15.11.2008

Working group 2: Strategic enforcement

Contribution of the Greek Ombudsman to the report on mediation

Definition of mediation

Mediation is the process during which two or more parties attempt to satisfy, through mutual engagement and good will, opposite legitimate interests by referring to a third impartial party, who does not judge the dispute, but along with neutrality and confidentiality aims to assist the disputants in achieving the best possible agreement.

Legal background on mediation

The law in force firmly exhorts opponent parties towards the exhaustion of all possibilities of compromising resolution of legal differences before reaching the court of justice. In this regard, mediation is a useful area of extrajudicial dispute resolution. Although there is no general mediation act in force, specific provisions of civil, criminal or administrative law define specific processes of mediation.

According to article 214A of the Civil Legal Procedure Code, there exists an obligation, before permitting a private legal case –within the jurisdiction of a multi-member Court of First Instance and during regular Process- to be tried in court, the attempt of extrajudicial dispute resolution, as long as stipulating a compromise is permitted in these cases by actual law. In this process, the parties may require the mediation of a third neutral party, if there is mutual agreement to this.

The process of mediation may also be useful in pre-trial cases where different points of view arise during the development of legal relationships and have not yet reached the stage of litigation. In any case the conventionally arranged settlements of legal relationships should not be in opposition to compulsory law.

In criminal law there are specific provisions on mediation dealing with domestic violence (law 3500/2006).

Extrajudicial dispute resolution is additionally applicable in administrative law, wherever relevant provisions allow so.

Mandate of the GO on mediation

The general mandate of the Ombudsman provides for an extrajudicial dispute resolution, where mediation is explicitly defined as the main power/mandate of the Institution. More specifically, according to article 1, par. 1 of the law 3094/2003, *"The independent authority entitled "The Ombudsman", has as its mission to mediate between citizens and public services, local authorities, private and public organizations as defined in article 3, par. 1 of this Law, with the view to protecting citizens' rights, combating maladministration and ensuring respect of legality"*. In this regard mediation is also applicable process of intervention on discrimination issues, taking into consideration the competence of the GO for the observance and the promotion of equal treatment in the public sector.

Due to the wording of the above provision, it seems that the GO's interventions are mainly focused on mediation. However, this is not the case, in most of the complaints investigated by the Ombudsman, not only as regards to its general mandate, but also to the specific mandate as equality body. So, even if we often refer to mediation, it is not conceived as the typical mediation process. In practice, it is rather an instrument integrated and used in the procedure of investigation of complaints rather than a separate process.

The advantages of mediation process in discrimination issues:

Mediation assists parties to:

- perceive and combat prejudices and stereotypes hidden behind acts of discrimination
- better understand the legal status of their dispute
- re-evaluate their positions and define their goals, in the light of the above understanding
- develop initiative in forming mutually their relationships
- achieve directly and confidentially a beneficial agreement which resolves their differences, annuls any pending in court through validation of the final mediation agreement and creates the possibility for the adverse parties to become future associates

In addition the opposing parties abstain from:

- causing or maintaining enmities
- risking the imposed outcome of a judicial process
- prolonged uncertainty about the final outcome of the court
- delay in the resolution of disputes due to the caseload of traditional courts
- accumulation of personal and psychological costs

The disadvantages of mediation process in discrimination issues:

- As regards the principle of voluntariness:

Voluntary participation is the precondition for a mediation process. When it comes to discrimination cases the lack of trust mainly from the part of the victim to the discriminator may be an obstacle for the application of a mediation process. On the other hand, it is also difficult for the EB to gain the trust of the discriminative party in order to accept voluntarily its intervention.

- As regards the principle of neutrality and power imbalance:

Mediators as human agents will necessarily bring certain personal and professional biases to the mediation process. On the other hand, there is an inevitable conflict between the theory of mediator neutrality and mediator assertions of the ability to adequately address power imbalances. The process of power imbalance identification could be argued as being biased towards one party, usually the victim of discrimination. So, when the EB through its mediator take steps to intervene to redress the imbalance is unavoidably non-neutral.

More specifically, in most of the cases handling by GO the victim of discrimination is in a weaker position than the potential discriminator. As a result the negotiation position of the victim in a mediation process needs do be straightened. This obvious difference of their position affects in practice the mediator's neutrality. While in the common procedure of handling complaints on discrimination issues this imbalance is restored by specific tools (e.g the shift of burden of proof), these are not applicable to a mediation process, as it is not compatible with the principle of neutrality. So, if we see the principle of neutrality as a procedural guarantee, that ensures the rights of the adverse parties in their negotiation process (ensure for each side to presentation of their positions and concerns, reframe these points of view and communicate the outcome), this could facilitate the mutual understanding and maybe the final agreement of both parties, in more realistic and applicable terms.

In addition the fact that the EB is designated as such, may be in principle incompatible with the concept of neutral mediation on discrimination issues. The profile of the Institution and the mandate to observe and promote the principle of equal treatment, could be seen or conceived as incompatible with any kind of neutral mediation. So, it is up to the EB to built a profile that makes these two processes possible, although it is in fact a difficult task.

- As regards the principle of confidentiality:

In order to gain the trust of the adverse parties, all communications and relevant documents and data are confidential and can never used as evidence in court, if mediation fails. The internal and external confidentiality of the process means that important evidence collected in the process of mediation is absolutely useless for any further investigation, judicial or not. Even if the EB, wants to continue the investigation after the failure of mediation cannot have access to the documents or data collected previously.

- As regards the principle of legality and the general mandate of the EB:

The main principle of extrajudicial resolution disputes through mediation is that they are not in opposition to compulsory law. Beyond this basic obligation, there are concerns that may appear when handling discrimination issues: Is it possible to respect the agreement of the parties, even if the EB estimates that the agreement is a compromise, that does not provides in general terms, the principle of equality? Is it acceptable for the EB to be a party or has a role in such procedures? Has the EB in such cases the obligation to respect the final agreement of the parties?

Actual example used as case study:

In the roma settlement in Votanikos the previous year the owner of the land where the roma population were settled and the company that had undertaken the works for building a stadium offered 1000 euro in each roma family in order to leave the place and facilitate the beginning of the works. Most of the roma families had taken the money and left. But the question is: If this case was in a mediation process, even if the roma families agreed voluntary to this compromise, could this outcome be acceptable by the EB? Even if we agree that the answer is obviously no, the above example shows the inflexibility of a mediation process and the barriers that may arise respecting strictly the principles of mediation in such cases.

Specific concerns:

- As regards the competence of the GO when a case is pending in court:

The GO, due to its general mandate, cannot have any intervention in cases when pending in court. So, the mediation process has to take place and reach a final outcome in a strictly limited time, that adds pressure to the parties and to the EB, as well.

- As regards the non binding decisions/resolutions of the GO:

In any case the outcome of a mediation process is not binding, so there is always the risk from the part of the discriminative party to accept a mediation process in order to avoid the judicial procedure or have the relevant time limit expired.

- As regards the pre-mediation stage:

The pre-mediation preparation is crucial in ensuring fairness and justice in mediation. It is at this stage that issues affecting power imbalances can be identified and reduced by providing parties with details of allied agencies which can help them determine their positions and options. In this regard, the need for services to be advertised to target groups in ways which are effective is not only useful, but essential.

- As regards the need of information or apology:

The experience of GO shows that, in many cases victims demand originally a due process of their complaint and the disciplinary punishment of the adverse party. In such cases, the victims during the process may modify their requests when their needs for information or an apology have been met. It is the usual demand or outcome of complaints concerning abusive behaviour of the police, although from the part of the police authorities even this outcome is not always easy to be achieved.

Conclusion

Taking into consideration all the above remarks, the GO acting as an EB rarely uses in practice, the formal mediation process. Even though its mandate is related to extrajudicial resolution of disputes and explicitly provides the possibility of mediation, alternative processes such as reconciliation, negotiation or in-formal mediation are more often used in the procedure of investigation of a complaint. In this regard, the mediation process is not strictly separated from the procedure of complaint.

Kalliopi Lykovardi
Senior Investigator at the Greek Ombudsman's Office
Tel. 0030 210 72 89 619