

The Small Claims Tribunal as an alternative dispute resolution mechanism in Fiji

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Alternative dispute resolution methods complement the formal apparatus of the state, widening the range of choice available for those who seek to finalise conflict.

(Jeffries 1991:159)

Abstract

Alternative dispute resolution (ADR) is an optional method of determining a dispute. It provides a separate mechanism from the existing state apparatus to solve problems. ADR can be divided into conciliation, mediation, counselling, arbitration and tribunals. Parties may employ any one of these schemes to resolve disputes without recourse to litigation. This study introduces 'Small Claims Tribunals' as a method of alternative dispute resolution in Fiji. The advantages and disadvantages of the Tribunal as compared to the civil court system are discussed and some suggestions made for improvement.

The Fiji Small Claims Tribunal

The Fiji Small Claims Tribunal was established to address the problem of small claims relating to small 'amounts of money' (Ratuva 1997) and poor services. It is modelled on the New Zealand Disputes Tribunal system, the major difference being that the Fiji system deals with almost all civil claims that come within the FJD 2,000.00 monetary limit, whereas the New Zealand version is based on claims being lodged upon established disputes (Ratuva 1997).¹ This mechanism now gives claimants the option of pressing their claims without instituting proceedings in a magistrates'

court.² The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement (Fiji Small Claims Tribunal Decree 1991, s. 15).

Commencement The Fiji Small Claims Tribunal Decree was promulgated in 1991 and the Small Claims Tribunal Rules were enacted in 1994. The Small Claims Tribunal began operation on 28 June 1996 (Commencement – Legal Notice No. 59, *Fiji Republic Gazette*).

However, the Small Claims Tribunals are not established by these statutory provisions. Rather, Section 3(1) of the decree gives the Minister the power to establish such number of Tribunals, to exercise the jurisdiction in respect of small claims, as he/she thinks fit. The Tribunal is to be under the division of a Magistrates' Court (1991 Decree s.3(3)).

Jurisdiction The Small Claims Tribunal has jurisdiction in respect of any civil claim not exceeding FJD 2,000.00.³ There are as well further exceptions to this wide range of claims. A Tribunal cannot exercise jurisdiction in respect of any claim in the following matters:

- for the recovery of land or any matters relating to an estate or interest in it;
- in which the title to any land or estate is in question;
- that cannot be brought in a Magistrates' Court; or
- that is required by any law to be brought only before any other specified court (s. 9 (a)–(d) – Further limitations of jurisdiction).

In essence, a Tribunal's jurisdiction focuses around claims for the recovery of chattels, money and claims for work orders—all of these not exceeding FJD 2,000.00. There is a very wide jurisdiction clause that gives a Tribunal such other jurisdiction as is given by any other law (s. 8(5)). Also, a Tribunal has absolute jurisdiction over claims not exceeding FJD 2,000.00 (subject to the limitations).⁴ The jurisdiction of a Tribunal cannot be excluded by any provision in any agreement (s. 13(1)). The jurisdiction of a Tribunal is exercised by a Referee or by a Resident Magistrate (s. 4). The Referee acts as an umpire, a trained individual who guides the Tribunal proceedings by listening to both sides and makes orders based on the facts and evidence put before the Tribunal.

Procedure Lodging a claim together with the fee in the appropriate Tribunal commences proceedings in a Tribunal (s. 18). As soon as a claim is lodged, the Registrar fixes a time and place for the hearing and gives notice to the claimant (s. 19(1)(a)), the respondent, and any other person who has sufficient connection with the proceedings in the capacity of a claimant or the respondent (s. 19(1)(b)). The parties are allowed to tell their stories in their own way, in private but in the presence of the opposing party and the referee (Spiller 1997). The referee's task is to listen, summarise and report back to each party in turn (Spiller 1997). Then the referee may discuss possible solutions to reach a settlement. In the interests of best achieving the ends of justice, a Tribunal can adopt such procedure as it thinks best (s. 29).

Hearings Each party to a claim is entitled to attend and be heard at the hearing. Certain parties can be represented by other people, if approval is given by the Tribunal. For example, the State may be so represented, if the representative is a servant of the State; a corporation or an unincorporated body, if the representative is an employee or member respectively; a person jointly liable or entitled with another, if the representative is one of the persons jointly liable or entitled; or a minor or person under a disability (s. 24). It is a beneficial feature of a Tribunal's proceedings that it may be held in private if all the parties agree to it (s. 25).

Evidence It is not a requirement to give evidence in Tribunal proceedings on oath. However, a Tribunal can at any stage of the proceedings require such evidence to be given on oath, whether orally or in writing. Interestingly, a Tribunal can on its own initiative seek and receive evidence and make investigations with regard to evidence. All evidence received has to be disclosed to each party (s. 26). The rules of admissibility do not apply. Also, a Tribunal can make a decision on whatever evidence is available, if reasonable time has been given to a party to present their case (s. 27). In the interests of achieving a just solution, presentation of evidence may include witnesses.

Orders With regard to any claim, a Tribunal can make orders for the payment of money, for a declaration that a person is not liable in respect of a claim and for the delivery of goods (s. 16). A Tribunal may also make work orders, and change harsh agreements or those made by fraud, as well

as dismiss claims (s. 16). In addition, a Tribunal may make an order or orders against a person, and may enforce such order or orders made against such a person, without further notification, where that person does not appear at the hearing.

Rehearing and Appeals In certain circumstances a Tribunal can order the rehearing of a claim upon the application of a party. This may arise, for instance, where the Tribunal gives effect to the determination of disputes or makes authorised orders (s. 32). Likewise, any party to a proceeding can appeal against an order made by the Tribunal if the proceedings were unfair or the Tribunal exceeded its jurisdiction (s. 33(2)).⁵ This takes care of appeals with regard to fact or law. A party wishing to appeal must file notice of appeal together with the prescribed fee in the Tribunal within 14 days of the Tribunal's order.⁶

Rules The Chief Justice is empowered by the Decree to make rules to regulate the practice and procedure of Tribunals, and prescribe other necessary matters for carrying out the provisions of the Decree (1991 Decree s. 41).⁷

Small Claims Tribunal (ADR) compared to civil court system: Advantages and disadvantages

Cost and time According to the Beattie Report (1994), the workload in the Magistrates' Court has increased considerably.⁸ This means that resort to litigation consumes more time, since the claims by parties could range from tiny amounts to as much as \$15,000.⁹ The Tribunal is a much faster and cheaper means of settling disputes. As noted, the Fiji Small Claims Tribunal is 'modelled more along the New Zealand Disputes Tribunal system' (Ratuva 1997:1). In his discussion of dispute tribunals, Professor Spiller (1992) points out the advantage that in Dispute Tribunals the referee has an important role as a mediator. Clark and Davies (1992) recognise time and cost savings as significant advantages of mediation.¹⁰

Simplicity of rules According to the Beattie Report (1994), the civil procedure rules are in urgent need of reform, for the simple reason that there are two sets of civil procedure rules, the Magistrates' Court Rules and the High Court Rules 1988. It was submitted that the Magistrates' Court Rules

were completely inadequate. In contrast, the Small Claims Tribunal is regulated by a Decree and a set of Rules enacted in 1991 and 1994 respectively. These are very simple to follow and understand, a decided advantage in a system where time and cost are significant factors.

Jurisdiction One major disadvantage is that a Tribunal cannot deal with small claims to land matters, although they could be dealt with quickly and cheaply. Also, it seems that there are no provisions in Fiji for the myriad of matters that cannot be dealt with by courts. There is no remedy or recourse for a complainant who cannot qualify his/her claim via the court structure. On the other hand, it is an advantage that a Tribunal can exercise jurisdiction notwithstanding any adverse agreements between parties.

Access to the courts Legal aid is available to financially poor persons in Fiji (Legal Aid Act 1996). However, the grant of legal aid is not automatic: the Legal Aid Commission formulates guidelines for granting it (ibid. s. 8) and the person has to satisfy the Commission that he/she has a reasonable prospect of success (ibid. s. 9). Also, according to the Beattie Report (1994), 'such legal aid is restricted only to criminal or family matters and in practice is limited only to murder and manslaughter'. A Tribunal has an edge over the courts in this respect. People now have an alternative and can present and appear for their case as long as the Tribunal has jurisdiction to deal with the matter. In this very real sense, the Tribunal system has given people greater access to justice.

Procedural and evidence rules It is clear that Tribunals are not bound by the strict rules of procedure and evidence. Judge Frenkel stated that there was no uniform approach in a small claims procedure:

Some appear to make considerable use of pre-arbitration hearings. Some ask the parties to prepare witness statements. Some conduct small claims hearings with the same formality as they would in a trial in open court with sworn evidence . . . (1997)

This contention on evidence is supported by section 26 of the 1991 Decree and Rule 9 of the 1994 Rules. The procedure in a Tribunal is also similar.¹¹ Consequently the presentation in Tribunals is less formal than in courts and it allows the parties to have more say in their disputes.

Proceedings in private Another advantage of Tribunal proceedings is that they can be held in private if the parties agree to or wish it so. Privacy and confidentiality are characteristic features of the institution (Clark & Davies 1992:70). In contrast, court proceedings have to be held in an ‘open court’ for the decision to be valid. The disadvantage of the privacy is that important cases may be swept under the carpet like dirt.¹² Also, because proceedings can be held in private, it will be difficult to improve any flaws in the Tribunal system, as one cannot undertake an evaluation.

Others In Small Claims Tribunal proceedings, the disputants control the process, with a neutral party to guide and assist them. Lawyers do not feature and clients are unrepresented. This is good as the disputants can say whatever they want in their own way without being dominated or intimidated by someone. The final decision is given either by the Referee (if the parties cannot reach a settlement) or by the parties’ agreement to be bound by their own decision. This is a positive system in that the parties will feel more obliged to abide by the decision since either they made it themselves or it was made by a Referee because they could not come to a decision when given the chance. One disadvantage of this method, since it involves mediation, is the emergence of power imbalances.¹³

Suggestions for improvement

The Fiji Small Claims Tribunal is a relatively new concept in Fiji and it will take some time before the system is perfected. It has already been mentioned that the Decree and the Rules were enacted only in 1991 and 1994 respectively and the Tribunal began operation only in 1996, the New Zealand system providing the model for Fiji’s Tribunal. Other overseas countries have already developed, and benefited from, the alternative dispute resolution process so it is important and helpful to keep abreast of what is happening worldwide in this area. The alternative dispute resolution process in the form of a Tribunal is newly established in Fiji and still needs improvement and fine tuning in the light of experience. The following are some recommendations to enhance what Fiji has already adopted to improve access to justice:

- A widening of the jurisdiction of the Tribunal to include matters that cannot be dealt with by the Magistrates' or other specified Courts;
- Implementation of rules requiring that relevant cases go to the Small Claims Tribunal *before* they can be calendared for trial;
- Implementation of programmes to raise public awareness of the existence and functioning of the option and the viability of the Small Claims Tribunal as a mechanism for dispute resolution;
- Specialised training for mediators who will be acting as Referees in Tribunal proceedings;
- The production of plain English, Fijian and Hindi leaflets about the 'procedure' for the disputants;
- Workshops for Referees and staff of the Tribunal to equip them better to fill their role as mediators, since the proceedings can be held in private;
- Establishment of a 'Tribunal Appeals Committee', which can 'weed out' cases that are likely to be non-viable;¹⁴
- Amendment of the Decree to identify clearly the decisions of the Tribunals that can be appealed;¹⁵
- Establishment of a mechanism to monitor the 'user demand' for the Tribunal system, so that staff numbers and resources can be upgraded as necessary; and
- Appointment of a Principal Disputes Referee (as in New Zealand) with legal qualifications, so that this principal referee can select and train Referees, provide advice for Referees on legal issues and developments and monitor the work of the Tribunal as well as the Referees (Fail 1998:5).¹⁶

Conclusion

The Small Claims Tribunal opens a new chapter in Fiji's legal system. It has enormous potential, both to settle disputes quickly and cheaply and to develop into a major dispute solving mechanism. The Tribunal accommodates natural justice procedures together with effectiveness, accessibility, informality and flexibility (Spiller 1997:5). A Referee guides the mediation process so that both parties win, or at least both parties can live with the solution. This innovation is a challenge as well as an aid to the existing court structures in Fiji. Success would mean the elimination of avoidable court delays and a reduction in the cost of access to justice. On both counts, this must be seen as an improvement in access to justice.

Notes

- 1 The New Zealand Disputes Tribunal Act 1988 has been amended and the monetary limits have increased from \$3000 to \$7500 (general jurisdiction) and from \$5000 to \$12,000 (party consent) (Fail 1998:5).
- 2 Note that the Fiji Small Claims Tribunal is a court under the Judicial Department and is independent of the Consumer Council. It does, though, provide an alternative to the existing court structure.
- 3 Part II – Jurisdiction and Functions of Tribunal, s. 8(1) of the 1991 Decree. A Tribunal has jurisdiction over matters such as ‘contracts; money owing; (borrowed); purchase of groceries, goods and services rendered; refund of deposit; rent owing; refund for the purchase of defective goods and items; return of items/value; refund of money given to arrange for marriage; costs for damage; FEA (electricity) bill; FEA damaged electricity poles; consequential loss/loss of income; unpaid city rates; dishonoured cheques; work order; unpaid wages/FNPF; unpaid bills; money owing on credit card; money owing on taxi income/taxi income and base fees and taxi permit; garbage removal fees; refund of fees for legal services not performed; refund of money given to arrange for migration/visa; fees for professional services rendered; recovery of overpaid wages; costs for items stolen/missing or lost; telephone bills; counter-claims; recovery for arrears (Public Trustee); recovery for overpaid salary-PS Education Women and Culture; payment of retired benefit and other benefits by PEU; land rent owing to Director of Lands; refund of advance; unauthorised labour costs deduction; vodafone bills; unpaid VAT; cases transferred from Magistrates’ Court and Costs owing to Director of Marine’ (Small Claims Tribunal, Central/Eastern Division Monthly Statistics of Cases as at 31 July 1998).
- 4 Absolute with the exception that the Magistrates’ Court in Suva still deals with cases below the FJD 2,000.00 monetary limit.
- 5 An appeal has to be made to the High Court if an order was made by a Resident Magistrate or to the Magistrates’ Court in any other case.
- 6 Section 33(3) of the Decree as amended by section 4 of the Small Claims Tribunal Decree (Amendment) Act 1997.
- 7 Amendments and further rules made by the Acting Chief Justice by virtue of section 41 – Small Claims Tribunal (Amendment) Rules 1997 came into force on 14 November 1997.
- 8 This results from the increase of the monetary jurisdiction from \$2000/\$3000 to \$15,000; the Matrimonial Causes (Amendment) Act 1982; and the Bankruptcy (Delegation of Jurisdiction) Order 1987.
- 9 According to the Beattie Report, ‘In the civil jurisdiction of the Magistrates’ Courts in Fiji, claims for small amounts of money take up a disproportionately large amount of time. It is usually uneconomic for lawyers to represent clients on these matters, and the whole exercise frequently fails to give satisfaction to anyone’ (p. 179).

10 Also, Shalini Singh (1996:38) said that in ADR there is an 'increased likelihood of . . . less cost, speedy resolution of disputes'. W P Jeffries (1991:156, 157) acknowledged that 'the development of the small claims tribunals . . . permits flexible and inexpensive disposal of disputes'. D Shapiro (1997:426) said that 'if . . . the use of mediation becomes widespread, most court delays will be eliminated and the cost of obtaining justice will be drastically reduced'. One very interesting comment was cited by Beaumont (1994:103): 'Imagine a civil legal system in which the parties choose their judge, decide their rules . . . Add speed, reduce attorney fees . . . you might just have created the perfect justice system . . .'

11 The Beattie report outlines the procedure under the 'Small Claims Tribunal' heading, (pp.179–86).

12 Beaumont expresses the opinion that 'a new private civil system has emerged that will undoubtedly see some of the state's major cases withdrawn into the unseen world of private law' (1994:103, citing Chambers 1992:15–16).

13 Clark & Davies (1992) point out that 'every time a mediator attempts to assist two parties resolve their dispute the issue of a potential power imbalance emerges'. More particularly, there are some 'disputes', for example domestic violence or child abuse, where mediation is not a proper course to take.

14 According to Beaumont (1994), the Court-based ADR in the US has a Civil Appeals Management Plan (CAMP) where 'two experienced trial lawyers . . . dispose of about half the cases referred, mostly by pointing out the non-viability of the appeal'.

15 As Professor Spiller pointed out in his article (1997:95) there are two schools of thought as regards appeals. The first is that an 'appeal should be limited to matters of procedural unfairness which prejudicially affected the outcome of disputes hearings'. This is the common sense model. The second one is the legal model, which requires the 'referees to have regard to the law'. This dichotomy of opinion has created conflict. It would be prudent to establish some basic guidelines as to which approach should be adopted for appeals in Fiji.

16 The idea of appointing a Principal Disputes Referee is to 'improve the quality of decision-making through individual performance monitoring and training, and access to legal advice and oversight of the appointment process'.

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