Problems in the Mediation of Employment and Labour Disputes

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Mediation is the new buzzword in the resolution of employment and labour disputes. Everybody it seems is talking about it and every second person seems to be training to be a mediator. The ADR Centre of the Ontario Court (General Division) has finally brought mediation into the mainstream. The ADR Centre forces lawyers and clients into the mediation process and requires that they at least try it before marching off to Court . However there has been very little written about the actual problems encountered in an actual mediation. I have participated in a large number of mediations , both as a mediator and as counsel. The one thing I noticed over the years is that no matter how well I planned ahead of time , issues or events came up in the course of the mediation which had to be dealt with on the spot and often , on the fly. My hope is that through this paper I can share some of those experiences with you and perhaps allow you to deal more creatively with these problems when you encounter them at your next mediation.

PROBLEM #1

You act for the employer in a wrongful dismissal action . Your representative at the mediation is the Vice President of Human Resources, who assures you prior to the mediation that she has full authority to settle. At 10: 00 p.m. , after 12 hours of intensive mediation ,the employee makes an offer which both you and your client believe should be accepted. Your client then tells you that she has reached the limit of her authority and can go no higher without the Presidents' consent, thus she cannot accept the offer. The President is available by phone but your client is unwilling to call her at home because of the late hour.

Comment

Needless to say the issue of authority should have been canvassed at the beginning of the mediation so this problem could have been be avoided. However people sometimes simply lie about this issue, even to their lawyers, or they assume that the settlement would come within a certain range in which they did in fact have authority . Other times the client does have the authority , if he or she chooses to use it, however, they would prefer not to make such a difficult decision so they simply plead lack of authority.

As the lawyer, you first have to find out where the real problem is, in other words, is it lack of true authority or rather lack of will to make a decision. You may prefer to do this without the mediator present, although I believe that the right type of mediator can help you with this inquiry, especially if your client is feeling somewhat embarrassed because of the situation she has put everybody in.

If it is simply an unwillingness to make a decision, then you can try to build up your clients' ego and feelings of self-worth by reminding her that the President would not have given her this task if she didn't trust her judgment in the first place. Moreover, you can suggest to her that the President will not be too happy to have to deal with this case herself when she delegated

it to the Vice President for the specific reason that she did not want to deal with it herself. You can also offer to send your client a reporting letter after the mediation, setting out the negotiations, the issues and how you highly recommended and supported the Vice Presidents' decision to accept the offer.

If it is truly a lack of authority problem , then you can suggest a settlement which states in writing that the decision is subject to ratification by the President within a set time frame and that both the Vice President and the employers' lawyer will recommend its acceptance. This will at least bring some closure to the mediation and require the employee to commit to a specific settlement for a set time frame. The credibility of the Company's position is enhanced if it commits to either accepting the offer in its entirety or rejecting it, but undertaking not to use it as the basis for a counteroffer.

Problem # 2

You act for the Union in a labour dispute. You cannot stand the opposing counsel as you feel he does not treat you with the appropriate respect that you are due as a fellow lawyer. You used to get along reasonably well until this case. You are very concerned because this animosity seems to be getting in the way of the resolution of the case and interfering with the reasonably good relations between your union client and the employer.

Comment

This is where you must involve the mediator. Meet with the mediator in private as you may not want to have your client present while you "bear your soul " to the mediator . Tell the mediator what is bugging you and that it is getting in the way of the settlement. The mediator can often give you some helpful tips on how to deal with lawyers like your opponent, and can also talk in private with the other lawyer about your concerns. At the appropriate time it would probably make sense to have a meeting involving just the lawyers and the mediator to help work out the ground rules of how the lawyers will talk and relate to each other. Nobody said you had to love each other, but lawyers owe it to their clients to deal with each other with sufficient respect and curtsey so as not to undermine the mediation process.

Often lawyers can be more honest with each other when their clients are not present as they feel that they have to put on a show for the client. I recently had a case involving a lawyer who clearly did not specialize in employment law but felt it was necessary to tell me in the joint session that my evaluation of benefits based on cost to the employer was clearly wrong and that his client would never pay it. As I did not appreciate being lectured to by someone who knew nothing about the area , I proceeded to embarrass the other lawyer in front of his client when I forced him to admit that he was not aware of the leading case in the Ontario Court of Appeal on that subject where my position was expressly upheld and his was expressly rejected.

Later on in a meeting between lawyers and the mediator, we reached an understanding. If, in the future, the other lawyer did not know whether or not my statements about the law were correct, he agreed not to state in public that I was clearly wrong, but rather he would indicate that he would have to look into that issue. That would be my clue to not pontificate about the latest cases in front of his client, but rather he and I would meet in the hall to discuss the finer points of the law.

Problem #3

You act for the grievor and/or a plaintiff in a complex case involving allegations of discrimination going back over 10 years. After two days of mediation, your client seems to be incapable of providing you with any instructions and has, in effect " shut down ".The employer has made a very good offer and you desperately want your client to take the offer.

Comment

Relations between client and lawyer can get very strained in the mediation process , especially when the employee takes on and embraces the "victim complex " . People who feel that they have been victimized for a long period of time often develop an inability to help solve their own problem or to agree to a solution because they seem to really want a third party to rule in their favour and thus validate their status as a victim. They say they want to settle the case but they really do not want to let go of the grievance as it has become, to a large degree, an important part of their life. Moreover once the case is settled, the former victim may not be able to blame all his future problems on the past discrimination and instead find that he or she is not only responsible for the problem but also for the solution. Responsibility can be a scary thought!

Again, the best thing you can do is to involve the mediator in the process. The mediator has not known your client for the years that you have, and thus can bring a fresh look at the situation. Some mediators may have had specific training in psychology or social work or have dealt in the past with individuals with psychological or social problems. It can also be useful to involve spouses or close family members in the mediation, although they may well be contributing to the employees' sense of victimisation.

Emphasising the negative aspects of not settling (i.e. lawyers fees, continued mental stress) often is not as convincing to this type of client as it would be to the more bottom line orientated type of client. Instead, stressing the positive aspects (You will finally have some money to spend, you do not have keeping on going to see all those defense doctors) may be more useful. This type of client often feels that no one else has ever suffered as much as him , thus a settlement that makes the employer "eat a little crow" can be useful. Thus an apology, a reference letter or an agreement to change an existing policy can be beneficial. These employees also seem at times to have what I call a " Joan of Ark Complex" which makes them believe that they are really going through all this suffering for the other employees in the workplace. In that case, it may be important to fashion some symbolic aspect of the settlement to solve this need, for instance to strike a committee to study the problem of poor ventilation in the workplace

where a basis of the employees' complaint is that their performance problems were caused by sick building syndrome. Another technique is to remind the employee that he will now be able to devote all the energy that he has previously put into the lawsuit into other good works that can help people (i.e. volunteer work, political parties and union office).

Problem # 4

You are the mediator in what you thought was going to be a full day mediation, however at 11:30 am one of the parties tells you that he has to leave at noon because of a important prior commitment. The process is coming along well, but slowly, however you feel that given sufficient time , a deal is possible.

Comment

This matter should have been dealt with even before the mediation, in that, the letter setting forth meditation should have clearly set forth how long the parties expected mediation to take place, that is, either half a day, or a full day. As well, this should have been repeated at the beginning of the mediation, so that everybody makes a commitment with respect to their time. In addition, I usually find that the real settlement discussion does not take place until the sun goes down, thus it often makes sense to start a mediation after lunch or towards the end of the work day, rather than first thing in the morning and since you often go into the night no matter what.

The situation as set forth in this hypothetical, I feel it is appropriate for the mediator to somewhat push the apparently departing party for an explanation as to why he or she is making this mediation their second place priority of the day. It should not only be emphasised that his early departure creates unnecessary delay and wasted expenses for all parties, but also that his apparent indifference towards the other side is a very negative sign to bring into the mediation process. It says to the other side that you are unimportant and I could not care less if I screw up your schedule. I suggest as counsel or a party in a mediation that you do not try to use this method of setting up artificial deadlines as a negotiating tactic, as it will be well remembered by not only your opponent, but by the mediator as well. In order for counsel to be successful in a meditation process, he or she has to establish credibility and reliability both with the other lawyers, as well as with the mediator. A cheap shot tactic might work well in one case, but will probably adversely affect your negotiating power in future encounters with same people.

If you are the unfortunate recipient of such behaviour, I would strongly suggest that you avoid the temptation to accept the opposing lawyer's offer when he says, "I will extend the mediation just one more hour, but only if I see significant movement by you." My response to this would be "I am glad to see that you can push your schedule forward an hour and I suppose, if you really wanted to, you could clear the whole day and devote to this mediation the time that you previously agreed you would."

If you do accept the other lawyer's time trap of extending the mediation by an hour or so, I can almost guarantee you that he will spend most of the time formulating his own position and then pressure you to respond to his offer immediately, so that he can meet his artificial deadline.

Problem # 5

You act for the employer. Late into the mediation your client starts to talk about the fact that he feels he cannot move another 5% on the money because it is now a matter of principle. You start to push him and he accuses you of being on the employees' side.

Comment

It always amazes me, both as a mediator and as counsel, that people often rely on the issue of "principles" as crutches or excuses for not settling. It seems strange that the goal of settling a dispute never seems to be raised as a principle worth defending, it is always some other important principle. One of the best devices I have seen used to get over this principle blockage is to ask the speaker "What exact principle is it that you feel needs defending in this mediation ?" Quite often, the person holding this fundamental principle cannot even articulate it, if they do articulate a principle, then you can often probe the logic behind the principle. I once had a chief executor officer client in a wrongful dismissal case who told that, as a matter of principle, he could only go as high as $50,000.00 and under no circumstances would he go to $55,000.00 to settle the case. The principle espoused that was worth defending was the fact that he could not explain to the board of directors that he had settled for $55,000.00 when it was more than double his original offer of $25,000.00. After I pointed out to him that the $55,000.00 was less than a third of the plaintiff's first offer, I questioned him on whether or not the board of directors trusted him, naturally, he said they did. Secondly, I asked him if $5,000.00 was too large an amount of money for him to approve himself and did he need to seek board approval. He laughed at me, called me an idiot and said "Of course not." Then I asked him "If you were to tell the board that you settled the case for a sum of money which, in your professional opinion, was a good settlement under circumstances, would anyone at the board meeting even ask a question, let alone inquire as to what the actual settlement was." He replied sheepishly, "Probably not." All of a sudden, the $5,000.00 was no longer a matter of principle, it was just money.

A similar situation can arise where the employer is relying on just cause and they feel that, as a matter of principle, they should not pay money to someone who they strongly believe was terminated for just cause. This is a more difficult hurdle to get over because, of course, it is a reasonable principle for an employer to refuse to pay money to someone who, for instance, stole from them. However, rarely are allegations of just cause that straight forward , rather they often relate to performance related issues or the inability to get along with supervisors. One technique is to explain to the client that, even if money is paid to this employee, it will probably not encourage other employees to bring litigation because the word will get out that the settlement came late into the process and only after spending inordinate amount of money on

legal fees. Secondly, you can often settle these cases with employer clients on the basis that, although the company had a good case for cause, because they did not properly document it or follow up that there is risk that a court would not find just cause. In other words, the employer can use the case as a learning tool as to how to better document a just cause case the next time.

Problem #6

The plaintiffs' lawyer seems to use the threat of walking out of the mediation as a response to anything which displeases him. He has pulled this trick two times already, and twice he has been convinced to stay at the table by means of the opposing side increasing their last offer. He pulls the same tactic again and now the employers' lawyer feels that she has been taken advantage of and is also threatening to walk out. The clients have been silent throughout this episode.

Comment

As a mediator, you can easily see that the problem here is the lawyer's tactics. The lawyers are practising "lawyer-based negotiations" and ignoring completely the invaluable input that their clients should be adding to the process. Some of the most successful mediations I have participated in were when the mediator made it very clear, either at the beginning or during the mediation itself, that they really wanted to hear from clients themselves and not so much from the lawyers. This does not mean that the lawyer has no role to play, it is just that the role is not necessarily that of being the primary mouth piece. This is a difficult role for some lawyers to adopt, as it goes against their very nature. It is useful to remind these types of lawyer, either in private or in front of their clients, that the case belongs to the client, not the lawyer. As a lawyer in a mediation, I see myself as having two roles; my jog is to provide honest and gutsy legal advice to my client and to tell them what, I believe, the expected parameters are of the outcome of the case. By this I mean I try to set out for my client their best case and worst case scenario. I then tell them that during the first part of the mediation, my jog is to try to get both parties to agree on these parameters.

Once that first step is achieved, I see my role as to guide and assist my client in negotiating the best deal within those agreed to parameters. Here I will provide legal advice, tactical negotiating advice, emotional support and perhaps a box of Kleenex to wipe the tears, but my client is the one who decides how much to offer, what to move on and, ultimately, what to accept or not accept. I will be absolutely blunt in spelling out for my client the chances of success, the cost of loosing, the cost of winning, the chances of getting a judge who knows nothing about this area, the horrible trial scheduling system, the demands on his or her employees, time and last, but certainly not least, the psychological toll that litigation brings upon all of its participant. However, the issue of settling is not mine to decide, it is only my client's. Therefore, before I threaten to walk out of a mediation, I first ensure that it is my client's desire to walk out and that we both mean it.

Problem #7

The case involves outstanding commissions owing both prior and after termination of employment. The employer has information regarding sales which took place after termination of employment . They share this information with the other side but the employee believes the figures are suspect. If the commission figures are accurate, then the employers offer is a very good one. The employee's lawyer wants to have examinations for discovery in order to verify these figures but the employer refuses because it does not want to incur the extra legal fees.

Comment

It often happens that in the course of a mediation, one party has difficulty making a decision because either they lack information or because they need to rely on the honesty of the other party for that information. This is especially true where the mediation takes place early on in the process, prior to examination for discovery or even the exchange of pleading. Needless to say, as in any other business or life decision, you never have all the facts and quite often people are forced to make decisions based on inadequate information. However, in the situation of the hypothetical mentioned above, I have developed a useful mechanism to get over this hurdle of when one party has information that the other one does not necessarily trust. Under this scenario, the employer would advise the employee of the commission figures and, at the same time, make a settlement offer based on the accuracy of those figures. The employee would accept the offer contingent on satisfying himself within a set period of time that the information provided by the employer is accurate. The employee, therefore, is taking no risk whatsoever because, if the underlying information turns out to be accurate, then he settled correctly. If, on the other hand, the information turns out to be false, then there is no settlement and he has risked nothing. This is a much more expeditious method of obtaining information, then to go through a full blown discovery just to find out perhaps two or three bits of relevant information.

Problem #8

You are the lawyer for the employer. The employee makes an offer which in your opinion is 20% more than your worst case scenario in court and you tell your client that. The employer says that he is fed up with the whole litigation process and wants to get back to making widgets , not spending all his time and energy on this lawsuit. He tells you he wants to accept the offer but only if you support him in the decision because he is worried his partner will hound him if he settles too rich.

Comment

As long as you, as the lawyer, do not question the legal competency of your client, I do not believe it is appropriate for the lawyer to stand in the way of settlement just because the settlement may be more or, for that matter, less than he thinks is legally possible. As I said before, the case belongs to the client, not the lawyer and if the client wants to ignore the lawyer's advice and settle for a number outside the range of reasonableness, that is his/her prerogative. Client's often have non-monetary reasons for not wanting to settle. I was involved in a particularly nasty wrongful dismissal action in which I represented the employer who had a long-standing personal relationship with the employee. In the final crunch of the mediation, the employee made a settlement offer which, in my opinion, was higher than my client's worst case scenario by about $5,000.00. I will never forget what my employer client said to me when he instructed me to accept the offer. He said, "Barry, I can earn $5,000.00 more by just selling a couple more widgets, but I cannot get a good nights sleep unless I settle this case. This case has been eating at me ever since it started. I have been in business 25 years and I have never had an employee sue me and I never want it to happen again."

With respect to the second part of the hypothetical, that is writing an opinion letter which does not truly reflect to your opinion, of course, it would be inappropriate for a lawyer to that. Rather, the job of the lawyer at that point in time would be to work with the client at the mediation in convincing his reluctant partner that he should go along with the deal. This is similar to the lack of authority problem discussed above.

Problem # 11

You are the client and you feel that your lawyer is not competently handling your side of the mediation because you feel he is too soft. You have known the other litigant (Fred) for 25 years, been to his wedding , his children's birthday parties, basically the whole 9 yards. You feel that if only you and Fred could go for a walk without the goddam lawyers , you two could strike a deal.

Comment

As a client, do not let the lawyers take over the mediation process, as this is your process and your case, not theirs. If you feel that a private chit chat with the opponent would make significant progress, tell your lawyer that and tell him that that is what you want to do. The lawyer may offer his opinion as to whether or not he thinks that is a good idea, but ultimately it is your decision, to follow or not follow your lawyer's advice.

One of the most fascinating mediations I was ever involved was resolved exactly because the lawyers knew to bow out at the end. After a full day and half the night of negotiating, the employer client reached the end of his limit and was insistent that this offer that he was about to make was his absolute final offer. All day the lawyer for the employer had been presenting offers in joint sessions and the client had been remaining quite silent. When he was asked by his

client to present this final offer, the lawyer quite properly turned back to his client and said, "Mario, since it is your final offer, why don't you present it?" Mario thought that was a good idea and proceeded to write out the offer for presentation to his ex-employee and ex-friend. He wrote a fascinating note which I remember went as follows,

Dear John

I am sick and tired of all this stupid back and forth between us and the lawyers. My final offer is $55,000.00. Please tick off the appropriate box one way or the other.

---------- *Yes*

---------- *No*

At that point in time, the mediator suggested that Mario and John take a little walk, which they did. Twenty minutes later they returned with huge smiles on their faces. The document that had been prepared by the employer client had been ticked off with the "yes" box. There is no doubt in my mind that if the lawyer had made that final offer in a joint meeting, in the same fashion as the previous offers had been made, the case would not have settled at that time. It took the personal involvement of the clients, at the critical time, without the presence of lawyers or mediators, to finally clinch the deal.