USING MEDIATION TO RESOLVE STATUTORY EMPLOYMENT DISPUTES: MORE JUSTICE AT LOWER COST FOR MORE WORKERS

Arnold M. Zack

Harvard Trade Union Program, USA

The high standards of statutory workplace protection too often seem to exceed the will of society, the resources of enforcement agency and government resources, and the economic self-interest of employers to abide thereby. That is true whether that work place be in the United States where there has been provision of numerous work place protective statutes in wages, hours, discrimination, etc., whether the work place be northern Europe where strong trade unions take the lead in negotiating and legislating work place protections and where labor courts afford added protection, or whether it is in the majority of developing nations where the struggle is often just to find and secure jobs and employment. In most of the world, despite ILO conventions and Codes of Conduct, the gap between enforcement of protective national statutes on the one hand and the pressures, power and politics of employer groups and weak disorganization of workers and the inadequate funding of enforcement agencies and the judiciary on the other hand is often so great as to impose insurmountable obstacles to employees reaping the protection to which the law entitles them. Yet people of good will are coming to recognize ever more clearly that worker perception of unfairness can lead to discontent to seriously disrupt the forecast of ever expanding national development amid peaceful workplaces and a tranquil labor force.[1]

I offer no magic bullet which will suddenly provide world wide statutory protections against below minimum wages or against maximum work hours, or which will protect employees from discrimination or workplace harassment on the basis of efforts at unionization or for age, gender, sexual orientation, senior status, disabilities. Lots of countries have lots of statutes on the books to which they point with pride to show that they provide a fair and just work place under fair and just conditions. In addition even more nations, usually the ones with the least successful economies, embrace and commit themselves to adhere to innumerable ILO conventions, which too many of the industrialized nations, and I point particularly to the United States, have failed to endorse. What I think should be the focus of concern is the shortfall between proclaimed protective standards and the development and availability of procedures, which permit employees easily accessible opportunity to seek enforcement of their contractual and statutory, and ILO Convention protections through workable machinery of work place dispute resolution. And the missing glue, I suggest is a commitment on the part of all the major players: the legislatures, the courts, the enforcement agencies, management and unions to endorse mediation as the most promising means of resolving workplace complaints to forestalling workplace unrest.

[1] This paper is but the latest recital of innovative approaches which have been undertaken in the United States under the very dynamic leadership and guidance of John T. Dunlop Former United States Secretary of Labor, and former Chair of the United States Commission on the Future of Worker Management Relations in the United States and former President of the International Industrial Relations Association.. It is based in part on a volume entitle Mediation and Arbitration of Employment Disputes written by the Author and Professor Dunlop and published by Jossey-Bass (1997) and on a more recent paper presented by us to the 2001 Dispute Resolution Conference of the Dispute Resolution Section of the American Bar Association in Washington DC in April 2001. All laudatory comments should be directed to Professor Dunlop while any criticism over the corruption of his innovative ideas and approach should be solely to the author of this paper.

Paper presented at the 3rd African Regional Congress of the International Industrial Relations Association (IIRA)
'Employment Relations in a Changing World: The African Renaissance' 6 – 8 March 2002, Cape Town, South Africa
Hosted by the Industrial Relations Association of South Africa (Irasa): www.irasa.org.za ISBN Number: 0-620-28023-9
Produced by: Document Transformation Technologies Organised by: Ripcord Promotions

Examination of the evolution of workplace dispute resolution procedures in the United States may be instructive to African societies where the gap between professed statutory protections and real life at the work place may appear so startling, and where in most countries there minimal development of procedures to help enforce those rights or disputes over entitlements arising there from. As in many areas of development, African countries can expedite the development of innovative procedures by learning from the tedious and faltering experience of countries like the United States. The same starting gap has also long been present and perhaps even more glaring in the United States.

The troubled history of resolving workplace disputes in the United States has come a great way. It has evolved from the days of conspiracy theories of unionization through statutory workplace protection and through the promise of unionization and union workplace negotiation available to all employees seeking unionization, the expectation of ideal workplace conditions and worker protections and even to the encouragement of strong workplace protection machinery outside the formal judicial system. In many respects the United States has lagged behind other industrialized and even many developing countries which have established labor courts, works councils and comprehensive mandatory systems to assure workers protections of fairness in due process at their workplaces. Certainly no country in the world has taken as startling a course as has South Africa in developing the Commission for Conciliation Mediation and Arbitration to assure fairness in employment and dismissal cases. And while the Unites States may lag behind South Africa and other countries in the government's provision of workplace dispute resolution structures, our often inadequate patchwork of legislation, public and private, union and non union and federal and state forums, collective bargaining, administrative actions and judicially endorsed private dispute resolution systems have helped meet the need. They have provided a challenging laboratory of innovations which other societies may use to move toward fairness in workplace dispute resolution in the absence of a strong and effective national policy of workplace protection.

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This recital of some of the innovative steps taken within the United States in the past decade is offered to show that despite a national policy calling for fairness at the workplace and despite the slippage between offered or promised legislated work place protections on the one hand, and the reality of many or most workers being denied the assured benefits and protections, there is always room for innovation to achieve protections through new avenues by the participants themselves, with perhaps even more widespread impact in providing employee protections even while limiting the governments role in imposing outcomes

EVOLUTION OF WORK PLACE DISPUTE RESOLUTION IN THE UNITED STATES

The Evolution of procedures for resolving workplace disputes in the United States must be viewed in the historical context of the United States long adhering to the widely discredited concept of termination at will: that the employer has the unfettered right to hire and to terminate unless the employer has violated some specific statute in so doing. There is no inherent recognition of fairness or due process as a standard for termination unless it can be shown that the termination violates a specific statute or protection such as the right to unionize or the right to report dangerous working conditions. In the United States there has been some effort to attain fairness through collective bargaining, through statute, through unilateral actions of employers and through some measures of judicial intervention.

Collective Bargaining Protections Aside from the establishment of the Federal Conciliation Service in the US Department of Labor in 1913 to assist private sector unions and management in seeking consensus on collective bargaining agreements, the enactment of the Railway Labor Act in 1927 marked the first Federal recognition of the benefits of alternate dispute resolution when it provided for neutral chairs to resolve disputes over employee claims under the Act. Then in 1935 Congress passed the National Labor Relations Act which empowered unions selected by the majority of

employees to negotiate with private sector employers over issues of wage, hours and working conditions. That right, matched by the employers' obligation to bargain in good faith led to the development of a privatized system of dispute resolution including final and binding arbitration of issues of contract interpretation and application. In 1947 the mediation function was transferred to the independent Federal Mediation and Conciliation Service, and unions were recognized as legal entities with the right to negotiate enforceable agreements most of which soon included provision for final and binding arbitration of disputes over contract interpretation and applications. In 1960, the United States Supreme Court endorsed the final and binding nature of those arbitration decisions in a series of decisions referred to as the Steelworkers Trilogy[2]. Since that time government provided mediation has come to be the accepted norm in providing assistance to unions and management in seeking agreement over contract terms in interest disputes, while private arbitration has come be accepted as the norm for resolving disputes over rights extended within those collective bargaining agreements. As unionization spread into the public sector, the private sector model was adopted although private neutrals were usually called upon both to mediate interest disputes and to arbitrate rights dispute.

Thus governmental and societal endorsement of mediation and arbitration were hailed in the United States as the preferred means for resolving employment disputes. Although the operation of mediation in the US was not appreciably different from its operation in other countries, arbitration was proclaimed as superior to the labor courts found in many other countries because the arbitration system was private and not government imposed and because it was voluntarily agreed to as part of the parties' collective bargaining machinery with the parties joint agreement to be bound by the decisions of their mutually selected arbitrator. What was often overlooked is that the US voluntary system of collective bargaining with grievance arbitration covered only a fraction of the work force, running from a high of 35% in 1954 to a low of about 8% of the private sector work force today. Even in the public sector, which has an organization rate of about 44%, the average for all of the US work force is about 13 % coverage under union management negotiated collective bargaining arrangements.

Statutory employment protection The US reliance on collective bargaining to achieve work place dispute resolution clearly provides benefits to workers by assuring management adherence to collective bargaining terms and in assuring a neutral forum for resolving questions of discipline and discharge. But the benefits of such procedures run only to the minority of American workers, and then only to rights negotiated away from the employer through collective bargaining. Workplace protection is also provided through legislation covering wages, hours, safety, pensions, and within the past two decades statutes covering a range of protection against employer discrimination. The United States has not followed the European model of developing specialized labor courts or works councils with relatively easy access and user friendly procedures for handling employment related disputes but has instead treated employment issues as matters to be handled by courts of general jurisdiction with the problems attendant on use and access of such formal and legalistic bodies.

Employees covered by collective agreements still retain their right to invoke statutory protection through the courts on discrimination grounds even though the collective bargaining agreement might likewise prohibit an employer from discriminating.[3] Unions have been in the forefront of the efforts to legislate such workplace protections, which of course extend alike to union and non-union employees. Employees seeking protection of such statutes have access to government enforcement

[2] United Steelworkers v. American Manufacturing Co., 353 U.S. 564 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) ; and United Steelworkers v. Enterprise Wheel and Car Corp., 363 US 593 (1960).

[3] In Alexander v. Gardner-Denver Co 415 US 36, 94 S Ct 1011(1974) the Court held that an arbitrators view of the case might help establish a factual record but that unionized employees retained the right to invoke statutory protections. In footnote 19 the court explained that such access must be protected in case the union and the management colluded to deprive an employee of statutory protections against discrimination.

agencies such as the Equal Employment Opportunities Commission and the US Department of Labor to help in enforcing their statutory rights with appeal thereafter to the US Judiciary. But appropriated funds for inspectors and such enforcement activities are usually so restricted as to limit proceeding in only a small fraction of the cases filed by workers claiming statutory violation. And if a worker were to survive the administrative agencies, resort to the court system subjects employees to the costs and delays of a formal legal structure and with it the need to hire lawyers and the requisite stamina to withstand long and costly appeals by deep pocket defendants

It must be remembered that for employees under collective bargaining agreements which cover issues of wages and hours and working conditions many of the statutory minima are replicated within the contracts, and employees may utilize their grievance and arbitration procedures to enforce those contractual rights. But for the more than 100,000,000 non-unionized workers in the United States they must initiate their complaints to management, to government, to the courts without union assistance and in potential fear of retribution by their employers for undertaking such challenges. Without union policing of such entitlements, they are frequently left unchallenged by non-unionized employees. The result of our increasing litigious society has been to restrict court access and protection to all but the wealthy. Certainly there is no agency or court to which US employees may bring complaints of unfair treatment, discipline or dismissal, unless it can be tied to a specific statutory violation. Thus an employee terminated for alleged poor workmanship, poor attendance, tardiness or insubordination has no forum to resolve such protests unless able to show statutory violation or in tort or breach of contract

Employer Unilateral Development of Mandatory Internal Procedures Since employers operating under the protections of the termination at will theory have no need to defend against employee protest of termination unless there is a claimed violation of a collective bargaining agreement, a statute or a contract of employment or allegations of tortuous conduct, they have largely been able to terminate at will. Obviously most employers do not exploit their dominant position to take advantage of or to exploit their employees. Indeed many employers have voluntarily unilaterally established internal dispute settlement procedures to resolve claims of unfair treatment in the work place. Some go so far as to provide mediation and arbitration of employee protests against improper managerial actions. In most cases those procedures constitute a good faith effort to conscientiously respond to legitimate complaints about employee treatment, coming into play after the employee brings the complaint. But in other cases the procedures have been designed to thwart the employee basic statutory right to bring protest through enforcement agencies or the courts. Some employers have required employees to sign contracts at the time of hire forcing the employee to utilize the procedures unilaterally drafted by the employer in lieu of taking outside enforcement actions. Under these arrangements signing the agreement to use the company crafted procedures becomes a precondition of being hired…no sign on, no job. And if a dispute arises while employed it has to be resolved within that mandated procedure.

Such procedures, which may be advertised to the job applicant as merely a substitute for litigation "to keep things within the family", often require that any workplace or employment dispute be submitted to the procedure, even though it might entail a violation of controlling wage and hours or anti discrimination or harassment statutes statues, may prohibit hiring outside counsel, may limit or proscribe depositions and discovery, may empower the employer to select the mediator or arbitrator provided therein even selecting a non lawyer despite a statutory violation being asserted, may require the employee to pick up the cost of the employer's legal fees if the employee loses, and will usually call for the employer to pay the whole cost of any mediator or arbitrator used. More importantly many such procedures do not require following the law or requiring a written opinion setting forth the reasoning behind such decision and may be unilaterally changed by the employer without consultation with or agreement of the employee

The National Association of Security Dealers had in place such an internal dispute resolution system when Robert Gilmer a 62-year-old Securities Representative sought to file a complaint with the EEOC claiming discrimination and a violation of the Age Discrimination in Employment Act when his employer replaced him with a junior employee. The Company sought to prohibit the suit on the grounds that Gilmer had signed an agreement at the time of his hire to "arbitrate any dispute claim or controversy" within the employers internal procedures. In 1991 the US Supreme Court in the case of Gilmer v. Interstate/Johnson Lane Corp[4] decided that such contracts were arbitration agreements covered by the Federal Arbitration Act [5] (which had been designed to arbitrate commercial business disputes), that Gilmer voluntarily and knowingly agreed to its terms, and that by signing the agreement to arbitrate has given up his right of access to the courts to enforce his claim of age discrimination.

That decision encouraged large numbers of employers, particularly in the non-unionized sector to set up such procedures. There have been numerous court challenges to such mandatory arbitration devices, but the U.S. Supreme Court while reserving the right to overturn those which are devoid of fairness, has thus far endorsed most such procedures to have come under its review. Whether the Court's decisions represent a newly found respect for private dispute resolution or whether it is dictated by judicial self interest at a time of increasing docket pressure arising from a skyrocketing number cases involving drugs and criminal law or from the shortage of judges or adequate budget funding, the fact remains that the courts have largely deferred jurisdiction over employment law issues including discrimination.

Commission on the Future of Worker Management Relations In 1993-95 the Commission on the Future of Worker-Management Relations appointed by the U. S. Secretaries of Labor and Commerce conducted hearings and issued two reports which emphasized the failure of existing governmental and private structures to provide adequate protection of employee rights at the work place[6]. It highlighted the fourfold increase in federal litigation in the prior 20 years, the constricted funding imposed on enforcement agencies, the resultant increase in backlog of unresolved claims, the proliferation of federal statutes calling for ADR for resolution, the absence of representation for low wage workers in particular, the unfair impact of most claims coming from employees who have already lost their jobs, the absence of effective monitoring of workplace conditions in too many industries the burgeoning development of mandatory arbitration systems to by pass or overcome legitimate legal enforcement of statutes ,and the conflicting signals emanating from the courts concerning statutory entitlements vis-à-vis mandatory private arbitration.[7]

In response to the foregoing charges that too many workers were being deprived of fair treatment under employment promulgated systems of arbitration, as then President of the National Academy of Arbitrators I recited to the American Bar Association many of the foregoing shortfalls in our employment protection system and proposed convening of representatives from a group of interested institutions to endeavor to establish a set of principles of fairness to which employees confined to employer mandated systems should be entitled. The convened group which we called the Due Process Task Force consisted of representatives from the American Arbitration Association, the American Bar Association the American Civil Liberties Union, Federal Mediation and Conciliation Service, National Academy of Arbitrators, National Employment Lawyers Association, and the Society for Professionals In Dispute Resolution. The resultant Due Process

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[4] Gilmer v. Interstate/Johnson Lane Corp. 500UIS 20, 111 S. Ct 1647 (1991)
[5] 9 U.S.C.S. 1 et seq.
[6] Commission on the Future of Worker Management Relations, Fact Finding Report May 1994, and Report and Recommendations December 1994. US Government Printing Office
[7] John T. Dunlop. and Arnold M. Zack, "Mediation and Arbitration of Employment Disputes", pub Jossey-Bass, pp 41-42 (1999)

Protocol[8] that was signed on May 11, 1995 called for the development of a roster of demographically diverse neutrals, training in employment statues from whom would jointly be selected through a neutral designating agency, a mediator or arbitrator for a particular case. Claimants would have the right to counsel of their own choosing The arbitrator would have the right to control depositions and discovery, would be knowledgeable of the law and adhere to it in rendering in writing his or her opinion and decision. Our protocol was thereafter endorsed by the major designating agencies, by three federal agencies and has been endorsed and cited by the courts as providing the basic set of standards that employees invoking mediation and/or arbitration should have the right to expect for a fair and equitable resolution of their claims. Many employers revised their internal structures to meet the requirements of the Due Process Protocol and it has been estimated that there are as many as 20 million employees working under systems that are in conformity with the requirements of the Protocol.

The Trend Toward Mediation of Employment Disputes As more and more cases are processed through government enforcement agencies and through employer promulgated systems of dispute resolution it has become apparent that mediation has become the preferred means for resolving such work place disputes. The EEOC has trained a cadre of its own personnel to do mediation and has, when funds have been available utilized outside mediators to reduce their caseload. In the Massachusetts Commission Against Discrimination, which serves as the contracting enforcement agency for the EEOC its experience has shown that the great majority of cases scheduled for resolution through arbitration, were in fact, resolved in mediation. The arbitrators on the roster of the American Arbitration Association likewise find themselves helping the parties reach agreement through mediation rather than through Arbitration. Although the drafters of the Due Process Protocol anticipated that arbitration would be more acceptable as a substitute for litigation to resolve employment disputes the evidence is now clear that employees are most comfortable with a forum in which they can partake in discussions concerning their complaints and resolution priorities, instead of being relegated to be a witness in a battle between attorneys. Additionally they prefer the option of having a say in and control over the outcome rather than to submit their dispute to a third party, be it arbitrator or judge for a decision on statutory criteria rather than an outcome based on the interests and personal needs of the disputants. Mediation has enhanced appeal because of its immediacy to the incident where the employee might still be at work compared to litigation or even arbitration where with depositions, discovery and busy lawyer schedules months or years might pass before the day in court. And probably most importantly it is increasingly clear that employment disputes most often brought to a head frequently involve interpersonal relationships where the participants are interested in adapting or developing arrangements to avoid repetition of like problems in the future. Mediation is forward looking. Litigation and even arbitration tend to be backward looking to determine who was at fault for the protested action and to fashion an appropriate remedy therefor. Thus mediation rather than arbitration has become the preferred venue for both employers and employees in resolving employment workplace disputes.

In 1998 I approached Dean David Lipsky of the Cornell University Institute for Labor Relations to propose a consortium of institutions to train qualified mediators to mediate statutory employment disputes. We sought employer or management advocates who would benefit from training in the process of mediation, and mediators of employment disputes who would benefit from training in the disputed employment statutes. The Alliance which currently includes the American Bar Association, the National Academy of Arbitrators, the Federal Mediation and Conciliation Service, the Industrial Relations Research Association, the National Bar Association, The Association for Conflict Resolution, and academic institutions such as MIT, Cornell, Univeristy of Illinois,

[8] Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship. It may be found at the web page of the National Academy of Arbitrators (www.naarb.org) which instigated the movement to the Protocol or on the web page of the American Arbitration Association which hosted its formulating meetings www.adr.org/rules/employment/protocol.html

University of Missouri Law School, Willamette University, Pepperdine University, UCLA, Ohio State University, Georgia State University, and George Mason University. We have provided 40 hour training for employment mediators in a series of training programs throughout the United States and have a roster of more than 100 trained mediators. In a demonstration of the increasing appeal of mediation to resolve statutory employment disputes the Alliance has been given a two year grant of more than $1,000,000 by the Unites States Department of Labor to mediate disputes arising between the Department's Solicitors Office and defendant employers over issues such as Retirement and Pensions (ERISA) Whistle blower statutes, OSHA disputes, wage and hour disputes and the like. The program has been adjudge successful by the fact that the great majority of cases has been resolved through mediation saving the Solicitors office and the employer extensive time spent in depositions and discovery, costs in legal fees and potentially destructive remedies.

OPPORTUNITIES FOR INNOVATION IN EMPLOYMENT DISPUTE RESOLUTION The foregoing historical recitation is provided to show how different tracks toward dispute resolution have their time and place and how interested parties can make a different in innovating new approaches and avenues for providing effective procedures for resolving workplace disputes. Additionally it shows how the government institutions for providing "justice" or "fairness": the courts, the enforcement agencies, and the legislatures, all have their own agendas, with usually more pressing items than providing the hoped for services to resolve employment conflict. None of the traditional three branches of government has the interest, the authority or the acceptability to provide the measure of workplace equity and statute enforcement that the workforce deserves or to achieve the level of industrial peace that management deserves. The role of collective bargaining in resolving workplace disputes is most effective but its effectiveness is restricted to the unionized workforce and, if it were to follow the universal standard as found in the organized US sector would provide for arbitration of only issues arising out of the collective agreement itself, including questions of unjust dismissal.

I have throughout this paper pointed out how at least from the US experience, employers in both the organized and non unionized sectors, and the government through enforcement agencies and the courts have all made a contribution toward resolving workplace disputes within their own sphere and focus. But because of that restricted focus and institutional mission none of the respective institutions alone have been effective in fully meeting the need to develop a credible procedure for minimizing or resolving work place dispute. Each of the institutions has other priorities and employment dispute resolution does not always command their attention. But the evidence worldwide is mounting that international stability is jeopardized as long as there is unrest, dissatisfaction and frustration in the way workers feel they have been treated. Certainly that malaise arises as well from conditions outside the employment area, unquestionably more than from employment and job issues. Indeed it could be argued that providing sufficient jobs for the unemployment of the world could reduce many of the world's problems and hostilities. But it is also clear that workplace discontent, and industrial conflict can likewise contribute to much of the frustration, distrust, dissatisfaction, discontent and dismay that help to kindle larger flames of hostility. I do not suggest that any dispute settlement procedure I may propose would resolve such employment crises let alone the greater problems confronting our world, but there can be no denying that provision of procedures for employees to turn to for resolution of their workplace disputes will help to bring order to one area which without assistance will continue to be an area of concern, indeed perhaps even growing concern. Alternatively a move to help quell workplace concerns over fair treatment may in the long run have a more positive impact on proficiency of the enterprise, on the preservation or improvement of relationships therein, and on the employees perception that there is interest in the workers viewpoint and procedures to resolve controversies over their perceived or actual entitlement to job rights or workplace fairness. Spread wide enough, adoption of effective procedures for resolving workplace disputes may also have a positive societal impact as well.

What better example of diverse institutions coordinating their self interest with a view to the larger picture than what occurred here in the private employment sector in South Africa with the cooperation of enterprising management and fledgling unions both seeking an alternatives to industrial workplace conflict and violence than their voluntary agreement to utilize conciliation and arbitration to resolve workplace disputes as early as the 1980s. Together they turned to the facilities of the Independent Mediation Service of South Africa to provide trained mediators and arbitrators for a wide range of workplace issues including termination in place of destructive "self help" or reliance on the government structures of the apartheid regime. From my observations and work with IMSSA since 1985 it has been clear that union and management, despite their other agendas and continued conflict with each other recognized that it was better to get work based disputes resolved and out of the way, than to permit them to fester with the potential for their escalation into conflicts which might be fatal to the fragile employment relationships of the period. That private experience, running contrary to the earlier traditions of works and industry councils, was recognized as viable for the new society, and through a tough negotiation and legislative process resulted in the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), now five years old

SUGGESTED STEPS TOWARD WORKING EMPLOMENT MEDIATION SYSTEM It is hardly up to me to describe what an effective and innovative approach has been undertaken here in South Africa in the development and indeed the continuing expansion of the work of the CCMA. It was created against all odds, has survived against greater odds, has brought to its offices disputes which prior thereto had no forum for being heard, and despite its budgetary and staff constraints has processed an unbelievable number of cases, stressing the preference for conciliation as the preferred method for bringing workplace disputes to closure. CCMA certainly has its detractors, but I dare any other country to have developed and operated such a structure on such short notice so effectively. In my estimation it comes closest to what I would term an ideal procedure for resolving workplace disputes some 90 % of which in CCMA are over dismissal issues, and though I can hardly speak for any other country, I can assure you that though it may be what the United States should have, we do not have the dedication commitment to workplace equity or drive to adopt or copy it.

If I were to propose a model to be followed for other countries seeking to establish a credible system for channeling workplace conflict into society approved and effective channels to avoid the disorder and discontent that would result without such focused machinery, at least in the area of unjust dismissal, I would recommend closely looking at the work of CCMA. And indeed the evidence is strong that CCMA has such international acceptability that the International Labor Organization has utilized the expertise of Charles Nupen former head of both IMSSA and CCMA to help spread the gospel and to help other southern African countries explore the establishment of similar institutions within their economies.

CCMA is an admirable institution for the resolution of disputes arising out of dismissal and related, issues. It brings finality and impartial judgment to the complaints tens of thousands of terminated employees over their termination. And to the increasing extent that conciliation has become its focus and emphasis with 82% of its cases voluntarily settled within the past year, it enables the complainants, those who might otherwise fuel the discontent of the unemployed, to partake in an acceptable resolution of their protest. That stake in helping to shape their future after bitterness of termination unquestionably contributes to a lessening of the tensions that might otherwise remain after a challenged termination.

Termination from employment is but one element of employee dissatisfaction in South Africa as elsewhere. Employment concerns run beyond termination, to issues arising within the employed workforce, not the least of which is the employees' perception of the lack of fair treatment on issues in which the statutes of the country have created expectancies and entitlements.

And that is where I hope the US and indeed the CCMA experience can help.

There are several elements that can help to make mediation the procedure of choice for resolving workplace disputes.

First, recognize mediation as the preferred and most effective procedure of employment conflict resolution. Mediation must have the recognition and encourage the faith of the participants to make it a preferred forum of dispute resolution. The evidence to date shows that mediation is the preferred procedure compared to the lawyer driven alternatives of litigation and even arbitration to resolve workplace disputes. There is likely to be less continued resentment and dismay if the employee has had an opportunity to participate in the outcome of a case, an opportunity to help shape the end settlement, and the opportunity to claim partial ownership of the end result. The evidence of the shift from arbitration to mediation in the US and Massachusetts Commission against Discrimination experiences is effectively borne out by the South African experience as well with an 82 % settlement rate in CCMA cases in their 2000-2001 fiscal year. It is particularly made clear by the undertaking of the US Department of Labor to mediate even cases of statutory enforcement. Mediation is, after all, merely a device to permit the parties to continue direct negotiations over their dispute, retaining control over the outcome, but merely using a conciliator or mediator as a facilitator to get them to that jointly acceptable end game. How much better than an outcome over which the participants have no control where the outcome may be based on legal rights rather than the interests and concerns of the disputants. And then do it with a backward orientation rectifying by law a past wrong, rather than bringing the parties together to fashion a mutually acceptable pattern for the disputants to work together more effectively in the future.

Second, assure that the most qualified and accepted mediators are available to help disputing parties The mediators must have qualifications and acceptability if they are to play a positive role in helping resolve workplace disputes. If mediation is successful in helping the parties reach agreement, it presumably has been fair, but it is important that the procedures under which mediation is provided are perceived as fair and balanced and that the mediators be recognized for their procedural skills as well as for their knowledge of the substantive issues giving rise to the dispute, including statutes if they be involved. The parties must have the right to jointly select their choice of mediator from a roster of qualified neutrals, and remain confident, regardless of how the mediator is compensated (by government, shared in some way by the parties, or paid for entirely by the employer) that they remain confident in the mediators neutrality and effectiveness with the right to seek replacement or to terminate the mediation at any time. Mediators, they say are born, not made, so the potential pool of mediators is best found from those already in the employment arena who are viewed as reasonable by their counterparts on the other side, in government, in the courts, etc. In the United States mediators came from the union management field as business agents, personnel directors, attorneys, but always with recognition that there is no guarantee of mediator success or acceptability. But there is survivability as long as the mediator is a good communicator, a good and accurate relayer of messages, and a source of suggested improvements and alterations in language and proposals to encourage greater likelihood of acceptability by the other side. If both sides continue to accept the mediator until settlement is reached, that is a good test of an acceptable mediator, but one who tries without success may also achieve acceptability for efforts made. The resolution is the parties, not the mediators and the success or failure of mediation is usually the parties' fault rather than that of the mediator.

Third, encourage the support and endorsement of mediation by all the governmental authorities. The Courts, enforcement agencies and the Legislatures must point out to the combatants before them in litigation and enforcement procedures, how much better they would be likely to do in where they control the outcome, than in the alternative risks of litigation, the strike or even arbitration.

In the United States the Civil Justice Reform Act of 1990[9] urged the courts to encourage use of ADR as an integral procedure for efficient case management. The Federal District Courts have developed a comprehensive program of mediator availability in all 72 Districts to which are referred cases which the judges think had better be resolved through mediation than litigation. The motivation for such deferral may indeed be docket reduction, but more importantly the system has permitted the plaintiffs in litigation to partake in settlements over which they maintain control and to work out resolutions that are geared to building for the future rather than punishing for the past.

Enforcement agencies as well have embraced mediation pursuant the encouragement of the Administrative Dispute Resolution Act of 1990[10] . The Department of Labor for one encouraged defendants in enforcement cases to work out resolutions of claims in which the claimant has an equal stake in reaching the agreed upon outcome, and to offer that alternative to litigation when the time for settlement is most promising, before the case is fully mounted and taken the courts after which because of time and energy and ego involvement, there may be no turning back toward settlement.

The US experience shows that particularly in the past decade there has been a continuing effort by the draftsmen of discrimination and other legislation to encourage the parties to use ADR to resolve their complaints instead of resorting to litigation. Much of this encouragement has been for naught in the absence of machinery to precipitate the parties into negotiation. If there were a CCMA in the US, then that might be the appropriate vehicle to initiate mediation[11]. But in the absence of strong societal endorsement of mediation of employment disputes, it remains for the mediation-espousing judge, or enforcement agency lawyer or sensitive employer or claimant to suggest the process. Frequently that does not occur for fear that recommendation of mediation might be viewed as a sign of weakness or a fear of continuing to litigation. That hesitancy may be overcome by a national or governmental policy urging mediation of employment disputes, and establishing an agency (such as CCMA or the EEOC) which actively encourage disputants to submit their fledgling cases to mediation long before they escalate into litigation.

Fourth, management and industry must be educated and encouraged in the benefits of mediation for their employment disputes. In the enterprise itself there must be adoption of mediation as the preferred means for resolving workplace disputes. For those in the collective bargaining milieu, mediation is less of a novelty, and mediation has long been embraced as the preferred way for resolving disputes between labor and management, reducing the hostility to it by the individual claimant. So to the extent that the collective bargaining relationship is the source of workplace conflict, resort to mediation therein is also the most immediately promising.

But for those in the non unionized sector, there is a desperate need to provide access to mediation within the enterprise to provide an opportunity for complaining employees to bring their complaints to management without fear of retribution and in the hope that any unrest generated by the dispute remaining unresolved will be dissipated by talking about it and seeking resolution with the help of a third party neutral, if necessary. This what has happened in the United States following the Gilmer

[9] 29 U.S.C. Sec 473 (a)(6)
[10] 5 U.S.C. Sec 572
[11] Sec 118 of the Civil Rights Act of 1991 provides in part: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including settlement negotiations, conciliation facilitation mediation fact finding mini trials, and arbitration is encouraged to resolve disputes arising under the Acts…"

and Circuit City[12] cases as employers increasingly create internal dispute resolution systems. These efforts may be generated out of fear of being taken to court to litigate claims of discrimination, but the reality is that they also provide a forum for resolving the disputes by mutual agreement through mediation before resort to any mandatory arbitration system. Employer organizations in developing countries should look favorably on such programs as a means of resolving individual employee disputes prone to escalation and expansion to the point that they become issues of workplace contention. They should also regard them favorably as a means of highlighting potential problems within their management structure which could be readily brought to light before becoming more systemic and more threatening to the operation of the enterprise. As in the US the programs can be self created, they can be encouraged by employer federations or law firms representing employers, or they can be encouraged by the governments urging such systems as a way to thwart the growth of worker dismay or unrest. IN any event such encouragement must be matched by a societal effort to find and train qualified neutrals to serve as the respected and accepted mediators of such a system. Institutions, such as the American Arbitration Association in the United States, ACAS, CCMA and the like have the experience and the competence to develop the requisite roster of mediators to serve the economy's needs.

Fifth, all social partners in the nation must endorse the value of employment mediation in nation building. There needs to be the will to initiate the movement toward mediation of employment disputes as a procedure and facility everyone recognizes as superior to conflict, litigation or arbitration. Someone has to "get off the dime" and pull the interested parties and potential beneficiaries of the procedure together to push for its more widespread respect, for recognition and involvement of the main players to assure the development of a mediation procedure with trained and qualified mediators who are readily available to handle referral from the courts, the enforcement agencies, and the private sector to place mediation in its rightful place on the map as the preferred means of employment dispute resolution, as the procedure most likely to achieve early resolution of workplace unrest or conflict. That initiating force may also be within the academics encouraging the development of dispute settlement machinery, sponsoring conferences which bring together the disputing parties, offering mediation services by the faculty in the cae of pending disputes, and in offering the training of mediators. The field is new, the societal support is important, but the benefits to the community dictate that the initiative be undertaken.

CONCLUSION

The prevalence of disputes in the employment area is universal, regardless of the stage of development of the society. But the advancing societies have come to the recognition that harnessing the frustrations, conflicts and anxieties of the workforce and channeling them into constructive procedures for their resolution is a most important, and rather inexpensive alternative to the growing unrest and discontent that can spread if employment issues remain unresolved and festering.

Courts and enforcement agencies do resolve disputes, power of management or unions may impose resolution of disputes, but these traditional approaches miss the most important element of party participation in mutual resolution of conflicts. That result is not always guaranteed, but it should be made available for those who want to use it and for those whose dismay will only intensify by the imposition of a third party determination they find alien to their interests.

In societies where the cooperation of all the social partners is such a critical component of national economic development, and where harmony rather than conflict is so much in the national interest, exploration of the machinery encouraging mediation may do much not only to resolve workplace problems, it might just set the stage for extending the concept of mutual problem solving with the aide of a mediator into fields beyond employment, where the stakes are higher and the importance of such conciliated cooperation even more productive.

[12] Circuit City Stores v. Adams 121 S. Ct 1302(2001)

USING MEDIATION TO RESOLVE STATUTORY EMPLOYMENT DISPUTES: MORE JUSTICE AT LOWER COST FOR MORE WORKERS

Arnold M. Zack

Harvard Trade Union Program, USA
170 West Canton Street, Boston Mass 02119
Tel: 617-262-1193, Fax: 617-262-3627, e-mail: zack@post.harvard.edu

Experience

- 1956-present: Arbitrator and Mediator of some 5,000 Labor Management Disputes; Designer of employment dispute resolution systems; Occasional consultant for governments of US (Dept of Labor, Peace Corps, Department of Labor, Department of Commerce), Greece, Israel, Australia (also government of New South Wales) Philippines, South Africa, International Labor Organization, IMF, UN Development Program. Member Four Presidential Emergency Boards (chair of two).
- 1963-64: Fulbright Scholar designing Conciliation Service for Government of Ethiopia, teaching Public Administration at Haile Selassie I University
- 1966-68: Director American Arbitration Association Labor Management Institute, designing dispute resolution systems for public sector dispute resolution in labor management relations
- 1985-present: Lecturer in Dispute Resolution Harvard University Trade Union Program
- 1986-90 Founder and Member Board of Control of Center for Socio Legal Studies at University of Natal, Durban South Africa, designing dispute resolution systems for employment disputes in South Africa
- 1994-1995: President of National Academy of Arbitrators
- 1994-present: Co Chair of Due Process Protocol Task Force designing Dispute Resolution system for the Mediation and Arbitration of Employment Disputes. Task force composed of American Bar Association, National Academy of Arbitrators, American Civil Liberties Union, American Arbitration Association, National Employment Lawyers Association, Society for Professionals in Dispute Resolution, Federal Mediation and Conciliation Service
- 1997-present: Member of the Council of the Labor and Employment Law Section of the American Bar Association
- 1998-present Member Harvard University Board of Overseers Visiting Committee on Human Relations, member Board of Director Industrial Relations Research Association
- 1999-present Chairman of Executive Committee of Alliance for Education in Dispute Resolution (consortium of 13 universities, ABA, NAA, FMCS, NMB, IRRA, SPIDR, etc, to train mediators of employment disputes)
- 2000-present: Chairman of Review Panel to Advise on Changes to the internal dispute resolution system of the International Monetary Fund

Education

- 1953 Tufts University AB
- 1956 Yale Law School LLB
- 1961 Harvard University Kennedy School MPA

Publications 80 Articles and 12 books on Dispute Resolution and International Employment issues

Honors Cushing-Gavin Award for Outstanding Neutral of the Archdiocese of Boston, Distinguished Service Award of the American Arbitration Association, Whitney North Seymour Award of the American Arbitration Association, Mildred Spaulding Award.

Directories Who's Who in America, Who's Who in the World, Who's Who in Labor, College of Labor and Employment Lawyers

Sept 1, 2001