PRIVATE DISPUTE SETTLEMENT: CREATIVE STRATEGIES TO PREVENT DISPUTES AND PROMOTE THE SHIFT FROM CONFLICT TO CO-OPERATION IN THE WORKPLACE

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1 Gear changes

The two major gear changes in the development of the labour relations system in South Africa have coincided almost perfectly with the start and finish of the last two decades. The start of the 1980's saw the radical overhaul of the LRA to create an experiment in industrial democracy in the absence of a political democracy. With newfound rights, labour tested the outer limits of its clout through strike action and litigation in the industrial court. Also, there was no clarity on what the rules were for unfair dismissals. The open-ended definition of the unfair labour practice was designed to enable the rules to evolve through a combination of court decisions and agreements between parties.

2 Power plays

Business found itself on the defensive but made full use of the legal processes to protect itself against a full offensive that it faced from the emerging trade union movement - bent on extracting maximum leverage from the labour regime to achieve a new political regime. Not surprisingly, the dominant feature of dispute settlement in the 1980's was power and litigation – particularly interdicts, restraining orders and the like…and often illegal action. This was because labour, while using it to its maximum advantage, regarded the law as illegitimate. The view extended to the statutory institutions for dispute settlement - the Conciliation Boards and Industrial Court.

3 LRA 1995

The start of the 1990's saw the negotiation and implementation mid-way through the decade of another radical overhaul to accommodate the new political democracy. Central to the new system was the establishment of the CCMA and the Labour Court as the key institutions for labour dispute resolution.

It was politically impossible in the second revamp of the LRA to fully digest the unfolding effects of the other big event that coincided with the new democracy – economic globalisation. The new labour system of the 1990's, encapsulated in the LRA 1995, focussed on job security by entrenching worker and union rights. At the same time, the harsh hand of global competition, worked to undermine job security through massive restructuring and retrenchments in both the public and private sectors. The CCMA, providing a free service, has found itself increasingly swamped by a veritable tidal wave of dismissed workers (about 400 new cases a day) clamouring at its doors for relief.

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4 LRA 2001

The start of the 2000 decade will see more significant changes to the LRA. Such has been the intensity of the threats to job security and the pressures on the CCMA, that a fresh new batch of negotiated changes to the labour law is due to take effect, probably from June this year to try and deal with these problems.

The nub of the issues that has traditionally divided the parties is labours' need to preserve hard won worker rights (mainly job security) and business's need for greater labour flexibility (to respond quickly to changing markets). The latest amendments represent something of a compromise between these conflicting needs. They include a right to strike against retrenchments and a less onerous dismissal regime for newly employed staff on probation.

They also include an expedited pre dismissal procedure that is designed to cut out the lengthy post dismissal procedure that must be followed through the CCMA or a relevant bargaining council. This is an attempt take some of the pressure off the CCMA. Though the amendments are to be welcomed, they will most likely add to the CCMA's already huge burden of responsibilities. Sending commissioners into factories and offices to preside over pre-dismissal arbitrations or to facilitate consultations between parties when an employer wants to retrench workers, will require a lot more personnel, skills, time and logistical management.

Clearly, there is room, if not a pressing need for an alternative dispute resolution mechanism to help ease the burden. Private dispute settlement can make a serious contribution as a complementary service to the high volume dispute resolution service the CCMA provides.

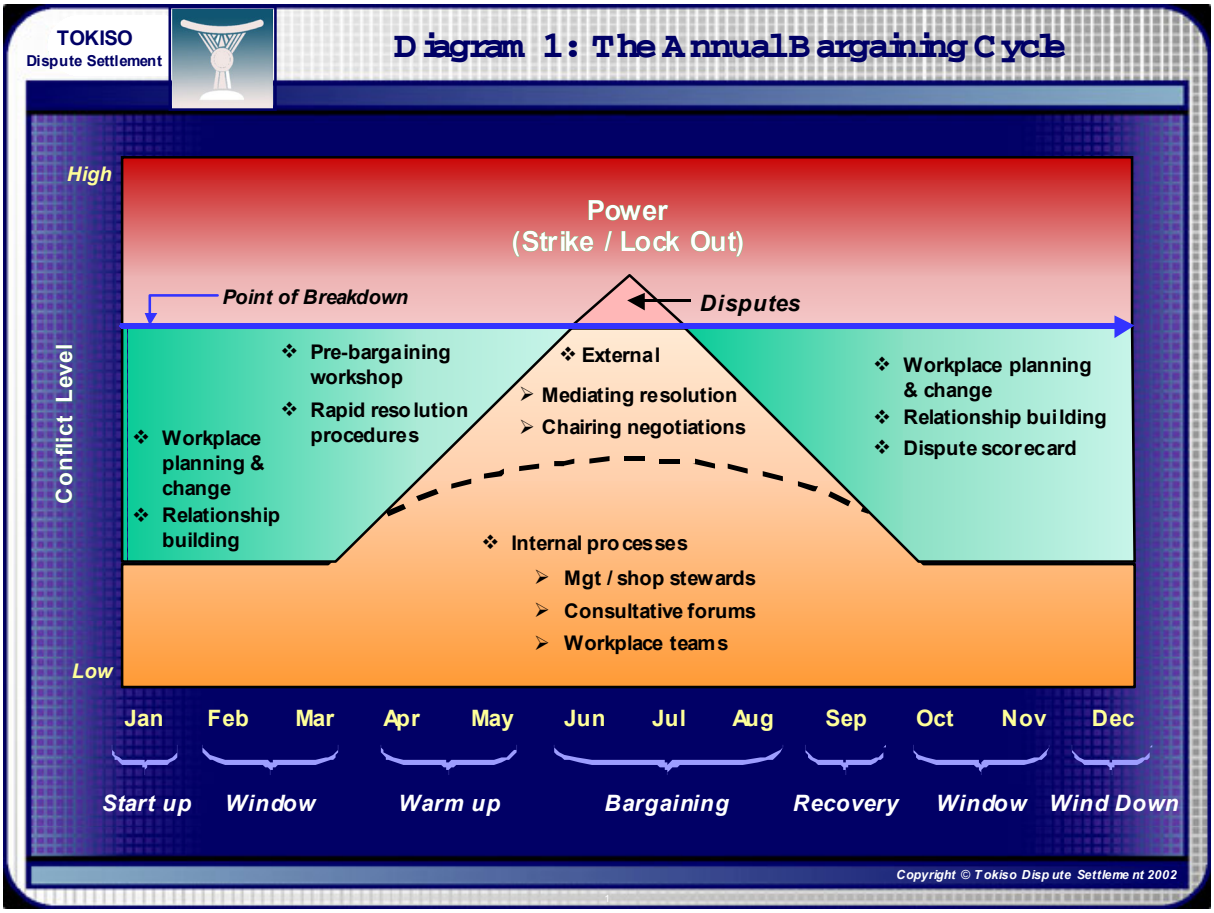
This paper will focus on the strategies that private labour dispute resolution experts can create and implement through facilitated processes between business and labour. I will start with some ideas to deal with the all- important aspect of dispute prevention. Then I'll make some suggestions on how private dispute resolution help to improve and streamline the settlement of individual and collective disputes.

5 Dispute prevention strategies

Even with the successive amendments to labour laws to better regulate employment relations, the sad truth is that management and labour are still caught up in a seemingly endless mode of adversarial relationships. Though there are much better relationships at an interpersonal level between managers and union representatives, there's a still deep sense of hostility that seems to persist just below the surface. This hostility is bred of a long history of mistrust and suspicion. The traditional divide in the workplace is aggravated in the SA context by the oppressor-oppressed orientation between managers and workers. If the common and particular characters of each workplace relationship can be understood, it is possible to take positive steps to change things for the better.

It often happens that parties don't see a dispute coming until it's upon them. This happens for a basket of possible reasons – lack of communication or understanding, different priorities, conflicting needs, different perceptions etc.

Any HR Manager worth his or her salt will make sure that the basic measures are in place to prevent and deal with disputes when they arise. Clear policies and procedures, training, regular meetings with employees and their representatives, all lay the foundations for sound working relationships. However, foresight, like hindsight, is a powerful source of knowledge for taking the right action.



6 *Diagram 1: The Annual Collective Bargaining Cycle – too little space, too little time*

The collective bargaining cycle that we see in most unionised organisations has a familiar pattern. Diagram 1 attempts to give a picture of what it looks like. It will be apparent that the typical pattern of annual wage negotiations leaves little space for the parties to spend "quality" time with each other in a non-confrontational environment. No matter how hard the parties may try to avoid it, it seems almost inevitable that negotiations on wages and other conditions lead to a degree of conflict and power posturing between the employer and the union. This is part of the ritual that the players have come to accept.

Time and space for non-bargaining activities are in short supply in this annual treadmill. Apart from the short "window periods" which appear briefly before and after the annual bargaining season, there is precious little scope for working on building constructive relationships.

It thus could be helpful to step back from the traditional pattern and to get things into perspective. In this way, and with the use of objective external experts, it's possible to identify the points of breakdown and the opportunities that might exist to make the bargaining a more effective experience.

As will be evident from Diagram 1 and Table 1, several process opportunities to take the some of the destructive sting out of collective bargaining experience begin to present themselves. These processes are all designed to lower the level of conflict and create more "green" time for the parties to engage with each other on operational and employee development issues. Internal staff can facilitate the processes but it it's probably more effective to use external dispute resolvers who can offer specialist expertise and independence.

Process	Purpose	When
Joint workplace planning	. To jointly survey the year ahead . To agree on actions plans to strengthen relationships	Before or after the bargaining round
Relationship building	. To identify and agree on solutions to problems in the working relationship	Before or after the bargaining round
Pre-bargaining orientation workshop	. To share relevant information before the start of negotiations eg economic data, state of the industry, trends etc . To modify expectations . To agree on the process for the negotiations	Before bargaining starts
Rapid resolution procedures	. To provide quick access to dispute resolvers (mediators & arbitrators) if an emergency arises that threatens to disrupt the negotiations eg a dispute about the interpretation of a collective agreement	At any time an incident happens that gives rise to a dispute
Chairing negotiations	. To ensure that the bargaining process proceeds in an orderly fashion in terms of the agreed procedures	During the bargaining process
Mediating deadlocked negotiations	. To help parties to reach agreement when they've deadlocked on substantive issues	During the bargaining process – before or after the dispute has been referred to a BC council or the CCMA
Dispute scorecard	. To quantify the conflict and dispute experience in terms of issues and costs	Periodically eg annually, quarterly etc.

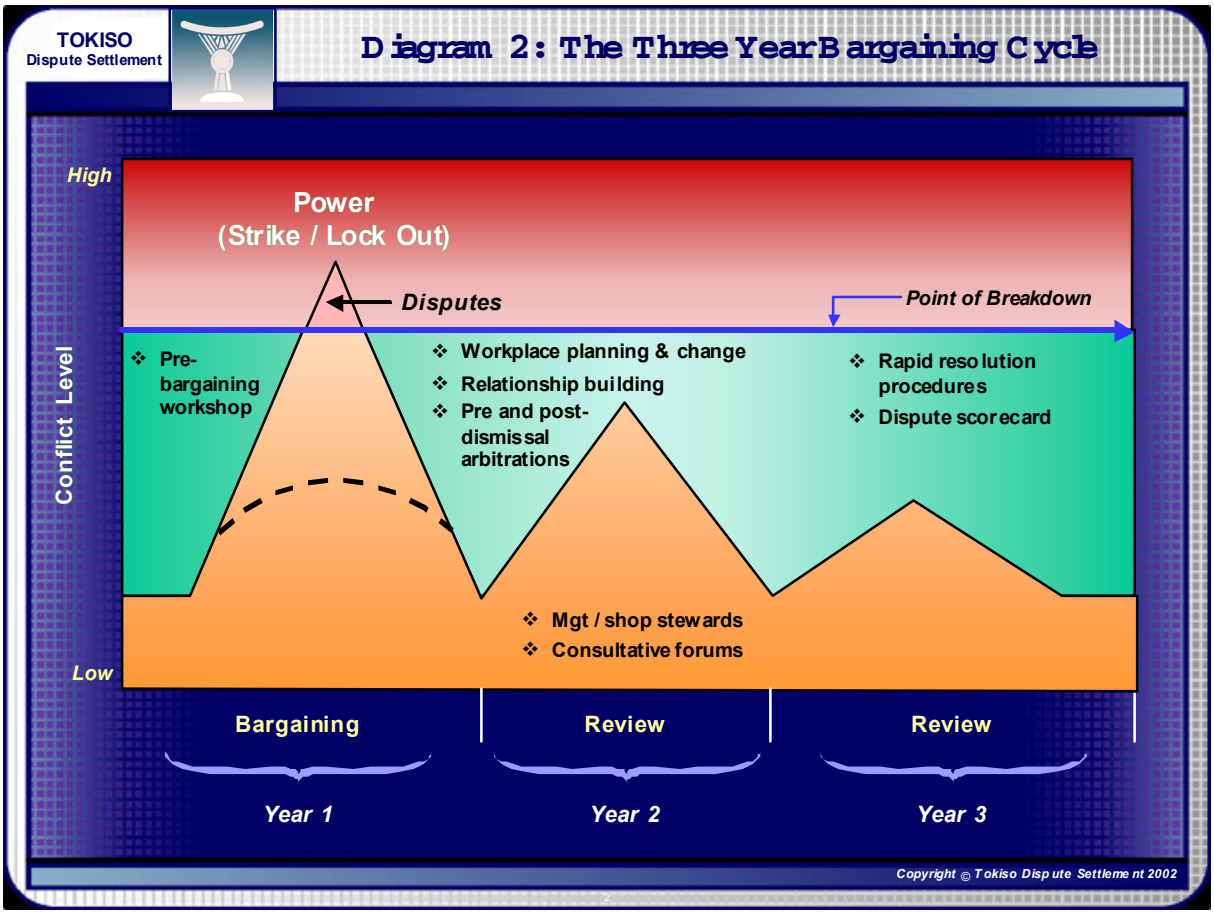


Diagram 2: The Three Year Bargaining Cycle – more space, more time

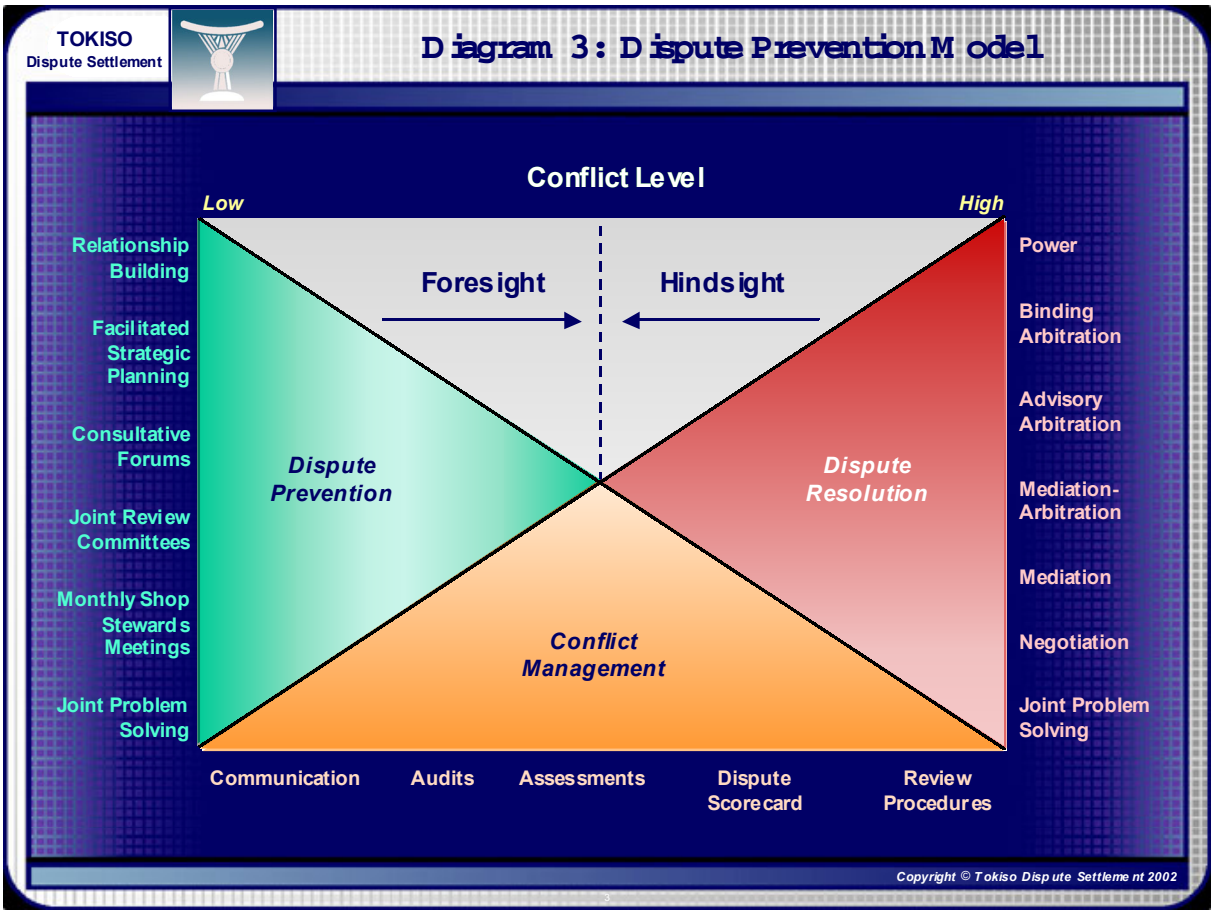


Diagram 3: Dispute Prevention Model – fixing it before it breaks

7 Diagram 2: The Three Year Bargaining Cycle – more space, more time

Diagram 2 shows the beneficial effects of the trend towards negotiating longer-term substantive agreements. The longer cycle between the traditional annual period of confrontation, offers much more space and time in between the bargaining encounter for parties to talk meaningfully to each other about ways and means to build common ground. The green space is far greater in this model and creates more opportunities for the parties to use innovative processes to improve relationships and work practices.

8 Diagram 3: Dispute Prevention Model – fixing it before it breaks

Many workplace relationships are in need of some degree of running repairs. The experience of the last 20 years has seen a significant improvement in the quality and maturity of workplace relationships. However, as mentioned earlier, the divide still runs deep. Lingering racism, discrimination, disparities in earnings, skills deficiencies, unfair work practices, poor communication and cultural conflicts are common ingredients in the recipe of many workplace relationships in SA. Treatment is required to build bridges – before, during and after periods of high conflict levels. The treatment should be a regular agenda item to help the parties to stay alert to the value of the old cliché – prevention is better than cure. It's also cheaper! A proactive mindset is needed to get results. It helps to stave off the issues of conflict that gravitate to the dispute resolution side of the model.

The independent insights of private dispute resolvers, who've got to know the quirks of the organisation, add objectivity and value to the working relationship. They help parties to get to the root cause of their problems and find creative ways solutions. Panelists are increasingly specialising in certain industries. The parties don't have to spend time educating their dispute resolver every time he or she is called on to deal with a particular dispute. For example, a dispute resolver with specialist knowledge of the banking sector will know about negotiable instruments, cash in transit procedures, bookkeeping practices etc.

Also, many independent private dispute resolvers have chosen to make a career of dispute resolution. They come from an array of different cultures and backgrounds. Parties thus have a wide choice to select a person who is most likely to understand the social and economic dynamics that make each relationship different from another. They are thus able to handle conflict and processes, like relationship building with knowledge, sensitivity and solid process skills.

Diagram 3 illustrates a perspective on the relationship between dispute prevention and resolution activities. All processes should be used to reduce conflict – and this of course includes well-managed and disciplined industrial action by one or other of the parties. Some processes, however, lend themselves more to preventing disputes and others to resolving them once they've arisen. This distinction is made in Diagram 3.

Private dispute resolvers can be called in to facilitate the suite of processes at short notice and cost effectively.

9 Dispute scorecard

The old adage “if you can’t measure it, you can’t manage it” applies as much to dispute resolution as it does to other fields of endeavour. To formulate an effective dispute management strategy, you not only have to understand the personalities that you’re dealing with, the history of the relationship and other influencers. You also need to have a grip on the numbers.

Statistics can be gathered on the number and kinds of disputes per year, how long they last, how they were resolved, what their outcomes were etc. These give vital clues about the state of health or otherwise of the organisation. This is because disputes are most often symptoms of deeper problems in the workplace relationship. They can also be used to calculate the cost of dispute resolution. Once you’ve got a fix on the costs of dispute resolution, it’s then possible to use the information for a whole lot of useful purposes. For example, you can quantify and compare the costs of statutory vs alternative dispute resolution options; you can budget more accurately; you can decide whether it makes financial sense to take out employee liability insurance cover etc

10 Contracting out the dispute resolution function.

Given the delays and uncertainties caused by the pressure on the CCMA and the current lack of capacity in many bargaining councils to deal effectively with dispute resolution, it makes sense for employers and unions to agree to appoint an independent specialist agency handle the dispute resolution function on behalf of the parties. The terms of the appointment can include key performance indicators like the target settlement rate, speed of resolution, review rate etc.

11 Diagram 4: Expedited Dismissal Flowchart

The LRA’s expedited dismissal procedure referred to earlier, is ideally suited to the use of private dispute resolution. Management and employees can agree on their choice of decision-maker and on the process they want to follow. They can also agree whether a lawyer can represented them at the enquiry.

This procedure is likely become the preferred option for employers, employees and unions. The value of quick, professional and impartial justice in the workplace will far outweigh the average direct cost of R3500 per day that private dispute resolvers charge to conciliate or arbitrate cases referred to them. The average cost of taking a single individual dismissal case to the CCMA, in terms of personnel time spent, weighs in at a hefty R10 000 – R20 000. This excludes the cost of a possible compensation award that could be the equivalent of 12 months pay. Also, there’s no risk of a compensation award being made in the case of a pre-dismissal arbitration.

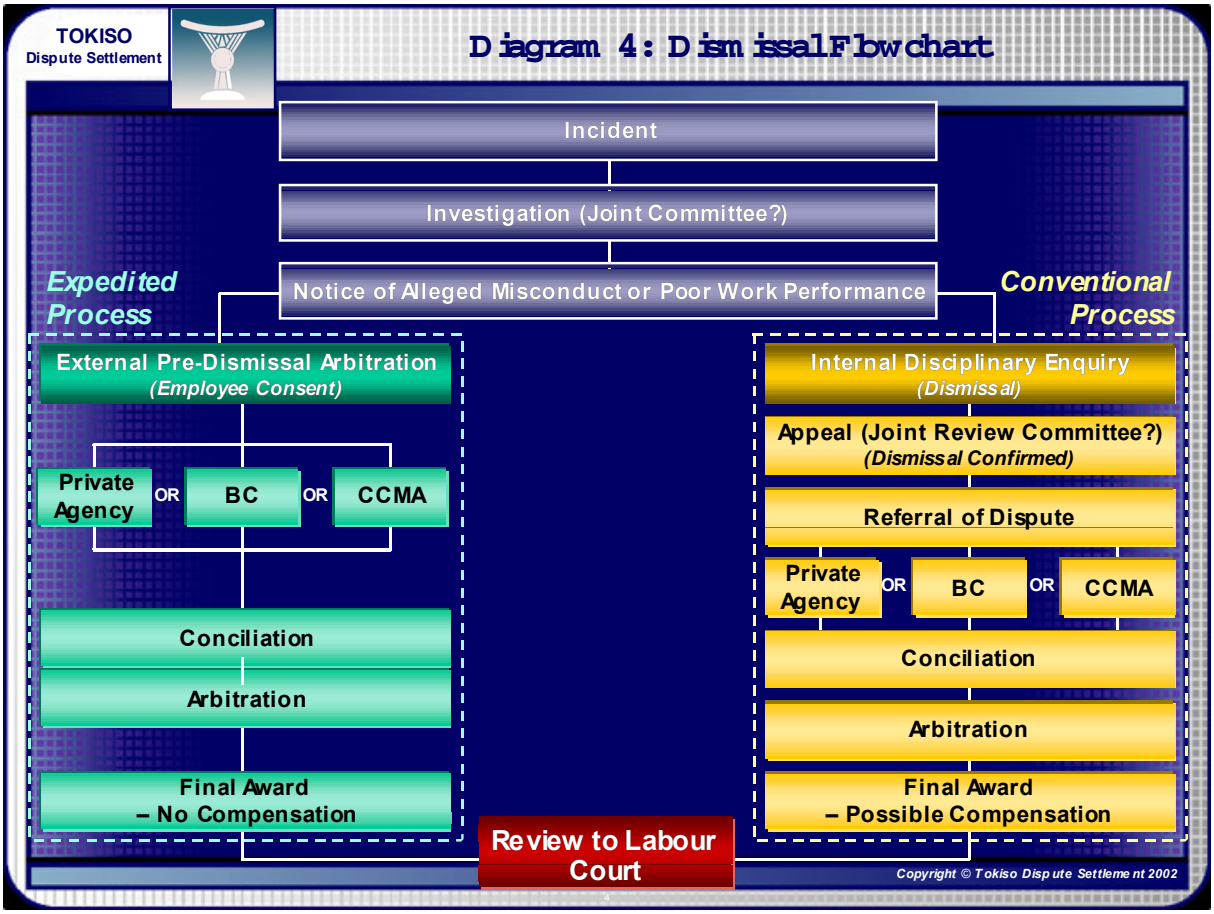


Diagram 4: Expedited Dismissal Flowchart

12 Conclusion

The overloading of the CCMA, the confrontational state of many workplace relationships and the need for cost effective employment to meet the challenges of the new economy will see a greater use of private conflict management and dispute resolution experts in the years ahead. They will complement the CCMA and help to take some of the load off its and bargaining councils' burden of cases. Their true measure of success will be the extent to which they can succeed in reducing the huge volume of disputes that we experience in our workplaces on every working day. They can do this with their specialist skills. They will create and facilitate effective dispute prevention and conflict strategies and processes. Above all, they will make a contribution to the shift from conflict to co-operation in the workplace. Herein lies the real value.

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Current position
Managing Director of Tokiso Dispute Settlement (Pty) Ltd, based in Hyde Park, Johannesburg. Tokiso provides private arbitration, mediation, disciplinary enquiry and workplace relationship building services.

Professional qualifications
Patrick gained his BA LLB from Natal University, Durban. He served his Articles and was admitted as an attorney of the High Court in 1980. He attended the CPIR programme at the Wits Business School in 1988.

Work experience
Patrick is an experienced workplace change strategist, facilitator & dispute resolver. He has facilitated the establishment of participative structures and conducted many successful management/union relationship-building processes across a wide spectrum of industries. His is a consulting specialist in the field of labour relations, labour law, conflict management, dispute resolution and relationship building.

Employment
He gained extensive corporate experience as the Group Secretary and Labour Relations Advisor for Gentyre Industries Ltd. during the 1980's. He was a practicing labour lawyer at attorneys Webber, Wentzel, Bowens and a partner of human resources consultancy, SPA Consultants. He founded and successfully operated an independent labour relations consultancy, Deale Labour Consultants (Pty) Ltd. for six years.

Dispute resolution
Patrick is an accredited Labour Arbitrator and Mediator and a former Senior Commissioner (part time) of the CCMA (Gauteng). In this capacity, he has presided over about 300 arbitrations and 100 mediations. He has also facilitated more than 30 relationship building exercises between various employers and their unions.

Publications & other
He is co-author of The Labour Relations Handbook, published by Juta & Co and has written many articles for various publications. He has lectured on the Certificate Programme in Industrial Relations (CPIR) at the Wits Business School.