

Labour Institutions (Mediation and Arbitration Guidelines)

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THE LABOUR INSTITUTIONS ACT, 2004
(No. 7 of 2004)

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RULES
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Made under section 15(1)(f)

THE LABOUR INSTITUTIONS (MEDIATION AND ARBITRATION GUIDELINES)
RULES, 2007

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PART I
PRELIMINARY PROVISIONS

Citation 1. These Rules may be cited as the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 and shall come into operation on the date of publication in the *Gazette*.

**Applica-
tion** 2.—(1) These Rules aim to guide Mediators and Arbitrators appointed by the Commission in the exercise of their powers and functions and assist parties to resolve disputes provided that every mediation and arbitration shall be considered on its own merit.

(2) Where there is any conflict between these Rules and the provisions of any legislation, the legislation shall apply and mediations or arbitrations shall be conducted in accordance with any rules for mediation or arbitration proceedings that may be published.

PART II
MEDIATION

**Mediation
process** 3.—(1) Mediation is a process in which a person independent of the parties is appointed as mediator and attempts to assist them to resolve a dispute and may meet with the parties either jointly or separately, and through discussion and facilitation, attempt to help the parties settle their dispute.

(2) A mediator may make recommendations to the parties suggesting for settlement if, the parties to the dispute agree or the mediator believes it will promote settlement. Recommendations made are not binding on the parties; It is only persuasive and aims to assist the parties to settle a dispute.

(3) The mediator has 30 days from the time the dispute is referred to the Commission, to assist the parties in resolving the dispute.

(4) The parties may extend this period by an agreement in writing.

(5) The mediator shall issue a certificate at the end of the mediation, identifying the nature of the dispute and stating whether the dispute has been resolved or not. This certificate may be issued within the 30 days period if, the mediator decides that mediation has failed.

4.-(1) It is a fundamental principle of mediation that the parties ultimately choose whether to settle the dispute or not. The recommendations of the mediators shall not be binding unless the parties agree.

Fundamental principles of mediation

(2) Whether the agreed parties have settled or not, the mediation under the employment and Labour Relations Act is compulsory and parties shall attend the mediation and attempt to resolve the dispute without strikes and lockouts or arbitration.

5.-(1) A mediator has powers to determine how the mediation shall be conducted.

Powers of a mediator

(2) The powers of the mediator include—

- (a) to require further mediation meetings between the parties, after the initial hearing scheduled by the Commission, provided that the mediator may do this after the period set aside for mediation has expired and in deciding whether to require further meetings, the mediator may consider the following—
 - (i) the prospects of progress towards settlement;
 - (ii) the consequences of a settlement or non-settlement being reached;
 - (iii) the interests of the parties; and

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(iv) the public interest generally.

(b) to respond in particular ways if a party or parties attend mediation hearings;

(c) to summon a person for questioning, attending a hearing, and order the person to produce a book, document or object relevant to the dispute if that person's attendance may assist in resolving the dispute.

Disputes
requiring
media-
tion

6.-(1) The Commission may refer a dispute to arbitration before it has been mediated or set down the mediation and arbitration hearing on the same date. In contemplating this, the Commission may consider the following-

- (a) the consequences of any delay in the mediation proceedings;
- (b) the prospects of settlement at mediation;
- (c) the effective utilization of the Commission's resources;
- (d) the interests of the parties; and
- (e) the public interest generally.

(2) Parties may agree to submit a dispute to arbitration.

(3) Nothing shall prevent trade unions and an employer or employers' association to conclude collective agreements providing for the resolution of dispute outside of the Employment and Labour Relations Act.

(4) Subject to clauses 2 and 3, a mediator on convening the mediation and after allowing the parties to make submissions in this regard may, rule that the dispute has been wrongly referred to mediation through the Commission and the mediator may then dismiss the referral of the dispute to mediation.

Representa-
tion

7-(1) A party to a dispute may be represented by-

- (a) a member or an official of that party's trade union or employers' association; or
- (b) an advocate.

Confide-
ntiality

8.-(1) Without prejudice mediation is a confidential process aimed at helping the parties to a dispute to reach an agreement.

(2) Information disclosed during mediation may not be used as evidence in any other proceedings, unless the party disclosing that information states otherwise.

(3) The mediator may not be compelled to be a witness in any other proceedings in respect of what happened during the mediation.

(4) The confidential nature of mediation proceedings prevents the Mediator, the parties and their representatives from disclosing any information obtained during mediation to any third party.

9.-(1) Each mediation may vary depending on the parties involved, the style of the Mediator, the nature of the dispute and the circumstances involved and mediations may involve four distinct stages:-

Stages of
mediation
process

- (a) introduction;
- (b) gathering information;
- (c) exploring options and developing consensus; and
- (d) conclusion.

10.-(1) The Mediator shall be prepared, having read the referral documents and any law applicable to the dispute.

Mediator
to read
referral
docu-
ments

(2) The Mediator shall introduce and welcome the parties, determine the language in which proceedings are to be conducted and if there is a need for translation, ensure the presence of an interpreter.

(3) The Mediator shall declare conflict of interest if any before the mediation.

(4) The Mediator shall withdraw from the proceedings, whether or not there is an objection from the parties, if the Mediator believes there is a reasonable apprehension of bias or partiality.

(5) The Mediator should give the parties an outline of how the mediation will be conducted and dealt with any concerns or queries raised by the parties about the process.

(6) The Mediator shall inform the parties of any logistic arrangements, and in appropriate circumstances, obtain the

commitment of the parties to certain ground rules during the process and these may include the understanding of the following—

- (a) that what is said in side meetings between the mediator and one of the parties shall not be conveyed to the other party unless it has been agreed;
- (b) that what is said during mediation will not be conveyed to anyone outside the process without the consent of all parties;
- (c) that the Mediator will not be called by any of the parties as a witness in any subsequent proceedings;
- (d) that the proceedings are off the record and conducted on a without prejudice basis;
- (e) a commitment from the parties to respect each other, the mediator and the process. They should accordingly give each other the opportunity to speak, as directed by the mediator and shall conduct the proceedings in a manner that maximises the possibility of a settlement being reached; and
- (f) that the parties determine whether or not they wish to settle, but the mediator controls the process and may decide when the parties may or meet in a joint session separately.

Information gathering stage

11. The mediator shall gather information about the dispute from the parties in a joint session.

- (a) inviting each party to give their views on the dispute;
- (b) allowing each party an opportunity to ask questions for clarification and to respond to any version given;
- (c) asking questions to the parties in an attempt to understand the real interests of the parties, the causes of the conflict, and what the parties expect to achieve; and
- (d) summarising the issues that need to be addressed during the mediation.

Exploring options and developing consensus stage

12.—(1) The Mediator may commence exploring options with the parties either in joint sessions or separately with any of the parties, depending on which options would best facilitate progress being made and may switch between these options and consider other process options such as—

- (a) establishing a sub-committee from the parties;
- (b) meeting with person or persons who provide a mandate to a party.

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(2) The Mediator should consider the order in which issues are to be addressed and attempt to generate possible trade offs or concessions between different issues.

(3) The Mediator should assist the parties to reflect on the consequences of the choices available to them and ensuring that they have considered all the implications involved.

(4) The Mediator should attempt to widen the possible range of solutions available to the parties.

(5) The Mediator should draw on the mediator's experiences in dealing with similar disputes in other industries or areas.

(6) The Mediator should ensure that the parties have in mind the consequences of a failure to reach an agreement and that they compare carefully the costs of settlement against the costs of stage of non-settlement.

13.-(1) The Mediator shall carefully keep record of proposals and counter proposals made by all parties and at an appropriate stage, draft a document reflecting consensus between the parties.

Mediator
to
keep
record

(2) Where the parties have settled the dispute, the Mediator shall draft a settlement agreement.

(3) The settlement agreement shall ensure that it-

- (a) is clearly understood by all parties;
- (b) does not create further disputes;
- (c) is clear and concise;
- (d) includes a procedure for dealing with any disputes that may arise from the application or interpretation of the agreement;
- (e) caters for any ratification process required; and
- (f) is signed by all parties to the dispute.

(4) Where settlement of the dispute is not reached, the Mediator should ensure that -

- (a) the issues in dispute are narrowed down as much as possible, by getting the parties to agree in writing on those issues in dispute which have been eliminated;

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(b) the parties are aware of their rights to process the dispute further in terms of the Act.

(5) The Mediator shall complete the necessary documentation at the end of the mediation, identifying the nature of the dispute and certifying that the dispute has been resolved or unresolved.

(6) The Mediator shall remember that the parties to the dispute are involved in an ongoing relationship and therefore the mediation process should accordingly be conducted in a manner that hopefully contributes to the growth of that relationship, irrespective of whether the particular dispute has been resolved or not.

Consequences of failure to attend mediation

14.-(1) Where a party is not present at the commencement date and time set, for the mediation, the Mediator shall wait for a reasonable time to give the party an opportunity to arrive.

(2) Where a party fails to appear at mediation, the mediator may do the following—

(a) in the case of a complaint the Mediator may postpone the hearing in accordance with rule 15 or may—

- (i) dismiss the complaint if the referring party fails to attend a mediation hearing during the initial 30 days period;
- (ii) decide the complaint if the other party to complaint fails to attend a mediation hearing.

(b) in the case of a dispute of interest, the mediator may postpone the hearing in accordance with rule 15 or may—

- (i) extend the 30 days period by a further 30 days, where the party referring the dispute fails to attend a mediation hearing during the initial 30 days period; or
- (ii) shorten the 30 days period where a party to the dispute other than party to the complaint fails to attend such a hearing.

(3) Subject to sub-clause (2) (a) (ii), where the party has failed to attend a hearing, it does not warrant the Mediator to find in favour of the party present.

(4) Subject to sub-clause (2) (b) (ii), where the Mediator brings forward or delays a party's right to participate in a strike or lockout the Mediator may shorten the 30 days period to the date of the mediation hearing, thereby giving the party present the right to immediately commence the steps to engage in a lawful strike or lockout.

(5) A decision by a Mediator resulting from the failure of a party to attend mediation, may be reversed by the Commission if it believes there were good grounds for failure to attend.

(6) An application to the Commission for these purposes shall be in the prescribed manner.

15.-(1) Irrespective of whether or not there is an agreement between the parties, a Mediator shall postpone a hearing in the following circumstances—

Post-
pone-
ments

- (a) there is a good reason to do so;
- (b) other parties to the dispute are not unduly prejudiced as a result; and
- (c) there are prospects that the dispute may be settled as a result of the postponement.

16.-(1) Where the parties to the dispute consent, an Arbitrator may suspend proceedings and resolve the dispute through mediation.

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media-
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process

(2) The same person may be assigned to both mediate and arbitrate a dispute.

(3) The person shall not meet with any of the parties separately during the mediation process, as this may create a perception of biasness or partiality.

(4) The person shall, during the mediation phase, attempt to focus on areas of settlement as opposed to the factual issues in dispute.

(5) Where the person is not able to settle the dispute during mediation, an attempt shall be made to narrow down the issues in dispute as much as possible, to reduce the amount of evidence to be led during arbitration.

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Enforce-
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tlement
agree-
ments

17.-(1) The Commission may, by an agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission an arbitration award.

(2) An arbitration award can be served and executed in the Labour Court as if it was a decree of a court of law.

PART III
ARBITRATION

Arbitra-
tion
process

18.-(1) Arbitration is a process in which a person appointed as an Arbitrator for resolving a dispute determines the dispute for the parties.

(2) The process involves a hearing where parties present evidence and argument.

(3) The Arbitrator's decision is provided with reasons in a written award.

(4) An arbitration award is binding on the parties to the dispute and is enforceable before the Court.

(5) No appeal shall lie against an arbitrator's award.

(6) Notwithstanding the provision of sub-rule (5) an application may be made to the Court to set aside the award on the basis of irregularities in the arbitrator proceedings.

Powers
of arbi-
trator

19.-(1) An Arbitrator has the power to determine how the arbitration should be conducted.

(2) The powers of the Arbitrator include to—

(a) administer an oath or accept an affirmation from any person called to give evidence;

(a) summon a person for questioning attending a hearing, and order the person to produce a book, document or object relevant to the dispute, if that person's attendance may assist in resolving the dispute.

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20.-(1) Dispute shall first be resolved through mediation.

Disputes
requiring
arbitra-
tion

(2) The Mediator may refer a dispute for arbitration before mediation or set down the mediation and arbitration hearing on the same date. In contemplating this, it may consider the—

- (a) consequences of any delay in the arbitration proceedings;
- (b) prospects of settlement at mediation;
- (c) effective utilization of the Commission's resources;
- (d) interests of the parties; and
- (e) public interest generally.

(3) The types of disputes referred for arbitration include —

- (a) a dispute of interest if the parties to the dispute are engaged in an essential service;
- (b) a complaint over the following-
 - (i) the fairness of an employee's termination of employment;
 - (ii) a contravention of labour legislation or breach of contract, in which the amount claimed is within the pecuniary jurisdiction of the Resident Magistrates' Court;
 - (iii) any dispute referred for arbitration by the Court.

(4) A complaint means a dispute over the application, interpretation or implementation of rights emanating from an agreement, contract of employment or labour legislation and a dispute of interest means any labour dispute other than a complaint.

21.-(1) A party to a dispute may be represented by—

Repre-
sentation

- (a) a member or an official of that party's trade union or employers' association; or
- (b) an advocate.

22.-(1) Subject to the discretion of the Arbitrator as to the appropriate form of proceedings, a party to the dispute may give evidence, call witnesses, question witnesses and present arguments.

Stages
of arbi-
tration
process

(2) The arbitration process involve the following five stages—

- (a) introduction;
- (b) opening statements and narrowing of issues;
- (c) evidence;
- (d) argument; and
- (e) award.

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Introdu-
ction
stage

23.-(1) The Arbitrator shall introduce and welcome the parties, obtain a register of all parties in attendance, determine the language in which proceedings are to be conducted and if there is a need for interpretation, ensure the presence of an interpreter.

(2) The Arbitrator shall explain the arbitration process to the parties particularly if they have no previous experience of the process answer any questions raised by the parties and ensure that the parties have a clear understanding of the process.

(3) The Arbitrator shall disclose conflict of interest if any and whether has had any contact with any of the parties before the arbitration.

(4) The Arbitrator shall withdraw from the proceedings, whether or not there is an objection from the parties, if the Arbitrator believes there is a reasonable apprehension of bias or partiality.

(5) The Arbitrator shall clarify the manner and extent to which the arbitration proceedings are to be recorded, and ensure that the necessary recording takes place.

(6) Prior to the commencement of the opening statements, an Arbitrator shall deal with preliminary issues that may arise.

(7) The Arbitrator may equally have concerns in regard to some of the issues, having read through the documentation prior to the proceedings.

(8) In the event of preliminary issues being raised each party shall be given the opportunity to present evidence and arguments.

(9) The Arbitrator may elect to decide the preliminary point before proceeding with the arbitration or to conduct the arbitration and decide the preliminary point at the time of considering all the evidence in the matter.

(10) In some instances it may be necessary to determine the preliminary points before proceeding with the arbitration.

24.-(1) Each party to the dispute shall provide a concise opening statement containing the following-

- (a) a statement of the issue or issues in dispute;
- (b) a brief outline of the dispute; and
- (c) an indication of the outcome that party will seek at the conclusion of the arbitration.

Opening statements and narrowing of issues

(2) The Arbitrator shall emphasize to the parties that what is contained in their opening statements does not constitute evidence in respect of the issues in dispute, unless admitted between the parties.

(3) The first party to make an opening statement shall present its case first throughout the proceedings. If the parties do not agree about who shall start, the Arbitrator shall be required to make a ruling in this regard.

Provided that, in a dispute over an alleged unfair termination of employment, the employer will be required to start as it has to prove that the termination was fair.

(4) At the conclusion of the opening statements, the Arbitrator shall attempt to narrow down the issues in dispute as much as possible and explain to the parties that the purpose of doing so is to eliminate the need for evidence in respect of factual disputes.

(5) Where an Arbitrator is required to determine a dispute in which no factual disputes occur, the parties may argue their respective cases on the basis of their agreed facts.

(6) Parties shall provide copies of each document intended to be used as evidence, for the Arbitrator and for each party to the dispute.

25.-(1) The parties shall attempt to prove their respective cases through evidence and witnesses shall testify under oath through the following process-

Evidence stage

- (a) examination in chief:-
 - (i) the party calling a witness who knows relevant information about the issues in dispute obtains that information by not asking leading questions to the person;

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- (ii) parties are permitted to ask leading questions during an examination in chief.
 - (b) cross examination:-
 - (i) the other party or parties to the dispute may, after a witness has given evidence, ask any questions to the witness about issues relevant to the dispute;
 - (ii) obtain additional information from the witness or challenge any aspect of the evidence given by the witness; leading questions are allowed at this stage of proceedings.
 - (c) re-examination, the party that initially called the witness has a further opportunity to ask questions to the witness relating to issues dealt with during cross-examination and the purpose of re-examination is to correct or clarify evidence covered during cross-examination.
- (2) Arbitrators are entitled to ask questions to a witness at any stage, but shall attempt to keep most of their questions until the end of the cross-examination of that witness.
- (3) The Arbitrator shall give the party cross-examining, a further opportunity to ask questions arising from the Arbitrator's questions and the party conducting the re-examination may take into account all questions asked by the other party or the Arbitrator.

26.-(1) Having presented the evidence parties are given opportunity to make closing arguments based on the facts admitted or presented to the Arbitrator.

Closing
argument

- (2) The Arbitrator may choose to alert the parties to specific issues to be canvassed during their closing arguments.
- (3) The closing arguments shall contain the following-
 - (a) a restatement of the issue or issues in dispute;
 - (b) an analysis of the facts; and
 - (c) submissions.
- (4) Parties shall address the Arbitrator with persuasive versions supported by most legal principles or authorities shall be provided to support their case.

27.-(1) The Arbitrator shall write and sign a concise award containing the decision within the prescribed time with reasons. Award stage

(2) The award shall be served on all parties to the dispute in the manner specified in the rules for mediation and arbitration proceedings.

- (3) An award shall contain the following—
- (a) details of the parties;
 - (b) the issue or issues in dispute;
 - (c) background information (i.e. information admitted between the parties);
 - (d) summary of the parties' evidence and arguments;
 - (e) reasons for the decision; and
 - (f) the order (the precise outcome of the arbitration).

28.-(1) When a party fails to attend an arbitration hearing, an Arbitrator may do the following— Consequences of failure to attend the arbitration

- (a) where a party who referred the dispute to the Commission fails to attend the hearing, the Arbitrator may dismiss the matter or postpone the hearing.
- (b) where a party against whom relief is sought fails to attend, the Arbitrator may proceed in the absence of that party or postpone the hearing.

(2) Where an Arbitrator proceeds in the absence of a party, the party present has to prove its case and to present an opening statement, evidence, and any argument in support of its case.

(3) In the absence of the opposing party there shall be no cross-examination of witnesses called and the Arbitrator may question witness or witnesses to enable the Arbitrator to decide whether the party present has proved its case.

29.-(1) An Arbitrator shall postpone a hearing in the following circumstances:— Postponements

- (a) if there is a good reason to do so; and
- (b) other parties to the dispute are not unduly prejudiced as a result of postponement.

(3) Re-engagement shall be subject to any terms of employment that the arbitration may decide.

(4) For the purposes of these Rules re-instatement means that an employee shall be put back in the job unconditionally.

(5) Subject to sub-rule (2), an Arbitrator may make an award of appropriate compensation based on the circumstances of each case considering the following factors—

- (a) any prescribed minima or maxima compensation;
- (b) the extent to which the termination was unfair;
- (c) the consequences of the unfair termination for the parties, including the extent to which the employee was able to secure alternative work or employment;
- (d) the amount of the employee's remuneration;
- (e) the amount of compensation granted in previous similar cases;
- (f) the parties' conduct during the proceedings; and any other relevant factors.

33.—(1) An Arbitrator may, on application by a party to the dispute or on the Arbitrator's own accord, correct any clerical mistake or error arising in the award from any accident slip or omission.

Correc-
tion
of
awards

(2) In carrying out the function provided in sub-rule (1), an Arbitrator shall follow the procedure set out in the Rules for mediation and arbitration proceedings.

(3) Arbitrators shall ensure that parties do not interfere with the final and binding nature of an award.

Dar es Salaam,
9th March, 2007

ADAM NJANGA SIMBEYE,
Chairperson of the Commission