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# THE EFFECTIVENESS AND VALUE OF USING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS TO PREVENT OR RESOLVE LABOR DISPUTES AT AN EARLY STAGE

Nini Kepuladze

*Doctoral Candidate of Law, New Vision University, Tbilisi, Georgia*

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## ABSTRACT

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The development of effective mechanisms for the prevention and/or alternative resolution of labor disputes is one of the challenges of the Labor Code of Georgia. It should be noted that in 2020, in order to bring the legislation closer to the recommendations and standards of the International Labor Organization (ILO), as well as to the directives of the European Union, a number of changes were made to the Labor Code of Georgia, including regarding the prevention and/or alternative resolution of labor disputes.

Despite the changes, the issue of the effective use of labor dispute prevention and/or alternative resolution mechanisms in practice is still questionable.

The article discusses the mechanisms of prevention and/or alternative resolution of labor disputes provided by the Labor Code of Georgia. The existing legislative gap in this direction is highlighted. Based on the review of international legislation, effective mechanisms for the prevention and/or alternative resolution of labor disputes are proposed.

## INTRODUCTION

Disputes are part of human nature. It can be manifest everywhere, including the employment arena.<sup>1</sup> Conflict is inherent in any organization and if not managed properly, such conflict will become a more formal grievance, like a dispute.<sup>2</sup>

Employment disputes can be stressful and lengthy, no matter what the reason behind them is. They can be the result of dismissal, discrimination, and a range of other factors. In most cases, employees are willing the dispute to be resolved easily and without a long, drawn-out process.<sup>3</sup> Alternative dispute resolution (ADR), is often regarded as a better option than the more conventional mechanisms for the settlement of labor disputes, because of the lower cost and greater speed involved.<sup>4</sup> Nowadays, solving and/or preventing any kind of conflict at the workplace is one of the main prerequisites for the proper functioning of the modern labor market.<sup>5</sup>

The research conducted under the auspices of the European Union (EU) and the United Nations Development Program (UNDP) showed that the citizens of Georgia most often complain about the violation of labor rights.<sup>6</sup> Consequently, effective alternative mechanisms for avoiding and/or resolving labor disputes has the most importance for the labor market of Georgia. Despite the legislative arrangement in the Labor Code of Georgia, there

is still a question mark about its effective use in practice.

The aim of the paper is to present ways of effective use of labor dispute prevention and/or alternative resolution mechanisms, by using the method of comparative research analysis.

## 1. THE VALUE OF ADR IN LABOR DISPUTES

The European Union has deliberately tried to promote alternative dispute resolution mechanisms.<sup>7</sup> International institutions like the UN and ILO are promoting the use of ADR in labor disputes, because of the various benefits and characteristics of it.<sup>8</sup> Several directives and regulations were adopted by the European Parliament and the Council of Europe to create a common legal framework for alternative dispute resolution mechanisms across Europe.<sup>9</sup>

The process of establishing alternative mechanisms for resolving labor disputes in Georgia began in 2011. The need to make changes to the Labor Code was greatly accelerated by the strained relations between the Georgian government and the labor movements.<sup>10</sup> In 2020, the latest amendments were made to the Labor Code of Georgia, regarding the prevention and/or resolving labor disputes in an alternative way.<sup>11</sup> According to the latest edition

1 Rwodzi NT., The use of alternative dispute resolution mechanisms in labor relations in the workplace in South Africa, UNIVERSITY OF FORT HARE, p. vii.

2 Alternative Dispute Resolution (ADR) in the Workplace, The South African Experience, June 15, 2007, p.9, <<https://www.accord.org.za/thematic-area/mediation/>> [Last accessed: 26.09.2023].

3 <<https://www.giambrone.com/site/advice/dispute-resolution/employment-law/employee-alternative-dispute-resolution/>> [Last accessed: 26.09.2023].

4 Alternative Dispute Resolution (ADR) in the Workplace, the South African Experience, June 15, 2007, p.1 Accessible at: <<https://www.accord.org.za/thematic-area/mediation/>> [Last accessed: 26.09.2023].

5 Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives Nicosia, Cyprus, 2007, 2.

6 On the draft of the Organic Law of Georgia "On Amendments to the Organic Law of Georgia "Labor Code of Georgia", ACT (2017). See Human rights and justice in Georgia: public attitude and awareness, GG.42-45. <[https://my-rights.gov.ge/uploads/files/docs/7951UNDP\\_GE\\_DG\\_Human\\_Rights\\_Survey\\_2017\\_geo.pdf](https://my-rights.gov.ge/uploads/files/docs/7951UNDP_GE_DG_Human_Rights_Survey_2017_geo.pdf)>

7 G. De Palo; L. Constable, Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries, Cardozo Journal of Conflict Resolution, 2006, 303-304.

8 DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters; DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); REGULATION (EU) No 524/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR).

9 *Ibid.*

10 Zhorzholiani L., "Resolving collective labor disputes through mediation in Georgian legislation", Tbilisi, Georgia, 2019, p. 16.

11 On the draft of the Organic Law of Georgia "On Amendments to the Organic Law of Georgia "Labor Code of Geor-

of the Labor Code of Georgia, consideration and resolving mechanisms for individual and collective labor disputes are different from each. Depending on the type of dispute, in the Labor Code of Georgia, we also consider the mechanisms of both dispute prevention and its alternative resolution.

### 1.1. Dispute prevention mechanisms in labor code of Georgia

Conciliation, information and consultations at the workplace, as well as the function of the labor inspection service to check compliance with the law of the situation at the workplace on the basis of a complaint or on its own initiative – are the mechanisms for prevention of individual labor disputes.

Article 62 (1) of the Labor Code of Georgia defines that, an individual dispute must be resolved by amicable procedures between the parties, which implies holding direct negotiations between the employee and the employer. Need to mention that this is not a mandatory provision, as Article 61 (5) defines that dispute arising during an individual labor relationship must be resolved by following the conciliation procedures provided for in Article 62 of this law and/or by referring to court or arbitration. It seems that, conciliation is an alternative means of dispute resolution and as the legislator makes it clear with the given “and/or” connection that, absence of conciliation procedures does not exclude the right of the party to apply to the court and/or arbitration. The Supreme Court of Georgia made an explanation regarding this issue and said that dispute resolution mechanisms are alternative, and which one will be used by the parties to the agreement, depends on the parties themselves.<sup>12</sup> Such wording of the regulation on conciliation may be considered as an obstacle to the effectiveness of alternative dispute mechanisms to avoid individual labor disputes.

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gia”, ACT (2017). See Human rights and justice in Georgia: public attitude and awareness, GG.42-45. <[https://my-rights.gov.ge/uploads/files/docs/7951UNDP\\_GE\\_DG\\_Human\\_Rights\\_Survey\\_2017\\_geo.pdf](https://my-rights.gov.ge/uploads/files/docs/7951UNDP_GE_DG_Human_Rights_Survey_2017_geo.pdf)>

12 Authors, Commentaries on the Labour Code of Georgia, New Vision University, 2023, see Supreme court decision AS-873-1183-07 June 4, 2008.

As a result of the changes implemented in the Labor Code of Georgia, the regulation on providing information and holding consultations at the workplace was added to the Labor Code with Chapter 15. According to the Article 70 (1) an enterprise where at least 50 employees work regularly, the employer is obliged to provide information and hold consultations in accordance with the procedure established by this chapter. The right of employees to information and consultation can be exercised through an employee representative.<sup>13</sup> But the labor code of Georgia does not suggest effective measures for the protection of employee’s representative. So, there can be a risk for the employee’s representative to fulfil its obligation with respect to the labor code of Georgia.

According to the Labor Code of Georgia, the state supervises the labor legislation through the Labor Inspection Service.<sup>14</sup> Article 5 of the Law of Georgia on Labor Inspection defines the role of the Labor Inspection Service in the prevention of labor disputes clearly. According to Article 5, the purpose of the Labor Inspection Service is to ensure the effective application of labor standards. To achieve that purpose labor inspection, a) in case of request, providing consultation and/or providing information regarding the fulfilment of labor norms; b) providing the society with information promoting the observance of labor norms and taking care of raising its awareness by implementing information campaigns and other effective measures.

### 1.2. Dispute resolution mechanisms in labor code of Georgia

As the mechanisms for alternative resolution of labor disputes, there are various arrangements in the Labor Code, in the Law of Georgia on Labor Inspection and in the Law of Georgia on the Public Defender.

Depending on whether the dispute is individual or collective, the use of alternative dispute resolution mechanisms is regulated differently. According to Article 63 of the Labor Code of Georgia, a collective dispute (a dispute between an employer and a

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13 Labor Code of Georgia, Article 70 (2).

14 Labor Code of Georgia, Article 75.

group of employees (at least 20 employees) or between an employer and a union of employees) must be resolved by an amicable procedure between the parties, which implies holding direct negotiations between the employer and a group of employees or between the employer and a union of employees or mediation. In the event that one party sends the relevant written notice to the Minister.

According to the mentioned arrangement, the use of conciliation procedures and/or mediation in collective labor disputes is the only way to resolve the dispute. The regulation does not provide for judicial review of collective labor disputes. It should be noted that mediation, as an alternative method of collective labor dispute resolution, was established in Georgian legislation in 2013 and was aimed at solving the growing collective disputes in labor relations in a short time without court costs.<sup>15</sup> According to statistical data, a total of 32 labor mediation processes were observed. Out of 32 cases, 15 processes ended with an agreement, and in 9 cases the agreement could not be reached. The rest of the labor mediation processes ended with a partial agreement, or were terminated or postponed.<sup>16</sup>

According to the previous years' statistics of labor mediation cases in Georgia, 47% of the mediations ended with an agreement, and in 28% of the cases the agreement could not be reached. Given the short period of implementation of the mechanism and other challenges, the current results, at first glance, may be considered a positive indicator.<sup>17</sup>

We can also consider the labor inspection service as an alternative mechanism for solving individual labor disputes. Since, according to the Law of Georgia on Labor Inspection, the labor inspector has the right to carry out state supervision c) receiving and reviewing complaints related to possible violations of labor norms; d) inspection.

We can also consider the public defender as an alternative mechanism for solving individual labor disputes. Law of Georgia on Public Defender and Article 8 of the Law of Georgia "On Elimination of All Forms of Discrimination" regulates the con-

sideration of the case by the Public Defender of Georgia, according to paragraph 3 of which: "*If the Public Defender of Georgia deems it necessary, he is entitled to schedule an oral hearing and invite the parties to settle the case. In case of settlement of the case, the Public Defender of Georgia monitors the fulfilment of the obligations defined by the settlement act.*"<sup>18</sup>

However, despite this possibility, the effectiveness of the Public Defender's office in dealing with labor disputes needs to be assessed, to the extent that, according to the new regulations, there is an intersection between the functions of the Labor Inspection Service and the Public Defender's office. Because of this, the Public Defender appealed to the Parliament several times.<sup>19</sup> However, Labor Inspection still has jurisdiction over discrimination disputes.

## 2. CUMPULSORY ADR AS AN EFFECTIVE WAY FOR PREVENTION OF LABOR DISPUTE

ADR in respect to individual labor disputes is a voluntary mechanism for resolving or preventing disputes in an alternative way before court.<sup>20</sup> For instance, the possibility of using mediation in individual disputes is not regulated according to the Labor Code of Georgia. Disputing parties can use mediation only after applying to the court.<sup>21</sup>

In order to prevent individual labor disputes and/or solve them effectively in an alternative way, like collective disputes, isn't it better to make the use of alternative dispute resolution mechanisms a compulsory prerequisite before applying to court?!

There is a difference of opinion regarding the compulsory nature of alternative dispute resolution mechanisms. Alternative Dispute Resolution

15 Legal and sociological research of labor mediation, experience, theory and practice, Human Rights Education and Monitoring Center (EMC), Tbilisi, 2019, p. 8.

16 *Ibid*, p. 69.

17 *Ibid*, p. 91.

18 Law of Georgia on Elimination of All Forms of Discrimination.

19 *Ibid*.

20 Labor Code of Georgia, Article 61.

21 Article 187<sup>1</sup> of the Code of Civil Procedure: "after filing a lawsuit in court, a case subject to judicial mediation may be referred to a mediator for the purpose of ending the dispute by agreement of the parties".

mechanisms all over the world aim at a Restorative Justice Approach.<sup>22</sup>

The decision of the Constitutional Court of Georgia regarding the appeal to the court on labor disputes is worth noting. The Article 213 of the Code of Labor Laws was (Decision No. 2/3/13, 05.12.1996) recognized as unconstitutional, because certain categories of managerial workers, judges, prosecutors and investigators were actually deprived of the constitutionally granted right to appeal to the court; They were prohibited from filing lawsuits to protect their labor rights.<sup>23</sup> It can be said that the purpose of the decision was to make the legal regulation compatible with the right to a fair trial.

In this case, it is important to assess whether the compulsory use of dispute resolution and/or prevention mechanisms before going to court is contrary to Fair trial. It is also important to assess whether it is better for public order purposes to add alternative dispute resolution mechanisms as a mandatory prerequisite before referring an individual labor dispute to court.

Article 6 of the European Convention on Human Rights (ECHR)<sup>24</sup> is about the Right to a fair trial. Critics question whether compulsory mediation is a legitimate process in light of these provisions. In this respect, the CJEU has confirmed that compulsory mediation is not a breach of Art. 6(1) of the European Convention of Human Rights on the right to a fair trial, because the mandatory mediation procedures cannot result in a binding decision, cannot cause substantial delay in bringing proceedings, cannot expend any time-bar period; and cannot give rise to more than minimal costs.<sup>25</sup>

### 3. INTERNATIONAL PRACTICE REVIEW

In this chapter, the existing practice in several European countries regarding the prevention and/or resolution of labor disputes through alternative dispute resolution is discussed. Research made by international labor organization made a comparative view regarding the Individual and collective labor disputes settlement systems in different European Countries.<sup>26</sup>

According to this research, in Spain, there are two kinds of conciliation procedure: Pre-court and in court conciliation. Pre-court administrative conciliation is mandatory for individual labor disputes in the private sector, with some exceptions for certain jurisdictions. Non-attendance of either party incurs a fine. If the conciliation ends without agreement, the way will be open for the parties to take the judicial route. The value of the conciliation procedure for the disputing parties can be seeable, as in Spain in the course of the judicial process, they will not be able to use facts different from those presented during the conciliation proceedings.<sup>27</sup>

In-court conciliation is pursued first by court secretaries, and if this fails, by judges. If a conciliation agreement is reached before the court secretary, it will have the same legal force as a judicial conciliation.<sup>28</sup>

In the UK, early conciliation was deemed as a necessary, pre-filing process that would avoid the 'far too costly, time-consuming, and complex employment tribunal processes.'<sup>29</sup>

In Australia and Belgium, a specialized tribunal is charged with individual disputes. In Belgium, the main institution for the resolution of labor disputes is the labor tribunal. Sweden's system differs significantly from the other countries: the labor courts are given exclusive jurisdiction over all labor disputes in the unionized context, but non-unionized cases are handled first by the local district courts. All appeals from the district courts go to the labor courts, which are the final instance in all cases.<sup>30</sup>

22 Mukuki A., THE VARIOUS ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS AND ACCESS TO JUSTICE IN KENYA p. 1, see: A Handbook for Community Justice Committees in the NWT, 2001;

23 Collective of authors, "Commentary on the Constitution of Georgia", chapter two, Georgian citizenship. Basic human rights and freedoms, Tbilisi, "Petit" publishing house, 2013, 378-379; Decisions of the Constitutional Court of Georgia (2006-2007), 2009, p. 249.

24 Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. ("[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".);

25 <<https://hsfnotes.com/adr/2017/07/04/cjeu-holds-that-mandatory-mediation-is-not-inherently-precluded-by-eu-law/>> [Last accessed: 26.09.2023].

26 Individual and collective labor disputes settlement systems – A Comparative review, July 2020, ILO, Funded by the European Union.

27 *Ibid*, p.51.

28 *Ibid*, p.51.

29 *Ibid*, p.51.

30 *Ibid*, p.57.

In the case of Australia, there is a practice of free-of-charge telephone conciliation in the area of its competence (i.e., dismissal rights). It needs to be mentioned that, Conciliation over the phone (rather than face-to-face meetings) was a controversial initiative. However, research evidence suggests that telephone conciliation has been generally prompt and effective, achieving a settlement in around four-fifths of unfair dismissal cases.<sup>31</sup> Employee's representatives institute is in very common use in France. The rights of the employee's representatives are defended in a way that they have the right to intervene in a range of areas during the grievance procedure. Their role seems very important in France labor market.<sup>32</sup>

## CONCLUSION

In this paper, the value of alternative dispute resolution mechanisms in labor disputes was demonstrated. As a result of the legislative review

31 *Ibid*, p.57.

32 *Ibid*, p. 42.

of Georgia, the gaps that could prevent its effective use were identified. Adding ADR as a mandatory component in individual labor disputes is one of the main challenges in this direction. As an example of a review of international practice, in order to prevent and/or resolve labor disputes in an alternative way, conciliation in individual disputes is the main prerequisite for transferring the dispute to court. Therefore, it would be good to evaluate the effectiveness of the presence of conciliation and mediation procedures as a compulsory prerequisite for considering the dispute before the court.

The role of employee representatives should be notified with regard to prevention of labor disputes. It is better that the representative of the employees should have such a high standard of protection that they can freely protect the interests of the employees.

It is also important not to lose the role of the ombudsman, as an alternative dispute resolution mechanism and to increase its effectiveness by separating its functions from the Labor Inspection Service.

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