matter without proceeding to trial. It is also a process of an amicable settlement of disputes in a friendly and win-win situation.²⁶ Neutral means an impartial and unbiased individual appointed by the President of the Court in accordance with the provisions of

²⁶ National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre Rules 2015.

NICN, ADR Centre Instrument to mediate or conciliate in a dispute or issue referred to the NICN ADR Centre.²⁷ Mediation as earlier define is a voluntary process where an impartial third party initiates communication with the aim of helping conflicting parties reach a resolution. Although all these processes are different forms of Alternative Dispute Resolution methods, that tend to help parties settle their disputes outside of the court forum, there can be true winners and losers in arbitration, as distinct from mediation or negotiation. Mediation seeks for compromise and a win-win situation, while arbitration seeks to justify a win-lose verdict. Also, while other processes require information gathering, arbitration focuses more on evidence, witnesses and law application to reach an award. One of the key features of ADR system with the National Industrial Court is that mediation can be identified as neutrality, confidentiality, flexibility, voluntariness, party control and facilitation.

CONCLUSION

Mediation has increasingly played an important role in upholding the key features of the rule of law in the settlement of employment dispute. A number of factors are working together to elevate the status of ADR in our dispensation. The legal practitioners have a duty to act judicially, a duty they owe not merely to the parties but to the public to assist in promoting labour dispute settlement. Mediation as an alternative form of dispute resolution outside litigation will

²⁷ Ibid

continue to move from strength to strength, and in so doing, promotes and upholds the rule of law nationally and globally. Mediation has come to stay. Let us all encourage it. It is not new in our society, its existence predates the court system.