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DO ALTERNATIVE DISPUTE RESOLUTION METHODS AND EMPLOYMENT DISPUTES FIT LIKE A HAND AND GLOVE? ALTERNATIVE DISPUTE RESOLUTION IN INDIVIDUAL EMPLOYMENT DISPUTES

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Abstract

There is a growing focus on resolving disputes through Alternative Dispute Resolution (ADR) methods in the world. This article explores ADR's role in settling employment-related disputes. It highlights the distinctive characteristics (sui generis) of employment disputes with particular focus on the power imbalance between parties and examine how ADR aligns with the that of employment disputes. It considers advantages and disadvantages of employing ADR within the realm of employment law by looking from the perspectives of both employers and employees.

Article reveals that the advantages and disadvantages of ADR are interconnected. Furthermore, a single advantage might also come with a disadvantage. These drawbacks mainly rely on the potential power imbalance. However, most disputes inherently involve some degree of power imbalance, and because mere power imbalance, completely disregarding ADR methods

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would not be reasonable unless parties are unable to seek their rights in courts or tribunals after attempting ADR.

Keywords
• ADR• Mediation• Arbitration • Employment Disputes •Power Imbalance

ALTERNATİF UYUŞMAZLIK ÇÖZÜM YOLLARI VE İŞ UYUŞMAZLIKLARI UYGUN BIR TERCİH MİDİR? BİREYSEL İŞ ANLAŞMAZLIKLARINDA AUÇY

Öz
Alternatif Uyuşmazlık Çözümü Yöntemleri (AUÇY) aracılığıyla uyuşmazlıkları çözme hususunda tüm dünyada artan bir eğilim vardir. Bu makale ise AUÇY'nin iş uyuşmazlıklarını çözmedeki rolünü araştırmaktadadır. Bu amaçla, iş uyuşmazlıklarının kendine özgü yapısını inceler, özellikle taraflar arasındaki güç dengesizliğine odaklanır. AUÇY'nin iş uyuşmazlıklarının çözümü için uygun olup olmadığını inceler. Bu bağlamda, bu uyuşmazlıkların çözümünde AUÇY'nin kullanılmasının avantajlarını ve dezavantajlarını işverenlerin ve çalışanların bakış açılarından değerlendirerek ele alır.
Bu AUÇY'nin avantajlarının ve dezavantajlarının birbiriyle bağlantılı olduğunu ortaya koymaktadır. Diğer bir deyişle, bir avantajın aynı zamanda bir dezavantaj olarak tezahür edebileceğini belirtir. Bu dezavantajlar genellikle potansiyel güç dengesine dayanmaktadır. Ancak, çoğu anlaşmazlığın doğası gereği bir dereceye kadar güç dengesizliği içermektedir ve sadece güç dengesizliği nedeniyle, AUÇY yöntemlerini tamamen göz ardı etmek, tarafların sonrasında mahkemelere erişim hakkına sahip olduğu müddetçe, mantıklı olmayacaktır.

Anahtar Kelimeler
• AUÇY • Arabuluculuk• Tahkim • İş Uyuşmazlıkları • Güç Dengesizliği

INTRODUCTION

Like taxes and death, disputes are an inevitable destiny of human beings.[1] This is a valid argument for any area of law. The central role of the law is to fairly resolve disputes to achieve just outcomes. However, where disputes involve people who are angry and aggrieved, the resolution of disputes is more difficult and displeasing. This situation is more prevalent in individual employment disputes where emotions run high, and the reputation and career of parties are at risk since personal matters

[1] **BITTEL**, Patrici: "Arbitration: Is This Where We Were Headed" Alternative Dispute Resolution Employment Relations, 3, 2001, pg.49.

are generally at the heart of these disputes.[2] Thus, the resolution of employment disputes via ADR (Alternative Dispute Resolution) mechanisms in areas such as unjust dismissal, discrimination and harassment cases requires further examination to understand to what extent ADR methods fit the resolution of employment disputes.[3]

There is an increasing emphasis on settlement through ADR methods and disputants are facing ADR methods sometimes as a part of employment litigation and sometimes as an independent and private proceeding before litigation.[4] In this context, this article will examine the role of ADR in resolving employment disputes. Firstly, it will express reasons for an increase in the number of employment disputes and a need for ADR. Secondly, it will investigate the relationship between ADR and the distinct features of employment disputes. Thirdly, it will analyse the advantages and disadvantages of ADR in the context of employment law. Finally, it will look at the relationship between ADR and employment disputes from employers' and employees' perspectives, respectively.

I. THE REASONS FOR THE INCREASE IN INDIVIDUAL EMPLOYMENT DISPUTES AND ADR

According to ILO sources, there has been a widespread rise in the number of employment disputes across the world and this trend brings about some concerns such as excessive caseloads leading to delays, and limited access to resolution mechanisms.[5] ADR might be a faithful servant to eliminate the shortcomings of employment litigation. On this basis, this section will investigate the reasons for the increase in employment

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2 **KALLIPETIS**, Michel: "Mediation in Employment Disputes" in NEWMARK, Christopher/**MONAGHAN** Anthony (editor): Butterworths Mediators on Mediation Leading Mediator Perspectives on the Practice of Commercial Mediation, Tottel Publishing, 2005, pg.183.

3 **EVANS** Frank, **SLOAN** Shadow: "Resolving Employment Disputes through ADR Processes", South Texas Law Review, 37, 1996, pg.745. KALLIPETIS, p.185.

4 **EBISUI**, Minawa/**COONEY**, Sean/**FENWİCK** Colin: "Resolving Individual Labour Disputes: A General Introduction" **EBISUI**, Minawa/**COONEY**, Sean/**FENWİCK** Colin (editor): Resolving Individual Labour Disputes: A Comparative Overview, ILO, 2016, pg. 24-25.

5 INTERNATIONAL LABOUR OFFICE, Social Dialogue: Recurrent Discussion Under the ILO Declaration on Social Justice for a Fair Globalization, Report VI, International Labour Conference, 102nd Session Geneva, 2013, pg.34-35.

disputes at a global level. Indeed, these reasons indirectly constitute elements leading to ADR developments in the context of employment law.

The first reason is an 'ongoing revolution' in employment law. That is, the increasing diversity of the workforce, employment legislation producing new workplace rights, the strengthening of anti-discrimination laws, and the willingness of employees to bring a claim against employers.[6] These factors might cause an increase in the number of employment disputes. For instance, in Turkey, whereas in 2004, the number of cases brought to the employment court was almost 190,000, the number was about 425,000 in 2014, and around 540,000 in 2018.[7]

Secondly, the components of employment disputes are getting increasingly complex. Massive changes in employment relationships reflect fundamental changes in our daily and work life. For instance, increased mobility and diversity have led to more conflicts in expectations and values among employees.[8] Laura Gilbert, in this regard, claims that basic questions such as 'what can I expect from my employer?' and 'is there anything I can do to ensure my position and the progress of my career in this company? If so, what?' no longer have simple answers.[9] Given that misperceptions in a workplace, such as what constitutes sexual harassment or when age constitutes a factor in discrimination cases, might fuel this fire.[10]

The third reason is economic crises and technological developments such as automation and on-demand working platforms. Throughout history, employers have struggled with economic crises having negative impacts on the production and growth rate of businesses. For instance, in the great recession of 2008 in Europe, many employees faced

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6 **MCDERMOTT**, Patrick/ **BERKELEY**, Eliot: Alternative Dispute Resolution in the Workplace, Greenwood Publishing Group, 1996, xv.

7 **OZDEMİR**, Eda: "Is Mahkemelerinin Isleyisi ve Bireysel is Uyusmazliklarinin Alternatif Cozum Yontemleri" Calisma ve Toplum, 2015, pg.187. Ministry of Justice, Judicial Statistics (2018) pg.193. https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/2182019155518istatistik2018.pdf (accessed 21.07.2023)

8 **EWING**, David: Justice on the Job, Harvard Business School Press, 1989, pg.19.

9 **GILBERT**, Laura: "Reducing the Litigious Climate in Organizations" Alternative Dispute Resolution in Employment Relations, 1, 1999, pg.63.

10 **GILBERT**, pg.63.

unemployment since their contracts were ended or they were laid off.[11] Besides to economic crises, employers need to meet the necessities of technological development in the workplace so that they can compete with other companies.[12] On this basis, while automation refers to 'a replacement of human labour by digitally enabled machines for many tasks within the production and distribution process', an 'on-demand working platform' is digital working based on the use of algorithms incorporating encoded rules and automated monitoring.[13] These developments might naturally affect the number of disputes because many employers might seek to either amend their workplace policies and employees' contracts such as changing working hours or dismiss a large number of employees, causing an increase in the number of employment disputes.

The fourth element is that employment disputes are sometimes funded on a 'no win no fee' basis. No win no fee is known as a 'contingency fee' in the US. It means that a law firm will receive payment only if a client is awarded compensation; otherwise, if the case is not successful, the law firm would not be entitled to receive any fee.[14] In this regard, it should be highlighted that the relationship between lawyer and individual is a contract of mandate, regulated by contract law principals, other than employment contract, regulated by employment law principals. In some circumstances, in the Turkish system, a lawyer bears even the court fee and other expenses if they believe that complainants are highly likely to win the case. This is why no win no fee, if it is available, may encourage employees to bring a claim against employers sometimes even over trivial matters.

In this regard, parties and governments ordinarily tend to seek to resolve employment disputes without getting involved in litigation. Even if a claim has been made, governments and courts encourage parties to

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11 **JUNANKAR**, Raja, "The Global Economic Crisis: Long-Term Unemployment in the OECD", IZA Discussion Paper, No. 6057, pg.4.

12 **SUZEK**, Sarper, Is Hukuku, 9th edn, Beta 2013, p.19.

13 **FERNÁNDEZ-MACÍAS**, Enrique: Automation, Digitalisation and Platforms: Implications for Work and Employment, Publications Office of the European Union, Luxembourg, 2018, p.15.

14 **WALKER**, Bernard/Hamilton: "Representatives and Employment Rights Disputes: What Works and What Doesn't?" Journal of Industrial Relations 54(5) (2012) pg.598.

resolve the dispute out-of-court.[15] For instance, in *Thompson v. Reading Borough Council,* the parties were encouraged by the Employment Appeal Tribunal to use ADR mechanisms by suggesting that ACAS (Advisory Conciliation and Arbitration Services) conciliation is the best way to resolve disputes if parties are unable to agree on the matter in direct negotiation. If parties are already able to negotiate without the involvement of ACAS, this is better since using ACAS would incur extra expenditures.

II. THE DISTINCT CHARACTERISTICS OF INDIVIDUAL EMPLOYMENT DISPUTES AND ADR

Identifying the distinguishing features (*sui generis*) of employment law helps to better understand the relationship between employment disputes and ADR methods. The first difference is that the physical and mental efforts of employees are dedicated to the needs of the employer in exchange for a wage or payment in employment relationships.[16] Mark Freedland and Simon Deakin identify this difference as a central feature of employment contracts and they call this relationship the 'wage-work bargain'.[17] Therefore, the employment contract needs to be protected by law and it differs from other areas of law such as contract law in terms of freedom of contract. It entails several principles in favour of employees, for example, maximum working hours and national minimum wage. That is, employers cannot pay remuneration lower than the national minimum wage and they cannot force employees to work longer than a statutory maximum of working hours. These principles restrict the freedom of contract in employment relations.

By contrast, the law also tends to protect the employer's managerial prerogatives or freedoms. In other words, employment law takes account of the economic, technical, and financial choices of employers.[18] For example, employment law regulates some circumstances such as continuing and unauthorised absence from work or committing a crime in a

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15 **GIBBONS**, Michael: Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain, Department of Trade and Industry, 2007, pg.31.

16 **SISLI**, Zeynep: "Bireysel Is Uyusmazliklari ve Yargisal Cozum" The Journal of Ankara Bar Association, 2, 2012, pg.48-49.

17 **FREEDLAND**, Mark/**DEAKIN**, Simon: "The Exchange Principle and the Wage-Work Bargain" in FREEDLAND/Mark (Editor), The Contract of Employment, Oxford University Press, 2016, pg.53.

18 **SUZEK**, pg.18.

workplace in which the employer can terminate the employment contract without notification.[19]

Because a central matter of employment contracts is the fundamental rights of employees, arguments against ADR in the context of employment law are based on these rights. In this regard, it is asserted that the State, whose duty is to control and protect employees' rights, is the third party of employment contracts.[20] That is, States protect employment rights by creating employment laws and establishing institutions such as employment courts/tribunals so that any party of the relationship can effectively seek to assert their rights.

It is argued that an employee who prefers ADR might be seen to be voluntarily making their fundamental rights negotiable and relinquishing their legal rights when an alleged claim relies on the violation of a clear principle of employment law.[21] However, ADR should not be construed as a process that undermines statutory provisions; rather, it should be viewed as an effort to resolve disputes outside of the courtroom unless there exists an obstacle to pursuing a claim in a court/tribunal.

Secondly, there is typically a power disparity in employment disputes and employers are regarded as the more powerful side of an employment relationship.[22] The 'power' can shortly be described as 'the capacity to influence the behaviour of others, emotions and the course of events' and the power imbalance can be defined as a circumstance where one party is more powerful than another party.[23] However, power is not necessarily static. It means that if the circumstances change, the notion of power might change.[24] To exemplify, an employee might be a more powerful party in the relationship and the imbalance might be in an

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19 Employment Act No 4857 (2003), Article 25.

20 **SISLI**, pg.48-49.

21 **DOLDER**, Cheryl: "The Contribution of Mediation to Workplace Justice" Industrial Law Journal (2004) pg. 323. **YAGCIOGLU**, Kaan: "Yeni Is Mahkemeleri Kanunu Uyarınca Arabuluculuk ve Arabuluculugun Is Yargılamalamasına Etkileri" Dokuz Eylul University Law Faculty Journal, 20(2), 2018, pg. 477.

22 **KALLIPETIS**, pg.195.

23 **SPENCER**, David/ **BROGAN**, Michael: Mediation Law and Practice, Cambridge University Press, 2007, pg.224. **BROWN**, Henry/ **MARRIOTT**, Arthur; ADR: Principles and Practice, 3rd edn, Sweet & Maxwell, 2011, pg.576-577.

24 **BROWN/MARRIOTT**, pg. 577.

employee's favour as in a top-level football player's contract. In this case, there would be a need to discuss again the notion of power.[25]

As for the types of power, there can be various types of power in a relationship and thus, the power should be understood in a broader term. According to David Spencer and Michael Brogan, while economic (resource) power refers to financial power and skill, information (negotiation) power alludes to education, position, and familiarity with the process.[26] Strategic power emerges when the weaker party has strong public support.[27] Having said that the disparity may always not have an impact on the resolution process since a party may have power but may choose not to use it or may be unable to use it.[28] In the realm of employment law, it seems that whereas economic (resources) power and information (negotiation) power, are generally in favour of employers, strategic power might be in employees' favour.

Employers generally possess economic power, which refers not only to their ability to engage with top lawyers and access more substantial resources than employees but also to their employees' immediate need for money, making the latter vulnerable to pressure to settle.[29] Employers typically also have information power as repeat players of employment relations, and thus, may be more likely to win compared to employees. According to empirical data, when an employer is a repeat player in employment disputes, employees have considerably less successful outcomes.[30] However, it should be highlighted that power disparity is not something specific to employment disputes and most cases include some degree of power imbalance. For instance, there might be a power imbalance between individuals in divorce cases, especially involving economic dependency, family disputes, or commercial disputes between franchisors and franchisees.

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25 **DOLDER**, pg.336.

26 **SPENCER/BROGAN**, p.223-224.

27 **SPENCER/BROGAN**, p. 224.

28 **SPENCER/BROGAN**, p. 225.

29 **FISS**, Owen:, "Against Settlement" Yale Law Journal, 93(6), 1984, pg.1076.

30 **BINGHAM**, Lisa "On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards" 29 McGeorge Law Review, 1998, pg.234.

In ADR proceedings where there is a great power disparity, the employer might dominate the process, the outcomes may largely reflect the employer's needs and interests.[31] Against this, trade unions, representing a large number of employees in a workplace or an industry, might have the power to redress this power disparity because one of the functions of trade unions is to represent their members.[32] This function involves giving legal advice and providing legal representation in courts.[33] In doing so, they can restore the imbalance in information power.

Besides the trade unions, in ADR mechanisms, neutral third-parties (i.e., mediators or arbitrators) can redress the power disparity but in this circumstance, there would be a dilemma. When neutrals endeavour to redress the imbalance, for instance, in evaluative mediation, a mediator might refer to case law or precedent, which is in favour of a weaker party, to redress information power imbalance, which might lead to an accusation of bias against them. In contrast, when neutrals remain passive in the ADR process, this might magnify the disparity.[34] Therefore, it would be more accurate to say that the responsibility of the mediator is not to change the power balance between parties, but instead, to ensure that any power imbalance does not have an impact on making the process unfair or unworkable.[35]

Thirdly, employment disputes are associated with not only employees themselves but also the employees' families since an employee needs to afford the fundamental needs of their family. For example, in dismissal cases, it is normal that a dismissed employee is likely to experience depression, panic and a fear of the future for their family. A loss of a job is traumatic, and it is not easy to quantify and understand the trauma that the employee has suffered.[36] In a case of race discrimination or other form of discrimination, the alleged discriminatory practice of employers is

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31 **SPENCER/BROGAN**, pg.225.

32 **ILO**, Labour Disputes Systems: Guidelines for Improved Performance, International Training Centre of the International Labour Organization, 2013, pg.8.

33 **EWING**, K. "The Functions of Trade Unions" Industrial Law Journal, 34, 1, 2005, pg.3.

34 **DOLDER**, p.336.

35 **BROWN/MARRIOTT**, pg.579.

36 **MILLER**, K: "How to Prepare for and Participate in an Employment Mediation" Alternative Dispute Resolution in Employment Relations, 1999, pg.51.

likely to injure the whole family of an employee. Thus, emotions such as anger and resentful expression might run high in employment disputes. Therefore, they might be more suited to be resolved by ADR methods because they enable parties to understand how the other side views the issue.

Fourthly, workplace interactions, personal values and behaviour, which are not present in many other civil disputes, are intangible issues in workplace disputes. To illustrate, while discrimination is insidious, discriminatory behaviour is typically subtle and such behaviours need to be proven by statistical or circumstantial evidence.[37] The damage may not always be visible in employment disputes. For example, the damage in a harassment case may be psychological and injurious to mental health which is not as obvious as physical injuries. Therefore, without supporting testimony, claimants would struggle to provide powerful evidence to prove their claims.[38] It must be warned that parties have to be cognisant of these pitfalls in proof before deciding to use ADR methods because there will be a more limited discovery procedure before the ET/court case and this limitation makes gathering information difficult to support the claim at the ADR stage.

III. ADR AND INDIVIDUAL EMPLOYMENT DISPUTES

ADR methods may arise from three sources; namely, an individual employment contract, a collective bargaining agreement (CBA), or legislation. Primarily, when pre-dispute ADR (arbitration) agreements emerged in individual employment contracts in the US, they were likened to 'yellow-dog contracts' by some critics because a powerless employee is compelled to sell their inalienable industrial birth-right to fulfil the basic requirements of life.[39] This is because these may include: waiving the statutory rights of employees and the right to a hearing, limiting discovery procedures, and reducing the right to appeal. Such agreements are now illegal in many European countries because they violate Article 6 of the ECHR (right to a fair trial).[40] For instance, in the UK, CEDR published a

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37 **MILLER**, pg.51.

38 **YUNGTUM**, Jason, "Mediating Sexual Harassment Claims: If, When and How" Alternative Dispute Resolution in Employment Relations, 1, 1999, pg.29.

39 **ESTREICHER**, Samuel: "Pre-dispute Agreements to Arbitrate Statutory Employment Claims" New York University Law Review, 72, 1997, pg.1352.

40 European Convention on Human Rights, Article 6.

sample model, which can be used to assist in drafting employment documentation. The model expresses that either party will not waive their respective statutory or contractual employment rights because the Employment Rights Act (ERA) 1996 prohibits inserting a clause precluding a person from bringing a claim to an Employment Tribunals and limiting statutory rights.[41]

Secondly, ADR proceedings may sometimes be based on CBAs.[42] During the negotiation of the agreements, parties can determine how individual employment disputes can be resolved. An effective CBA can establish a framework protecting the rights and interests of employees and employers. Parties can also benefit from mediation before signing a CBA to set the ground for the agreement's terms, clear up misunderstandings, frame discussion, manage an agenda, discover new perspectives for discussion and secure fairness.

Ultimately, ADR methods may rely on national employment statutes and/or procedural laws and the approach of countries to ADR mechanisms may vary. Some countries might force the use of ADR methods by creating a 'pre-condition to action', such as Article 3 of the Turkish Employment Court Law (ECL). Another example is to encourage the use of ADR methods by providing monetary incentives for those using ADR methods such as section 69b of the German Court Fee Code. In the UK, a sanction can be imposed under Civil Procedural Rules for those not using ADR to resolve their disputes without any reason, despite a court's recommendation.[43]

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41 Employment Rights Act (1996) (ERA), section 203(1)(a)(b). Also, CEDR, 'Model Mediation Clauses and Mediation in Employment Policies', 2020, pg.9. https://www.cedr.com/wp-content/uploads/2020/01/Model-Mediation-Clauses-and-Mediation-in-Employment-Policies.pdf (accessed 1/11/2022)

42 This is a written, legally enforceable agreement for a certain period between employer(s) and a trade union representing employees. It includes the terms and conditions of employment relations and procedures for dispute resolution.

43 Employment Court Law No.7016, Article 3; German Court Fee Code (Gerichtskostengesetz (GKG) Verordnungsermächtigung) (2004), section 69(b); Civil Procedure Rules (1998), Article 44.

A. Advantages and Disadvantages of ADR in Employment Disputes

The concerns and desires of parties might influence the outcomes of ADR proceedings. To discover these factors, 'empathy', requiring looking at matters from the perspective of another side, can be employed to comprehend the wants and needs of an opponent.[44] Hence, while analysing the values and motivations of ADR in employment disputes, it is significant to bear in mind the different perspectives being considered. On this basis, this section will first analyse the advantages and disadvantages of ADR in the context of employment disputes. Then, it will investigate them by looking from employers' and employees' perspectives.

The first advantage of ADR in the context of employment law is to preserve employment relations that are intensive and ongoing. According to an empirical study, the preservation of the employment relationship is one of the most outstanding reasons for choosing ADR techniques.[45] Bringing a claim to courts/tribunals may lead to irreparable damage in the relationship because turning back to a normal relationship may be almost impossible after hostile litigation.[46] By contrast, ADR methods are designed to restore and rebuild trust by keeping open the doors of communication between disputants, which tackles suspicion and hostility emerging in adversarial court systems.[47] On this issue, ADR adopts an approach of 'be hard on the problem and soft on the people'.[48] Hence, it has a function to contribute to parties' morale by developing mutual trust and respect between employees and employers by allowing them to have an active role in the process of dispute resolution. ADR methods except for arbitration switch the purpose of dispute resolution from determining one winner and one loser to trying to discover the underlying interests of both

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44 **NOCE**, Dorothy, "Seeing Theory in Practice: An Analysis of Empathy in Mediation" 1999 Negotiation Journal 15, 3, 1999, pg283.

45 **VARMA**, Arup/**STALLWORTH**, Lamont, "The Use of Alternative Dispute Resolution Mechanisms in the Workplace: An Empirical Study" Alternative Dispute Resolution in Employment Relations, 2, 2000, pg.73.

46 **AYDIN**, Bugra: "Bireysel Is Uyusmazliklari ve Tahkim" Law Research Journal of Marmara University Law Faculty, 21, 2, 2015, pg.841.

47 **LIEBERMANT**, Jethro/ **HENRY**, James, "Lessons from the Alternative Dispute Resolution Movement" University of Chicago Law Review, 53, 1986, pg. 429.

48 **BASTIDE**, Ernest: "ADR in the Workplace - An Arduous Journey" LawNow 27, 2003, pg.20.

parties. In doing so, ADR may develop cooperation rather than aggravating competition and thus, its concept may be regarded as a 'win-win' for all parties.[49]

Among ADR methods, mediation can be the most effective way of repairing relationships in workplaces because mediation is less daunting and more inviting to participants.[50] By contrast, arbitration is more adversarial and thus, the healing function of ADR may not work.[51] This advantage is of particular significance for disputes where an employee seeks reinstatement or re-engagement in their job since these remedies require a continuing relationship in the workplace.[52]

Having said that for the healing function of ADR to be fulfilled, there must be good communication including respectful listening, obtaining and absorbing new information and advice, proposing a solution, representing parties' interests, and acting in good faith.[53] These may not be easy where, for instance, an employee suffers from workplace abuse because it may reduce their self-confidence and bring about negative emotional and behavioural effects leading to either remaining passive or reactive defiance rather than producing a powerful argument for a settlement. Therefore, such behaviour may undermine the ability of injured-parties to advocate for themselves. Similarly, where there is great animosity among disputants, a quasi-criminal allegation such as fraud or libel, widespread and systematic unlawful treatment by co-workers or employers, or no interest of disputants for settlement, effective communication would be very unlikely.[54]

The second advantage of ADR is that it can provide a cost-effective and time-saving process to resolve employment disputes. When

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49 **VARMA/STALLWORTH**, pg.71.

50 **CANBOLAT**, Talat: "Is Hukuku Bakimindan Arabuluculuk" Arabulucugun Gelistirilmesi Uluslarasi Sempozyumu, Yildirim Bayezid Universitesi, 6-7 December, 2018, pg.99.

51 **BENNETT**, Tony, "The Role of Workplace Mediation: A Critical Assessment" Personnel Review 43, 5, 2004, pg.769.

52 **SISLI** (n17) 50.

53 **BALLARD**, Allison/**EASTEAL**, Patricia: "(Alternative) Dispute Resolution and Workplace Bullying Some Pros and Cons From The Coalface" Alternative Law Journal, 41, 2, 2016, pg.106.

54 **BLAKE**, Susan/ **BROWNE**, Julie/SIME, Stuart: A Practical Approach to Alternative Dispute Resolution,5th edn, Oxford University Press, 2018, 45.

disputants prefer to pursue their action in the courts/tribunals, the cost of litigation, even if the party is a defendant, may spiral regardless of the features and types of disputes because litigation may include, depending on the legal system, a court fee, the cost of a lawyer, expert witnesses, gathering documents, engaging in discovery and ultimately the award of compensation. If the case is lost, the losing party may have to pay the winning party's legal fees.[55] This calculation does not involve 'opportunity costs', which refers to the cost of the value that disputants place on the time saved by resolving conflicts promptly.[56] To illustrate, if a dispute is resolved sooner, an employee could secure a new job and commence work earlier, or an employer could hire a replacement. Based on this reasoning, reducing opportunity costs by resolving disputes in a short time is considered the primary advantage of ADR methods.[57]In addition to the monetary costs of litigation, the parties may suffer from emotional costs such as stress and anxiety and the litigation process might worsen the existing animosity between them.[58]

One of the factors making ADR cost-effective is that parties may not hire a lawyer and they can deal with their cases without representatives in ADR proceedings but some claim that mediation may not be an appropriate forum if disputants are not represented by lawyers.[59] Most applications made without a legal representative are likely to encounter considerable difficulties. According to research published in 1998, the success rate of applications made by employees without representation against represented employers was only 10%. When the position was reversed, applicants reached a 48% success rate.[60] In this circumstance, when parties are represented by lawyers, they normally have to bear the cost of hiring

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55 **MCDERMOTT/BERKELEY**, pg.xvi.

56 **LIPSKY**, David/**SEEBER**, Ronald; "Resolving Workplace Disputes in the United States: The Growth of Alternative Dispute Resolution in Employment Relations" Alternative Dispute Resolution in Employment Relations, 2, 2000, pg.38.

57 **LIPSKY/SEEBER**, pg.38.

58 **MCDERMOTT/BERKELEY**, xix.

59 **YUNGTUM**, pg.29. **CICEK**, Mustafa: Is Hukukunda Zorunlu Arabuluculuk, Seckin Yayincilik, 2018, pg.65

60 **GEORGE**, Barbara: "Mandatory and Voluntary Arbitration of Workplace Disputes: A Comparative Analysis of U.S. & U.K. Systems" Alternative Dispute Resolution in Employment Relations, 2, 2000, pg.58.

a lawyer, which is one of the basic cost-saving elements in ADR proceedings.

Employment disputes need to be resolved as soon as possible. Excessive delay in the resolution of disputes may lead to irreparable damage to the employment relationship since 'the longer a labour relations dispute is allowed to go on, the greater the risk of hostility, mistrust, and disaffection.'[61] Thus, 'justice delayed is justice denied' is of particular importance for employment disputes.[62] Therefore, for instance, in Turkish employment courts, the principles of acceleration are applied to disputes. It means that litigants do not give a second pleading letter, unlike in disputes in other areas of law, to shorten the duration of the litigation.[63]

In this regard, ADR may offer a time-saving alternative to disputants. In ADR meetings, the direct involvement of parties can obviate difficulties since they are more familiar with the nuances of their disputes than their lawyers. Therefore, they can reply creatively and quickly to the proposals raised by their counterpart.[64] By doing so, ADR may resolve disputes in a short time without excessive delays. The advocates of ADR in the US argue that while arbitration is generally completed in months and the majority of mediation cases are settled on the first day, litigation may last for years.[65] For example, in Turkey, whereas mediation proceedings must be ended within a maximum of 4 weeks after application for mediation, the average duration of employment litigation was 629 days in 2018.[66] Nonetheless, it is worth noting that ADR mechanisms can also be used as a delaying tactic by parties. If parties cannot settle at the end of the ADR proceedings, this might typically create an extra expenditure and delay.

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61 **RAY**, Douglas: "Sexual Harassment, Labor Arbitration and National Labor Policy"1994 73 Nebraska Law Review, 73, 1994, pg.830.

62 **GUZEL**, Ali: "Is Mahkemesi Kanunu Tasarisi Taslagi Hakkinda Bazi Aykiri Dusunceler", Work and Society Journal, 2016, 3, pg.1132.

63 Civil Procedural Law No.6100 (2011) (CPL), Article 317(3).

64 **LIEBERMANT**, pg.430.

65 **FAULKNER**, Richard: "Employment Arbitration: Advanced Dispute Resolution for the Global Economy" Alternative Dispute Resolution in Employment Relations, 1, 1999, pg.58.

66 Ministry of Justice, *Judicial Statistics* (2018) 144. <https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/2182019155518istatistik2018.pdf> accessed 21 July 2023. Also, Employment Court Law, Article 3(10).

Thirdly, confidentiality is arguably another advantage of ADR. It might be particularly significant for employees and employers where the dispute is about vulnerable information since confidentiality provides a secure forum for embarrassing, sensitive, factual issues such as sexual harassment cases where the injured party may want to return to their job without the stigma attached to their career.[67] As for discrimination cases, discrimination in the workplace is not just wrong, it is also 'economic suicide' in a global economy.[68] Discrimination might be painful and insidious and therefore, 'it can permeate an organisation from the top down, or bubble up from underneath the surface'.[69] If employees believe that they are discriminated against based on disability, sex, age, race, religion or belief, sexual orientation (protected characteristics in the UK law), or other grounds, they intensely feel it but employers do not want to be labelled as bigoted, sexist or racist.[70] As a result, from a purely procedural standpoint, confidentiality might be key factor in obtaining successful outcomes in ADR proceedings in employment disputes.[71]

In addition, confidentiality typically involves a 'without prejudice' ADR process. It means that whatever is said during ADR proceedings is on a without prejudice basis which means that it must not be referred to in correspondence or at subsequent hearings.[72] It can be ensured in different ways such as by prohibiting recording, destroying any notes taken during the proceeding or signing a confidentiality agreement before the beginning of the proceedings.[73]

On the other hand, the confidentiality of ADR methods might pose an obstacle to evaluating whether the procedure is fairly managed, whether a less powerful party (employee) has been under pressure, and whether there is an irregularity in the process.[74] Moreover, it could lead

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67 **WILBURN**, Kay: "Employment Disputes: Solving them Out of Court" Management Review, 87, 3, 1998, pg.20.

68 **FAULKNER**, pg.57.

69 **MILLER**, pg.51.

70 **MILLER**, pg. 47.

71 **NELSON**, Scott: "The EEOC's Mediation Program: A New Hope" (1999) Alternative Dispute Resolution in Employment Relations, 1, 1999, pg.18.

72 **ACAS**, "Guidance on Settlement Agreements" December, 2018, pg.18.

73 **NELSON**, pg.19.

74 **YAGCIOGLU**, pg.478.

to a cover-up and thus, other colleague employees may face discrimination. For example, when the employer agrees in ADR meetings to pay more compensation than the amount paid to other employees who are in the same situation but want it not to be heard by other employees, confidentiality may serve this purpose. Besides these, if an employee wants to use the pressure of public opinion as a powerful weapon (strategic power), confidentiality prevents them from benefiting from publicity. For instance, an employee may want to use mass media for the public vindication of a reputation, which is frequently the primary objective of a libel action, but confidentiality might be an obstacle to doing so.

Fourthly, another advantage of ADR is that it may enable parties to choose expert neutral third-parties with expertise in employment law who have gained the trust of the disputants. As explained above, employment law is *sui generis* and all third-parties may not be suitable when they are not adequately familiar with employment law.[75] Even if they are sufficiently familiar with employment law, they sometimes need to have expertise in a particular area of employment law such as discrimination law. Otherwise, where the third-party does not have much experience in employment relations, disputants may be guided by 'contract law principles' instead of 'employment law principles'.[76]

The strength of the ADR processes also relies on the ability of expert third-parties to address 'power imbalance' between the employer and employee.[77] However, there might be a shortage of qualified third-parties with expertise in employment disputes and that shortage is considered as holding back the use of mediation.[78] This shortage may constitute another problem. To illustrate, even where the expert is found, they may, because of having a heavy workload, put pressure on the parties to reach an

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75 **GEORGE**, pg.52.

76 **HALEGUA**, Aaron: "United States" **EBISUI**, Minawa/**COONEY**, Sean/**FENWİCK** Colin (editor): Resolving Individual Labour Disputes: A Comparative Overview, ILO, 2016, pg.335. **YENISEY**, Kubra: 'Is Yargısında Zorunlu Arabuluculuk (Mandatory Mediation in Employment Litigation)' in **YENISEY**, Kubra (editor) İş Mahkemeleri Kanunu Tasarısı Taslağının Değerlendirilmesi, Türkiye Isveren Sendikaları Konfederasyonu, 2016, pg.176.

77 **BENNETT**, pg.773.

78 Employment Lawyer Association: "ADR and Employment Disputes", 2017, pg.5. https://www.elaweb.org.uk/sites/default/files/docs/ELA%20ADR%20%20Employment%20Disputes%20report_November%202017.pdf (accessed 25.07.2023)

agreement.[79] Nevertheless, even where it is not possible to have an employment law expert, neutral third-parties would, at least, may ensure that disputants understand the ADR proceedings (negotiations, behaviours, discussions and outcomes) on the basis of being equals in that process.[80]

Fifthly, ADR methods might give flexibility leading to innovative solutions that parties can benefit from.[81] A possible disadvantage of the courts/tribunals is that a judge only has the power to make such orders as are available to them under the rules of the court/tribunal. By contrast, the outcomes in ADR are confined only by the creativity of disputants and their representatives within the employment law. That is, the power of decision-making in ADR has been removed from third-parties and transferred to the parties except when arbitration is used.

However, it does not mean there are no impacts of third-parties. They can offer remedies tailored according to the needs of a case.[82] To illustrate, mediators, like the conductors of an orchestra, can influence the emphasis, tempo and other facets of negotiation by creating the right environment, keeping parties focused on the key issues, and raising relevant questions. In doing so, they can profoundly influence the outcome of ADR proceedings.[83] Ultimately, the outcomes of ADR may involve acknowledgement, apology, explanation, and credit including trust or guarantee.[84] On this issue, Allison Ballard and Patricia Easteal enumerate potential outcomes of ADR in employment disputes as follows:

'apologies; the right to resign (rather than be terminated); reinstatement (rarely); a restorative letter to third parties if the target feels their reputation has been damaged by the employer; the provision of a statement of service or reference; transfer to another position; 'agreed'

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79 **HERON**, Robert/**VANDENABEEL**, Caroline: Labour Dispute Resolution, ILO, 1999, pg.29.

80 **BENNETT**, pg.773. **SAHIN**, Cagatay, "İş Hukukunda Zorunlu Arabuluculuk Uygulamasi" Yeditepe Universitesi Hukuk Fakultesi Dergisi, 2018, 2, pg.89-90

81 **SILBERMAN**, pg.1538.

82 **BLAKE/BROWNE/SIME**, pg.47.

83 **RICHBELL**, David, "Evaluative Mediation" Arbitration, 73, 1, 2007, pg.38.

84 **BROWN/MARRIOTT**, pg.35.

redundancy; an agreed departure announcement; and payment of career coaching'.[85]

For instance, in discrimination cases, findings on legal rights alone might not be enough to resolve disputes since an employee, in addition to monetary awards, may put a value on a sincere, voluntary apology including the acknowledgement of wrongdoing by an employer.[86] This is because an apology may include a message of caring and eliminate the perception that an injured party is being ignored. Thus, it may have a crucial role in healing an injured relationship by restoring trust or mitigating harm.

Flexibility also means tailoring the process according to the needs of the case. This involves determining not only the time, duration and venue of ADR meetings but also who can attend. For instance, in a harassment case, whether the alleged harassers should attend the ADR meetings is a controversial issue because if they attend, their attendance would be likely to impede the freedom of the injured party to tell their story. In contrast, without their attendance, the neutral third-party only hears from the victim's perspective.[87] If third-parties invite only the representative of an alleged harasser, it will constitute an extra economic burden for the alleged defendant. Consequently, the third-party may prefer 'shuttle diplomacy' meaning that the alleged harasser and victim are separated and the third-party goes back and forth between disputants.[88] In this context, because of the lack of flexibility in arbitration, mediation might be a more suitable resort for such complex cases.

The final advantage of ADR in employment disputes is to encourage disputants to think about their disputes at the earliest stage of the proceedings. In *Brookfield Construction (UK) Limited v Mott MacDonald Limited*, the judge recommended the parties to endeavour to iron out minor differences between them, leaving only significant disputes (if any) to be dealt with by the court' by using ADR methods. This is because third-parties may help disputants to understand what the conflict is, in reality, about, to clarify and narrow the issues by explaining the strengths and

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85 **BALLARD/EASTEAL**, pg.108.

86 **GIBBONS**, pg.35.

87 **YUNGTUM**, pg.33.

88 **YUNGTUM**, pg.36.

weaknesses of the cases, and potential outcomes in litigation. In doing so, they may bring realism to the expectations of the parties, which is an important element for settling.

An approach that encourages the parties to have realistic expectations may have the effect of decreasing the caseload in employment litigation by reducing the number of vexatious and meritless cases.[89] For instance, in the UK, in 2016-2017, approximately 50% of claims where ACAS conciliators were involved were withdrawn by claimants without reaching any settlement because of a lack of merits.[90] Even if parties bring their claim to a court/tribunal after ADR proceedings, this advantage would simplify and shorten the duration of the litigation. By contrast, this motivation can easily transform into a disadvantage since, where third-parties' explanations give weight to the weaknesses of a case and negative scenarios regarding outcomes of a court such as excessive judicial cost, employees might feel pressured to settle even if their claims have legal strength.

In some circumstances, the use of ADR may not be *appropriate* to resolve employment disputes. Initially, there might be jurisdictional issues compelling employers and employees into litigation and precluding them from ADR methods. To illustrate, there may be uncertainty as to the legal status of the claimant. In the UK, the case will depend on their status as an 'employee', 'worker', or being wholly 'self-employed'. This is because there might be a disguised employment relationship where employers may engage in various practices to avoid establishing formal employment relations not paying national minimum wages, social security, unemployment taxes etc. In this regard, one way of seeking to avoid formal employment relations is to treat an individual as an 'independent contractor' rather than a 'business's employee'.[91] This means that such disputes would not be eligible for ADR proceedings.

Moreover, if a claimant seeks to establish a legal precedent, ADR might not provide a creative, flexible and beneficial solution because ADR

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89 **DICKENS**, Linda: "Employment Tribunals and Alternative Dispute Resolution" DICKENS, Linda (editor): Making Employment Rights Effective Issues of Enforcement and Compliance, Hart Publishing, 2012, pg.30.

90 Acas, "Annual Report and Accounts 2016–17", 2017, pg.15. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631785/acas - annual-report-2016-2017-print.pdf (accessed 30.10.2023)

91 **HALEGUA**, pg.313.

cannot deliver a precedent decision. Similarly, if parties seek an interim injunction or if either party believes they have a strong case, a court/tribunal might be more appropriate in terms of an effective solution.[92] Also, ADR cannot deliver a public hearing - a day in court - and hence, it cannot provide 'justice' for a party seeking exoneration from a charge of discrimination or public affirmation that they were unfairly treated.[93] Furthermore, it cannot deliver a legal ruling, clarification or interpretation of employment terms.[94]

1. ADR From Employers' Perspectives

The approach of employers to ADR may vary. On the one hand, employers might resist offering ADR techniques since they fear that any willingness to pursue ADR or any demand to compromise with employees might be regarded as a weakness and an invitation to frivolous claims.[95] Additionally, employers might see themselves as having the economic staying power to outlast a claimant employee in the legal battle in litigation.[96] In these circumstances, the probability of settlement might be less.

On the other hand, resolving employment disputes in a short time by using ADR methods might allow employers to make a more foreseeable business plan because ADR enables participants to avoid the legal uncertainty inherent in litigation.[97] In this regard, arbitration especially provides a greater degree of finality when compared to litigation because litigation frequently involves an appeal.[98] It should, however, be said that the greater finality might be a problem since the ability to overturn is limited in arbitration.[99] Mediation might be seen as disadvantageous for an employer who wants to make a more foreseeable business plan because it may add another layer before getting involved in litigation where a

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92 **BLAKE/BROWNE/SIME**, pg.18.

93 **DICKENS**, pg.40.

94 **DICKENS**, pg.40.

95 **SIMON**, Howard/**SOCHYNSKY**, Yaroslav, "In-house Mediation of Employment Disputes: ADR for the 1990s" (1995) 21(1) Employee Relations Law Journal 29, 30.

96 **SIMON/SOCHYNSKY**, pg.33.

97 **SIMON/SOCHYNSKY**, pg.29.

98 **WILBURN**, pg.20.

99 **SIMON/SOCHYNSKY**, pg.35.

settlement cannot be reached. But, if parties settle, the employer would be able to see the future more clearly.

ADR may also help to increase the productivity of an organisation. Employment disputes may reduce the productivity of dissatisfied employees when the conflicts are ignored due to the fear of the cost of litigation. This is because employees, who are dissatisfied because of an unresolved conflict with either co-workers or executives, might tend to work less effectively. Even if this problem is not apparently expressed and even if the employee seems calm on the surface, the cohesiveness of the group might be lost due to the passive-aggressive behaviour of the employee.[100] This may also poison the organisational climate since when an employee believes that they have been treated unfairly, they may think that 'the company does not care about me, so why should I work for them.'[101] This is why, when the employee has not left the organisation, unresolved conflicts and unhealed relationships might undermine productivity. When an employee has left the organisation, the employer may have to pay for the hiring and even training costs of a new employee until the newly-hired employee learns the job.

In the UK, they may have to pay the cost of so-called 'gardening leave'[102] to keep the employee away from the workplace during the notice period. All of these would undoubtedly impose an extra economic burden on employers.[103] At the end of the litigation, even if an employer ultimately wins, the profit of the organisation may be small and the harm inflicted by an employee or previous employee may be considerable and not repairable.[104] In this situation, just because of their cost-effective and less time-consuming features, ADR methods might be a fruitful alternative for employers.

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100 **CONBERE**, John: "Designing Conflict Management Systems to Resolve Workplace Conflicts" Alternative Dispute Resolution in Employment Relations, 2, 2000, pg.31.

101 **CONBERE**, pg.32.

102 It is a period of time after an employee leaves a job. In this period, the employee continues to be paid but is neither allowed to go to work nor to begin a new job. Some employers sometimes put gardening leave into the contract so that the employee cannot give private information from their previous employer to a new employer.

103 **CONBERE**, pg.32.

104 **WILBURN**, pg.18.

2. ADR From Employees' Perspectives

According to an empirical study in South Africa, a decrease in employment levels might be related to an increase in the number of employment disputes in litigation.[105] This is because inefficient judicial employment resolution mechanisms may discourage investors from creating more jobs.[106] In this context, ADR systems would indirectly be beneficial for employees since they might eliminate uncertainty, excessive delay and cost in litigation and thus, might encourage employers to create more jobs.

In contrast, employees may be highly sceptical as to the advantages of ADR because those threatened with disciplinary action or termination of employment would be suspicious of any proceedings that employees feel that they are under the control of the employer. Despite the cost-effective nature of ADR, employees may resist ADR methods since 'they fear it will be a low-cost 'fishing expedition' by the employer.'[107] Moreover, there might be some assertions that need to be proven by statistical evidence such as a claim of a decrease in the performance of an employee. In this case, the employee may be concerned because evidence, such as files, personnel records, or witnesses, who are often co-workers, are under the control of the employer and limited pre-case discovery procedures in any form of ADR might constitute a barrier to reach these materials for the weaker party.[108]

The lack of legal aid in ADR methods might also create a deterrent effect for employees. In ADR techniques, an employee may not be entitled to legal aid.[109] In other words, if an employee is not a member of a trade union or if an employee is not able to bear the expense of a lawyer, they must conduct their case. When the lack of information power of

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105 **BHORAT**, Haroon/**JACOBS**, Elne/**WESTHUIZEN**, Carlene Van Der "Do Industrial Disputes Reduce Employment? Evidence from South Africa" Africa Growth Initiative Working Paper 6, 2013, pg.17. https://www.brookings.edu/wp-content/uploads/2016/06/02-industrial-employment-south-africa-1.pdf accessed (21.07.2023)

106 **AYDIN**, footnote 5.

107 **SIMON/SOCHYNSKY**, pg.32.

108 **BUDD**, John/ **COLVIN**, Alexander, "Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice" Industrial Relations, 47, 3, 2008, pg.473.

109 **GEORGE**, pg.58.

employees is considered, employees may typically have considerable hesitation in using ADR methods for resolving disputes.

CONCLUSION

As shown above, the pros and cons of ADR are two sides of the same coin. That is, any single advantage might include a disadvantage. Criticisms regarding the resolution of employment disputes via ADR mainly rely on power disparity between employees and employers. It means that because of the disparity, statutory protection may be lost, and confidentiality or limited discovery might constitute a problem for a weaker party when an employee chooses ADR techniques. However, as stated above, the majority of disputes involve somehow disparity and hence, just due to the power disparity in employment relations, abandoning ADR methods would not be sensible unless parties are unable to seek their rights in courts/tribunals after ADR proceedings. Therefore, where the drawbacks of ADR are expected to surpass its benefits, disputants should consider that ADR may not be an appropriate resolution mechanism for a specific dispute.

By contrast, employers and employees may enjoy the quicker, less expensive and disruptive features of ADR while resolving their disputes under the control of an expert third-party in a secure and confidential environment. ADR might sometimes do more than resolve employment disputes. Particularly, the healing function of ADR might be a cure for a damaged employment relationship that might be continued. In doing so, it might foster productive synergy in a company. Consequently, it is not difficult to say that in many cases the benefits of ADR outweigh the drawbacks. In addition to the pros of ADR, when the shortcomings of employment litigation such as complexity, bureaucracy, and excessive delay are added, it can be said that ADR and employment disputes may not fit like 'a hand and glove' but ADR methods are always worth considering.

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