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EMPLOYMENT DISPUTE RESOLUTION AND MEDIATION: AN ANALYSIS

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ABSTRACT: *Litigation is a much dreaded word across all continents. Nevertheless, the number of litigators is increasing at an unprecedented rate. Given the backlog, the delay and the cost associated with traditional litigation, people are fast turning towards another method of dispute resolution – ADR or Alternative Dispute Resolution.*

Employment disputes have become one of the quickest areas of dispute escalation, the context of the disputes being manifold. The present paper seeks to analyse the role of mediation and negotiation in the determination of disputes in matters of employment.

Key Words: *Litigation, Delay, Mediation, Negotiation, Employment Dispute.*

I. Introduction

The traditional system of dispute resolution through litigation is well known to us all. The picture of a judge or jury giving a decision is well ingrained in our minds. Not alien to this scenario is the delay and the cost incurred in the process and the consequent acceptance of the inevitability of the long road to justice. As a result, litigation has become a much dreaded phenomenon across all continents. Nevertheless, the number of litigators is still increasing at an unprecedented rate.

Given the backlog, the delay and the cost associated with traditional litigation, people are fast turning towards another method of dispute resolution – ADR or Alternative Dispute Resolution. To explain briefly, Alternate Dispute Resolution is nothing but simply an alternative to going to the court directly. Having emerged in response to the traditional long drawn process of dispute resolution, a new system of adjudication is seeking to establish its feet in the world of conflicts. Alternate Dispute Resolution System or ADR as it is commonly known, is fast emerging as a viable alternative for conflict resolution. ADR is being seen as an avenue of compromise and out of court settlement for all kinds of disputes- domestic, neighbourhood, employment. Enabling the dispute to be resolved in a quicker manner than traditional litigation, ADR provides an excellent opportunity to save time and money both. These processes mostly use arbitration, negotiation, mediation and conciliation of disputes between parties. Amongst the lesser known methods are early neutral evaluation, mini trials and summary jury trials.

II. Mediation

Mediation is a voluntary process of dispute resolution which enables the concerned parties to take the help of a third person, a mediator, to reach at an informal solution for their problem. The mediator acts as a mere facilitator to a solution which does not involve any coercion or imposition. The basic idea behind mediation is to encourage the parties to arrive at an out of court settlement which is beneficial for both the

parties without any sense of legal obligation being involved. The agreement so reached at is thus mutually agreeable to both parties.

As mentioned earlier, the process of mediation is voluntary and devoid of any force. Neither party has to adhere to the suggestions of the mediator. The solution is entirely attuned to the agreement of the parties involved. The presence of the mediator only ensures a greater degree of probability in moving towards resolution of the deadlock. Mediation only ensures the participation of both the disputing parties and makes them responsible for arriving at an acceptable solution to their problem. The basic method followed in mediation begins with bringing together both the parties. The process of mediation cannot be conducted wherein any party to the dispute is absent. Thereafter, both the parties present their point of view about the dispute to the mediator, enabling the other party to appreciate the view countering their own. Sometimes, the mediator can apprise himself of the dispute by meeting the parties independently as well.

Therein after, a solution is amicably reached at with or without inputs from the mediator. The mediator maintains impartiality in the entire process and suggests the parties to move towards settlement options which are acceptable to both. The solution does not necessarily have to be in line with judicial remedies. It can be one which is not available from a court of law. Once an agreement is reached, it is generally written down and can be made enforceable in the form of a contract. If however that is not done so, the agreement retains only moral force having been reached at with mutual consent, but does not debar other judicial or non-judicial remedies. Moreover, either party has the option of quitting the process till the agreement is arrived at.

Being a voluntary and flexible procedure and yet capable of maintain privacy and confidentiality, mediation is garnering increased favorability in resolving disputes of almost any character. Land disputes, family disputes, divorce, labour disputes, employment disputes- mediation is being utilized to resolve deadlocks in every field. Mediation has the capability of not only solving the major crisis issue, but can also address incidental issues like miscommunication, personality clashes, breakdowns and misunderstandings owing to its one-on-one approach.

Given its win-win mechanism, mediation is finding a lot of resonance for the resolution of employment disputes as well. As in all other categories of disputes, the mediator helps the parties to focus on the real issues at hand and reach a solution which reflects the needs of both the parties and is in sync with their interests.

III. Employment Dispute Resolution

Employment dispute resolution refers to resolving conflicts which arise out of employment relationships, either existing or terminated. Employment disputes are unique in nature, involving emotionally charged situations, allegations of unjust treatment, interpersonal facts and incidental allegations over through employment. Such disputes can relate to unequal opportunities, unequal wages, compensation, working hours violations, breach of safety conditions, wrongful discharge or termination.

Employment disputes can be tackled with the help of mediation, which can either be mandatory or voluntary.

Mandatory mediation may be the outcome of a provision of such nature in an employment contract, the employee handbook or an agreement. Such mediation

proceedings are conducted in good faith and towards adequate settlement. The proceedings are, in spite of being mandatory, not mandatory as far as the decision is concerned. The decision reached at is involuntary and mutually agreeable.

Voluntary mediation is in contrast to the obligatory nature of mandatory mediation. It is resorted to by the employer and employee out of complete voluntariness. In addition to all the key features of mediation, such mediation also is also cathartic. The employee loses half of his/her grievances on being heard by the employer. As a result, trips to the courts and fees of the lawyers do not dent a hole in the company's budget. Furthermore, successful conclusion of mediation enables parties to save themselves from public disclosure of personal and private information which is not guaranteed in cases of traditional litigation.

The procedure in case of mandatory as well as voluntary mediation is the same. The mediation opens with preliminary remarks by the mediator and reminders of confidentiality. The parties then proceed to put across their point of view about the dispute, usually beginning with the employee. Alternatively, separate sessions with the employee and employer may be conducted by the mediator, known as separate caucuses. In such situations, the mediator alternates between the parties placed in separate rooms. At the end of the mediation, the parties are gathered again for a joint sitting, where the settlement is reiterated and put down in the form of an agreement. The concluding agreement may be reached at without any suggestions from the mediator, or if such agreement cannot be arrived at, the mediator might suggest certain proposals in order to break the deadlock.

The agreement reached at might be final and conclusive, listing down precisely all the details of the settlement. However, in certain cases, the agreement might be a mere 'term sheet', only being reflective of the nature of the settlement and the precise terms of settlement might be subject to further negotiation.

IV. Advantages of using Mediation in Employment Dispute Resolution

Involving mediation in the resolution of work place disputes has several advantages. These advantages though common to mediation in all fields, hold especially true in cases of employment disputes due to the unique and particularly sensitive nature of the relation shared between an employer and an employee.

The success of mediation to a very large extent also depends on the skills of the mediator. His skills and expertise can immensely affect the outcome of the mediation. Several benefits of using mediation to resolve employment disputes are as follows

informal and flexible

- a. is balanced
- b. is inexpensive as compared to traditional litigation
- c. time saving
- d. promotes communication and cooperation
- e. has the ability to reduce hostility and continue ongoing relationship
- f. parties can withdraw at any stage
- g. avoids litigation related uncertainty in decisions
- h. looks at mutual acceptability of settlement
- i. voluntary agreements lend to durability of decision reached at
- j. cathartic

- k. non-binding in case of non-mutuality of decision
- l. ensures confidentiality of information
- m. protects the reputation of the organisation and the employer
- n. mediator only acts as a facilitator
- o. the outcome depends on the parties and not the mediator
- p. leads to a win-win situation for both parties

V. Disadvantages of using Mediation in Employment Dispute Resolution

It is evident beyond doubt that mediation as a process is replete with benefits which traditional modes of litigation and other means of alternate dispute resolution do not provide. However, mediation might still be an inappropriate response to deal with employment disputes in certain situations.

In the following enumerated scenarios, mediation might not result in a positive outcome:

- a. Where mediation is used as a first resort ignoring resolution of disputes at the first juncture by not making the disputant parties talk to each other.
- b. Where it is used by the management as a means of ignoring accountability and avoidance of taking decisions.
- c. Where the appropriate remedy would be adjudication owing to the seriousness of the issue at hand.
- d. Where the aggrieved party is inclined towards litigation alleging harassment or discrimination.
- e. Where one party is obstinate and the mediation procedure will only result in loss of time and effort.
- f. The parties are not in a position of adequate bargaining power and have no power to settle the matter.
- g. Where mediation proceedings are not accorded any legal status.

VI. Conclusion

Mediation as an alternate dispute resolution mechanism has all the required characteristics of –

- a. Dispute prevention
- b. Dispute resolution
- c. Dispute management

The advantages of using mediation to resolve employment disputes cannot be reiterated enough and can by no means be overlooked. Not only is mediation cost and time effective, it is also a win- all remedy for both employers as well as employees. Both parties stand to gain ground by resorting to mediation in order to effectively find a solution to their problems rather than resorting to traditional means of litigation which ultimately does provide a solution but at a great cost.

However, despite the important role that mediation plays in resolving employment disputes, its use has to be employed judiciously to result in a favourable outcome. Where mediation is inappropriate, the end result will only mar the positives of its applicability.

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