MANDATORY MEDIATION IN LABOR DISPUTES: THE PRACTICE OF THE REPUBLIC OF AZERBAIJAN

RAHIMOV Azar Eldar oghlu - Doctor of Philosophy in Law, Doctoral candidate for the Doctor of Science program of the Department of Labor and Environmental Law of Baku State University

Orcid.org\0009-0007-5497-9233
DOI: https://doi.org/10.71404/NP.2025.1.17

Compared to court proceedings, being one of the main methods of alternative dispute resolution, mediation is relatively simple and more transparent from a procedural perspective. It should be noted, however, that attitudes towards the use of mediation vary across countries and, in some cases, are even quite skeptical. Ambiguous attitudes towards mandatory mediation exist in both theory and practice. Overall, it can be said that in order to prevent costly, lengthy, and unsatisfactory legal procedures, there is currently a global trend of actively promoting more efficient mediation. The Republic of Azerbaijan is among the countries that have legislatively established the procedure of mandatory mediation in labor disputes. This paper examines the specifics of applying the mandatory model using a concrete example.

Keywords: labor relations, labor dispute, conflict, claim, mandatory mediation, alternative resolution.

Each of us throughout our lives faces various types of conflict situations and the need to get out of them. Similar prospects are not excluded in labor relations, which play such a significant role in our lives. In practice, conflicts can have different natures, and often at early stages it is possible to identify their nature, to determine whether they stem from material interests or from the relationship between the parties.

Conflicts in organizations and in the workplace are inevitable, despite the fact that they can take on both a constructive and destructive character. Conflict management methods essentially reflect key elements of organizational culture and social norms, which can be called a conflict culture, which in turn has a direct impact on its dynamics and prospects for resolution.

We can conditionally distinguish three types of conflict cultures:

a) A collaborative culture in which collective constructive dialogue, negotiation and joint problem solving prevail.

b) A dominance culture where members of the organization strive to be competitive, trying to outdo others.

c) A culture of repression in which conflicts are collectively suppressed and avoided.

Collaborative cultures tend to create healthier, more productive, and more innovative organizations. They recognize conflict as inevitable and potentially constructive, and encourage integrative problem solving. This helps to optimally use the creative potential of conflicts and prevent their destructive consequences. In addition, such cultures facilitate the possibility of involving additional third parties for mediation, including mediators. In turn, mediation can be applied in various types of conflicts both within the organization (in horizontal and vertical relations), as well as in disputes with suppliers, clients, government agencies and other interested parties. We consider it necessary to note that labor relations are limited not only by the factor of the presence of an organizational culture, since in modern labor relations of the development of the gig economy there is an increasing tendency towards some isolation of the

worker from the team, and the term team in its former understanding is losing its relevance. In this case, perhaps it would be more correct to focus on the formation of a conflict culture in society as a whole.

To prevent costly, lengthy and unsatisfactory legal procedures, there is a trend around the world to actively encourage mediation. Against the background of changes in the format of labor relations, it is safe to say that the requirements for its fundamental institutions are also changing, one of which can be recognized as the institution of resolving labor disputes.

An example of the trend towards promoting mediation in European countries, in particular, are the directives on mediation approved by the European Parliament in 2008 and 2013 (Directive 2008/52/CE and Directive 2013/11/EU). Their aim is to "ensure access to dispute resolution and promote the peaceful settlement of disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and judicial procedures" (Article 1). In addition, mediation has been integrated into a number of European regulations to improve the efficiency of labor relations and reduce the burden on the labor court system (Deakin, 2016).

Thus, we can consider that we are in a period of flourishing mediation throughout the world.

As for labor legislation, it regulates mediation issues differently in different countries. In practice in some countries (Italy, Turkey), the mandatory Mediation procedure directly follows from the requirements of legislation, which often gives rise to disagreements regarding the admissibility of such an approach due to the presence of the principle of voluntariness as fundamental in the theory of mediation itself. That is, given the existence of various forms of alternative dispute resolution, mediation, being one of such forms by its definition, is already voluntary [1].

It should be noted that on March 29, 2019, the Law "On Mediation" (hereinafter referred to as the Law) was adopted for the first time in the Republic of Azerbaijan [2].

In accordance with the Decree of the President of the Republic of Azerbaijan dated April 3, 2019 "On further deepening reforms in the judicial and legal system" and the Law of the Republic of Azerbaijan "On Mediation", a relevant working group was created, the charter of the Mediation Council was agreed upon, and on February 12, 2020, the Mediation Council was established.

The Academy of Justice of the Ministry of Justice of the Republic of Azerbaijan became the first member of the Mediation Council, which was accepted as a member of the Council on March 3, 2020 as the first educational institution for training mediators. On October 20, 2020, a decision was made to accept 17 candidates who applied to the Council for the first time as mediators into the Mediation Council. Currently, the process of preparing candidates and accepting persons who have completed the initial training of mediators and received certificates into the Council is ongoing, and the total number of mediators by the end of 2023 exceeded 300 people [3].

Thus, the factor of professionalism of mediators in the formation of the new institute was taken quite seriously and at first the main role in the formation of a highly professional corps of mediators through their training was actually assigned to such a significant organization as the Academy of Justice.

Even earlier, by the Decree of the President of the Republic of Azerbaijan dated December 6, 2016, No. 1138, the "Strategic Roadmap for the National Economy and Key Sectors of the Economy" was approved, which emphasized the importance of mediation as one of the mechanisms for alternative dispute resolution.

Thus, the legal basis for the formation of the mediation institute was laid in the Republic. Subsequently, corresponding changes were made to a number of regulatory legal acts. In particular, the Labor and Civil Procedure Codes were adapted to the requirements of the innovation.

The law defines mediation as a process related to the settlement of a dispute between the parties on the basis of mutual consent through the mediation of a mediator (mediators).

At the same time, on the basis of Article 3 of the Law, the requirement for the application of a preliminary mediation session is determined in two areas: disputes arising from family relations and disputes arising from labor relations.

That is, the legislation establishes a model of mandatory mediation applicable to the specified categories of labor disputes. In general, in addition to those indicated for the application of mediation, civil and commercial disputes, as well as disputes arising from administrative and legal relations, are also recognized as acceptable areas.

It should be noted that, in accordance with Article 39 of the Law, the rules regarding the application of mandatory mediation in the Republic actually came into force only on July 1, 2021.

What is the element of obligation and how does it work, in particular, in relation to labor disputes?

To begin with, it is necessary to note that voluntariness is enshrined as one of the main principles of mediation along with the equality of the parties, impartiality and independence of mediators, inadmissibility of interference in the mediation process and confidentiality.

The essence of the model is that at least one of the parties (the plaintiff) must undergo a preliminary session procedure. Before the preliminary session, the plaintiff, being the initiator of the claim, is obliged to send the opposing party a corresponding proposal to conduct mediation with a description of the essence of the labor dispute. After the expiration of the waiting period specified by law, the plaintiff contacts the mediator with documents confirming the submission of the relevant proposal. Upon receipt of a corresponding request, the mediator shall send a notification to the opposing party regarding the date and time of the proposed preliminary mediation session upon acceptance of the case into proceedings. It should be noted that the defendant, in accordance with the law, is not obliged to take part in this proposal. If it is possible to involve the parties in the mediation process, it is possible to proceed to a full mediation session. Thus, three main scenarios are considered possible when contacting a mediator:

- obtaining a document on the non-participation of the opposing party (which makes it possible to appeal to the court).
- obtaining a document on the impossibility of continuing the process as a result of a preliminary mediation session (when the parties took part, but did not agree to continue the process. In this case, the parties also have the opportunity to appeal to the court).
- Conclusion of a mediation agreement (the dispute is considered settled).

In essence, the entire prospect of mediation, in our opinion, when generalized, depends on two main factors:

- The constituent elements of a specific dispute (objective and subjective aspects);
- The level of professionalism of the mediator.

Undoubtedly, every dispute or conflict has its own background, factors influencing its dynamics and other components. In our opinion, the most fundamental distinguishing feature of mandatory mediation is precisely the factor arising from the requirement for a legislatively defined mandatory preliminary session. If, according to various sources, the success rate of mediation processes in world practice can vary in the range of 65-85%, then achieving this result in mandatory mediation is much more difficult. This is determined by the very factor that leads the parties to participate in the mediation process. For example, in cases where the parties discuss the use of mediation in advance in the content of the contract, or when, after a specific dispute has arisen, they come to an agreement to use an alternative dispute resolution mechanism, then, in essence, the parties consciously accept and allow for the possible positive prospects of this step. In the case where the parties perceive mediation as a legislatively defined mandatory instance on the path of legal proceedings, the situation, of course, becomes more complicated. This is where the maximum professionalism is required from the mediator. That is, if in the process of mediation the final expected result in case of success is the conclusion of a mediation agreement, then in case of mandatory mediation the process is additionally complicated by a preliminary stage the possible result of which is aimed at obtaining the consent of the parties regarding the admissibility of the use of the mediation process itself.

According to official statistics, only in 2023, the Republic achieved a mandatory mediation rate of 51.4%, while the rate for the previous year, 2022, was approximately 20% [4]. Undoubtedly, taking into account the overall

novelty of the institution of mediation for the Republic, we consider this indicator to be very significant, and the dynamics as a whole positive for further strengthening.

It is important to distinguish between mediation carried out within organizations (workplace mediation) and mediation which is usually carried out in external specialist structures such as ACAS in the UK [5].

In the United States, it is the Federal Mediation and Conciliation Service (FMCS), a small, independent federal agency that plays a vital role in supporting the American economy by preventing, minimizing, and resolving work stoppages and labor disputes. FMCS accomplishes this mission by offering mediation, training and assistance services to employers and unions throughout the country, promoting the development of cooperative labor and management relations [6].

In Azerbaijan, there is no similar state structure specialized in alternative resolution of labor disputes.

Thus, the flexibility of the mediation process compared to the judicial process, ensured by the specified criteria, makes it more oriented towards the interests of consumers. Of course, by resorting to the mediation process, the parties do not lose the opportunity to further appeal to the court. In accordance with the requirements of Article 296 of the Labor Code, a period of one month is set for filing a claim from the moment of detection of a violation of labor rights [7]. In turn, for material claims, a period of one year applies. In accordance with the requirement of the said article, the conditions for suspending the running of the limitation period are determined by the norms of the "Law on Mediation". In accordance with the requirements of Article 35, the running of limitation periods is suspended for the period of application of the mediation process.

Speaking about the accessibility of the mediation process from the point of view of lower costs, here we should take into account some aspects of the legislation. In particular, according to the law "On state duty", the plaintiff is exempt from paying the duty when applying to the court with a claim related to labor activity. At the same time, in accordance with the decision of the Cabinet of Ministers of the Republic of Azerbaijan dated July 15, 2019, No. 308 "On determining the amount of fees and other expenses during a preliminary mediation session", the fee for labor disputes is conditional, 50 Azerbaijani manat (equivalent to 29 US dollars).

In this way, the amount of payment for the preliminary session is regulated, and the amount of the mediator's services for conducting the mediation itself is determined by the price list of each organization and is applied on the basis of the service agreement concluded with the parties. The average cost varies and starts from 50 Azerbaijani manat and up, although the legislation does not define any price limit and is determined exclusively by mediators.

It should also be noted that the legislation (decision of the Cabinet of Ministers of the Republic of Azerbaijan dated August 16, 2019, No. 360) also provides for a category of beneficiaries, whose mediation expenses for the preliminary session are paid from the state budget. These include persons with unemployed status or persons receiving targeted social assistance.

It should be noted that the legislation of the Republic of Azerbaijan does not directly regulate the mediation procedure within organizations. The parties are free to choose and include mediation conditions in the content of the employment contract.

In particular, part three of Article 294 of the Labor Code provides for the possibility of including in the contract other procedures for resolving labor disputes that do not contradict the norms of legislation and are based on the principle of equality of the parties. But this practice is rather limited, although it has quite a significant prospect of expansion in the foreseeable future.

In our opinion, a significant gap and a factor to a certain extent holding back the wider use of mediation in labor relations can be considered the absence of relevant clauses on mediation in the standard employment contract (appendix to the Labor Code), as well as the absence of a norm regulating the procedure for voluntary and intra-organizational mediation in the Code itself. We believe that the adoption of such an insignificant change in legislation at first glance, as well as the addition of a specific

rule on the application of mediation to the legislation, can significantly improve the practice of applying voluntary mediation, as well as intra-organizational mediation.

There is a significant lack of comprehensive measures aimed at educating the public in the area of alternative dispute resolution. Despite the fact that the Law on Mediation was adopted in 2019, the level of mistrust towards the institution remains high. This situation is exacerbated by insufficient awareness not only among the population, but even in the professional environment.

Thus, one of the innovations in this area can be considered the provision of mediation services in the "DOST" centers. The DOST project, which opens a qualitatively new stage in the field of social services, was created with the aim of ensuring transparency, efficiency and satisfaction of citizens and was approved by the Decrees of the President of the Republic of Azerbaijan No. 229 dated August 9, 2018, and No. 387 dated December 10, 2018, and the first DOST center was opened on May 9, 2019. The centers provide free access to more than 150 social services, including labor relations, on a one-stop-shop basis. Also, by directly contacting the specified centers, it is possible to receive an initial consultation on the fact of violation of labor rights and, if desired, initiate the consideration of a labor dispute through mediation or file an official appeal to the Labor Inspectorate to ensure the appropriate measures provided for by law [8].

Thus, taking into account the fact that the majority of persons who have encountered violations of labor rights primarily prefer to appeal to the supervisory function by filing a complaint with the Labor Inspectorate in order to initiate proceedings for an administrative offense and the fact that the DOST centers provide a whole range of services in the field of labor relations, this decision can also be considered very significant from the point of view of the previously voiced aspects.

Although some authors criticize mandatory mediation, opposing it in some aspects even to the foundations of law [9], in our opinion, the need to use mandatory mediation is supported even by simple "pragmatism" and "skepticism" towards everything new, inherent in us at a subconscious level. This tool is simply necessary, at least in the early stages of the development of national systems of alternative dispute resolution. Potential beneficiaries should be given the opportunity to experience all the benefits of mediation, the main one of which, in our opinion, can be recognized as the possibility of maintaining, and sometimes even improving, relationships between the parties, as well as reducing conflict in society as a whole. Thus, the adoption of comprehensive measures to popularize various forms of alternative resolution of labor disputes and, in particular, mediation at the state level can become a significant and effective step with a very noticeable social connotation.

As a result, we believe that despite the formation of the institution of mediation in almost all post-Soviet countries, the practice of the Republic of Azerbaijan can be recognized as one of the most successful and of considerable interest from the point of view of a more detailed study and adoption of experience, including in the practice of resolving labor disputes.

List of references and sources

1. Berman, L.J. Voluntariness in Mediation: An Historical Perspective:
https://www.mediationtools.com/articles/ART%20Voluntariness%20in%20Mediation.pdf
2. Law of the Republic of Azerbaijan "On Mediation": https://e-qanun.az/framework/41828
3. Information from the official website of the Mediation Council: http://mediasiya.gov.az/haqqimizda/tarix
4. Information from the unified judicial portal of the Republic of Azerbaijan: https://courts.gov.az/mediators
5. Official website ACAS: https://www.acas.org.uk/
6. Official website FMCS: https://www.fmcs.gov/
7. Labor Code of the Republic of Azerbaijan: https://e-qanun.az/framework/46943
8. Official website DOST: https://dost.gov.az/
9. Bartlet M. Mondatory Mediation and the Rule of Law: https://journals.sas.ac.uk/amicus/article/download/5066/4962/8928