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Mediations of Employment Law Disputes: Why We Love Them and You Should Too

These materials were prepared by Sara Forte, Jessie K. Hadley, and Harmit Sarai of Forte Workplace Law, Surrey, and Nazeer T. Mitha, QC of Mitha Law Group, Vancouver for the Continuing Legal Education Society of British Columbia, May 2022.

MEDIATIONS OF EMPLOYMENT LAW DISPUTES: WHY WE LOVE THEM AND YOU SHOULD TOO

This paper will help you become a master of mediation advocacy, which we believe is one of the key skills you need in order to successfully represent your employment law clients.

We will cover these topics:

- What mediation is;
- Why use it in employment files;
- When to use it;
- How to use it effectively; and
- How to take care of yourself when doing mediation advocacy.

I. What is Mediation?

The ADR Institute of Canada defines mediation as:

> … a process in which the parties agree to an impartial facilitator (a neutral third party) to assist them to reach a voluntary settlement of the issues in dispute. The mediator does not make a decision, and the parties may terminate the process at any time. Mediation is generally voluntary, confidential and unbiased. Where a voluntary settlement is achieved, it only becomes binding

> when the parties sign a formal settlement agreement. Parties in mediation may still seek independent legal advice (in legal cases the parties are encouraged to do so).

There are various different styles of mediation that focus on different things. The most commonly recognized styles are:

- **Facilitative mediation**. The mediator structures a process to help the parties to reach a resolution. The facilitative mediator does not make recommendations about how the parties should settle – rather, they guide the parties' discussions using effective questioning, listening, and reframing of issues.
- **Evaluative mediation.** The mediator helps the parties to settle by helping them understand the weaknesses and risks of their case and assessing what a judge would do at trial.
- **Transformative mediation.** The mediator aims to facilitate settlement by enabling both parties to express their values, interests and needs and to feel heard.

A good mediator can use all of these styles and will mix them together as needed depending on the nature of the dispute.

Regardless of style, the parties' discussions in any mediation are always:

- **confidential**, in that they will not be shared with anyone other than the parties and their counsel;
- **without prejudice**, in that they cannot be referred to in future litigation if the case does not settle; and
- geared toward **voluntary** settlement, in that the mediator is not empowered to impose a settlement.

In BC, mediation often happens when litigation is underway and one party formally initiates a mediation under the Notice to Mediate Regulation (BCSC) or Small Claims rule 7.3 (Provincial Court). There are court rules on when parties can require a mediation in these contexts, how the mediator gets appointed, who bears the cost, etc.

But mediation can also happen outside those formal processes. Parties to an employment dispute may, and often do, agree to mediation at any stage - including before litigation has even started.

A. What Actually Happens During A Mediation?

Mediation is an extremely flexible process. A good mediator will freely adapt their process depending on the nature of the dispute, and also depending what happens moment-to-moment on the mediation day.

Having said that, a typical BC employment law mediation might involve the following elements: A welcome/introduction from the mediator, including explanation of the mediation process/parameters – dull for counsel, necessary for clients who are often new to the process;

- Opening statements by both counsel;
- A period of "shuttle mediation" (where the parties separate into breakout rooms and the mediator meets with each in turn and brings ideas and offers back and forth);
- Possibly some discussions between the parties all together, if the mediator determines that will be useful; and
- A convening of the parties at the end of the day (especially if the matter has settled) to hammer out next steps.

B. Why Is Mediation More Effective Than Negotiation Alone?

Here are 5 reasons we believe mediation is effective:

1. Mediation provides a formal "occasion" that requires parties to do a reckoning of the benefits and risks of proceeding to a hearing.
2. Mediation is a forum where the parties can feel heard – if not by the other party, at least by the mediator (who is trained to listen and validate what each party needs to express).
3. On mediation day, the parties are stuck in the mediation, a process that they are both expending time and money to participate in. They may as well try and figure out a solution.
4. The mediator is skilled at identifying potential avenues for settlement and supporting movement toward a settlement.
5. One or both parties may need to hear input from a neutral third party (the mediator) in order to understand the risks of litigation and benefits of a settlement.

C. Hybrid Models (Which Mix Mediation with Other Processes)

The parties to an employment dispute sometimes agree to med-arb, although this is not provided for in our court rules. The ADR Institute of Canada defines med-arb as:

> … a hybrid approach which combines the benefits of both mediation and arbitration. In this process, parties first attempt to reach an agreement with the help of a mediator. If the issues remain unresolved or the mediation comes to an impasse, the parties may move on to arbitration. If qualified as an arbitrator, the mediator can assume the new role and make a binding decision quickly as all the facts are already known, or the mediator can hand over the case to an arbitrator.

One example of a hybrid med-arb process is final offer selection, where the parties agree that they will each make their best offers, with supporting evidence, and the mediator-arbitrator will then then choose which offer will form the terms of a binding agreement.

Another hybrid model comes up when employers hire investigators to look into workplace problems, with terms of reference that contemplate moving into a mediation process (rather than doing a full investigation) if appropriate. Such role fluidity creates delicate issues of fairness and procedural integrity. Counsel should ensure their clients retain highly skilled investigators/mediators if there is a possibility for these kinds of role shifts.

II. Why Use Mediation in Employment Files

In all kinds of litigation (not just employment law) mediation is obviously geared toward achieving a settlement instead of putting the parties through a formal hearing. This has well-known benefits for the parties:

- The stress of going to a hearing is removed;
- The costs of litigation (in money and time) are curtailed;
- The publicity associated with a trial and decision is removed;
- There is no need to wait for a trial and then for the decision;
- The parties get to have a controlled, voluntary settlement rather than gambling on the results of a trial.

In the employment context, mediation can be particularly helpful in helping the parties to settle, because employment disputes are often characterized by intense emotional responses by the parties.

Employment files can involve strong power dynamics and themes of institutional betrayal and distrust. Because of the importance of work to people's lives (as recognized by the SCC in *Wallace*), a broken employment relationship has particular poignancy for the parties. All these feelings are roadblocks to settlement.

Mediation is advantageous in that it allows the parties to articulate their feelings and perspectives in a manageable forum. Being heard by a skilled mediator (and potentially even by the other party) can help remove the emotional roadblocks to settlement. In our experience, being heard in the context of an effective mediation is also far more of a positive experience for parties compared with giving evidence and being cross-examined at trial.

In employment disputes, employers may also be concerned to avoid setting a precedent for other employees. In this sense, the confidentiality associated with mediation can be desirable. But this cuts both ways – employers also want to avoid creating the perception that they'll fork out money whenever a disgruntled employee makes a claim.

III. When to Use Mediation

What type of case is suited to mediation? And when should you think about engaging a mediation process?

A. What Type of File?

We think that almost all dispute-based employment files are amenable to mediation if the timing is right.

Having said that, it's important to consider what style of mediation is most suitable for your file, and ensure you are setting up something that will work. For example, a purely evaluative approach may not be appropriate for parties who come out of a small industry or a family business where there is a longer-term relationship to be preserved. In those cases, something more relational will be needed.

It's equally important to recognize that mediation will be pointless if one or both parties are just not ready to settle. In that case, it will be more useful for you to take legal steps to chip away at the reasons for this unreadiness (or to let time chip away at it) rather than scheduling a mediation. Some mediators say that "compromise is a four-letter word." For mediation to work, both parties must be ready to do the painful work of compromise.

B. At What Stage of the File?

The parties cannot usefully mediate before both sides have a decent understanding their case. Therefore, mediation typically waits until after document disclosure is complete - and sometimes until discoveries have been done.

IV. How to Use Mediation Effectively

In this section, we will talk about what you need to do to make effective use of mediation once you have decided to go that route. Our comments are divided into three sections:

- Selecting a mediator
- Preparation
- On mediation day

A. Select a Great Mediator

When proposing or approving a mediator, counsel should look for a mediator who:

Can command respect from both sides, including counsel and client;

- Has the skill set / style you want (facilitative, evaluative, transformative – and ideally all of these);
- Can adapt their process on the fly to suit the particulars of this dispute (e.g.: what are the relationships between counsel? Do both clients have complete trust in their counsel, or are there gaps? Are the parties more objective and transactional, or will emotions guide their negotiations?);
- Has sufficient knowledge of employment law; and
- will continue to assist after the mediation if necessary.

B. Prepare!

Contrary to popular belief, preparing properly for a mediation requires a fair bit of work.

Here are 8 things you should do before any mediation.

1. **Thoroughly assess your case.** Without a good, current understanding of the merits of your case, you are in no position to properly represent your client in mediation.
2. **Write your brief.** In BC, written mediation briefs (addressed to the mediator) are required in formal mediations under the court rules, and they are often used outside the rules too. If you are doing a brief, it should be no more than 5 pages and should

clearly set out what is in issue and what is not. It should also state where past negotiations, if any, have left off. Frame it neutrally and factually. Being aggressive and positional in your writing will do a disservice to your client. And if a brief is not technically required, consider whether it is needed; in some cases it may be better to invest your prep efforts elsewhere.

3. **Prepare a verbal opening statement**. In many mediations, counsel do an opening. It is wise to prepare one just in case. If you give an opening, you are not going to want to read out your brief. Instead, a good opening will do these things:
    - ❑ State your client's intent to participate in good faith;
    - ❑ Set out the points of agreement & disagreement as you understand them;
    - ❑ Make any acknowledgments that you can spare to help the other party feel heard. (e.g. acknowledge that the dismissed employee has been through a hard time and has been off work for a long time after their dismissal, or acknowledge that employer may not have realized the impact its actions had on the employee);
    - ❑ Last and most importantly: give your client the floor to tell their story, assuming they are comfortable with that. It promotes settlement if your client can talk about what has happened from their perspective and say what matters to them. This goes for both employees and employers.
4. **Prepare your client.** They will be the one deciding whether and how to settle. Your job is to get them ready to make that decision.
    - ❑ Prepare them to tell their story after you give your opening. If they don't want to do it themselves, find out what they want you to convey for them.
    - ❑ Help them get clear on what they really want. Get them laser focused on that - and not on "winning" or punishing the other side. (Help them to avoid the syndrome that students fall into in Naz's exercise on negotiation, where they irrationally keep bidding higher for the $20 bill.)
    - ❑ Make sure they understand your current advice on the merits of the case and the risks and costs of going to trial.
    - ❑ Manage their expectations. Tell them they will need to compromise very significantly to reach a settlement, as will the other side. Warn them that while an apology and mutual understanding are theoretically possible, they are unlikely. Warn them about anything else you expect will be difficult for them - and create a plan to deal with it.
    - ❑ Explain the expected process and logistics for the mediation day – for many clients this is a new and intimidating experience.
    - ❑ Tell them anything constructive you know about the other lawyer and the mediator.

- ❑ Ask them if they have questions and ask how you can make sure the day goes well from their perspective. You might be surprised by what they are worried about, or what bit of information they are missing.

5. **Arm yourself** with the necessary documents, calculations etc. to support your negotiating positions. Commonly overlooked are:
    - ❑ Tax issues - have a HR person or accountant on speed dial if needed.
    - ❑ Bill of costs – have it ready to go, since costs should be part of any settlement where litigation is underway.
6. **Deal with any issues that you can sort out in advance with the other side** (e.g. if there is key information missing from their disclosure, or if you identify a new issue that has not previously been discussed).
7. **Ensure your instructing client will be with you on the day**, or available via phone. It is much preferable to have the person with the power to settle present in the mediation room. Calling out for instructions can create delay and it can be difficult to explain what has happened in a mediation room – "you had to be there."
8. **Be ready with a framework for settlement** in case the matter settles on the day. You will want to bring your laptop so you are ready to type up the terms of settlement. If you are the employer, consider bringing a chequebook. Full and final resolution with sign off and same day payment can be an attractive incentive to get a deal.

C. On Mediation Day

1. Before the Mediation Starts

- Arrive early so you can meet with your client and get them settled.
- Introduce your client to the others right away. Ensure that your client's correct name and pronouns are used at all times.
- Work to build a positive rapport with your client - and also with the mediator, the opposing counsel and even the other client. Appropriate small talk is great, and jokes about any issues or situations that the group is sharing (e.g. the weather is gorgeous, the coffee is disgusting, or whatever) can be helpful.

2. At the Start

- Mediators often ask that each side start with an opening statement. When delivering your opening, try to speak to the other side rather than reading from a page. Notice how the other side is reacting. It is always more effective to connect with the other side (even if not in a warm and fuzzy way) and win their respect, than to speak in a way that creates negative feelings at the start of the mediation.
- Some mediators are leery of openings, because when they're done badly they create roadblocks to settlement. If your mediator knows you, they should know that you will

give a constructive opening. If the mediator doesn't know you, tell them your plan is to make a constructive, settlement-oriented opening.

3. Throughout the Day

- Mediators often ask the parties questions, including in front of the other side. They also routinely make decisions about process on the fly. That is fine. But if your mediator is doing anything you aren't sure is constructive, it's your job to speak up. It can be diplomatic to ask for a brief caucus with the mediator to discuss such issues.
- Small talk is inevitable during a long day of mediation. As counsel, you should ensure that any small talk respects the fact that the clients are there to settle a contentious dispute that may be weighty for them – not to mention the fact they are paying counsel and the mediator a lot of money to be there for the day. We have often seen counsel and mediators chatting about things like wine, sailing trips, or mutual friends that the clients don't know. You can build rapport with your colleagues without excluding (and annoying) the parties.
- Keep an eye on interpersonal issues that might be creating sticking points. If the other party or their lawyer is irritating you, take a deep breath and let that go. You might even tell the mediator this is going on so they can help you. If your client is refusing to take your advice, that is of course their prerogative - but you can ask the mediator to work with you on that too, if you think it's appropriate.
- Be patient. There is something about the passage of time, and the process of exchanging offers, that makes mediation work. Help your client be patient as well.

4. At the End

- If it becomes clear the mediation is going nowhere, it is fine to call an end to the day.
- If the mediation settles the dispute, you must ensure there is a signed written record of the settlement. Some mediators might help you with creating minutes of settlement, but many do not see it as part of their role to do this – so counsel should be prepared. Bring your laptop.
- If you run out of time but the discussions are still going somewhere, don't lose momentum! Agree on concrete steps to keep the negotiations going in the next day or two, ideally with the mediator's support.

V. Self-Care in Mediation

In our experience, a day of mediation is a long and tiring day for counsel – at least if they are actually applying themselves to the process. It is often at least as exhausting as a day in court.

This is especially true where there are emotional roadblocks to settlement; where the other counsel lacks mediation skills; or where your client needs a lot of support to understand and trust the legal process.

Even a successful mediation result can leave you feeling worn out. A successful mediation result is usually a hard-won compromise that your client has grudgingly accepted as their “least bad” option. Seldom will your client walk out overjoyed at the outcome you have helped them to obtain.

To care for yourself during and after a mediation so that you can quickly get back to your life after the day is done:

- ❑ Take real breaks, without your client if possible. Get out for a walk or go for a coffee. Take some deep breaths. Encourage your client to do the same; they will need a break from you as much as you need a break from them.
- ❑ Make sure you eat and drink properly. Bring snacks for yourself and your client.
- ❑ Be mentally prepared for the possibility of a long day. Thorny mediations sometimes run well into the evening.
- ❑ Call a colleague if you run into something you don’t know how to manage.
- ❑ Be generous to yourself and have patience, even if the negotiations are not yet going well from your perspective.
- ❑ Remember that a successful result is one that lets everyone move on with their lives. It’s normal not to feel like you’ve had a big win, even after a successful mediation.