

# **What Every Human Resources Manager Should Know about Mediation**

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## **What is Mediation?**

Mediation is a process whereby parties to a dispute work to settle their differences with the assistance of a neutral third party whose job is to help them achieve a voluntary settlement. The mediator has no power to impose a decision on the parties nor does the mediator normally give his or her opinion as to what a proper settlement should be. In essence then mediation is “non-binding” in that the only legally binding aspect of mediation is the settlement agreement that may result from mediation.

Mediations in the employment or labour context are always held on a “without prejudice “ basis. In other words, nothing that is said in the mediation can be used or quoted by either party in any legal proceedings. This encourages the participants to be more open and frank in their discussions both with the mediator and the other party. Furthermore, the mediator is not a compellable witness in any court. Thus neither party has to worry about the problem of the mediator being forced to testify in court about what went on in the mediation.

## **What is the physical setting of the mediation?**

The mediation can take place anywhere the parties agree. Usually the parties want the mediation to take place on some sort of neutral ground, like a hotel or the mediators’ premises. However, where quick access to information would facilitate the mediation, it may make sense to have the mediation at the employers’ premises, if this does not unduly upset the employee or the Union.

The mediation needs at least two rooms to work. This is because each party needs a room to separately confer in, and sometimes the parties each want to confer separately without the presence of the mediator. Normally the mediation room is set up in typical boardroom style with the mediator at one end and the parties on the each side. However some of the most effective mediations I have done were at a round table, where the setting itself created a less adversarial atmosphere.

Mediations can be lengthy processes. It is not unusual to have a typical wrongful dismissal mediation last a whole day and often part of the night as well. It is important therefore that the participants have a clear schedule for the day, as nothing is more frustrating than to have a mediation fail because one party has to leave, or says he has to leave, while everyone else wants to push on.

## **Who is present at mediation?**

Normally in employment or labour mediations the parties have their professional advisors present throughout the mediation. These advisors may be lawyers, business agents, or consultants. Of course the clients must also be present as mediation is a client-based process, not a lawyer based one. The client is the key to mediation because it for him or her to decide if a deal is made, not the lawyers. Normally for the trade union, the

relevant client would be the individual grievor and perhaps the local union president. For a non-bargaining unit case, the client would naturally be the employee or ex employee. However the employee may also wish to have a family member present, either as moral support, or as a translator or more importantly as a person whose consent is required before a settlement can be approved. Where one spouse has been fired, the decision to sue the employer and then to settle is often viewed as a family decision requiring the input and consent of both spouses. The mediation will be much more effective if all the decision-makers are in the room so as to not let someone use the convenient excuse that he or she needs to seek the consent of a third party.

From the employer side, it is critical that the person representing the employer at the mediation has real authority to settle the case. Do not send the foreman to the mediation just because he was the one who fired the employee if that foreman has no authority to cut a deal. You may wish to have him on the mediation team for his input, but do not send him alone. The more usual problem however is where the corporation sends in a senior Human Resources Manager with no real authority to settle, or with preset limits on his or her authority. Typically in these situations, the ultimate authority is the CEO, however the CEO refuses to attend the mediation herself but on the other hand does not trust the Human Resources Manager to do the deal. By not being involved directly in the mediation itself the outsider does not always understand what has already happened in the negotiations, who has already given up a particular point, where the sticking points were and the like. Therefore where the CEO is presented with a recommendation from her lawyer and Human Resources Manager which is greater than her pre-mediation understanding of the employers' potential liability, the tendency is to refuse to consent to the deal. At this point the credibility of the lawyer and the Human Resources Manager with the other side and the mediator is compromised and the chances of a settlement are greatly diminished.

Of course, the mediator is present throughout the process. The parties can use the mediator as much or as little as they like. Some parties like to meet between themselves without the mediators present where other parties want the mediator to be present at their private meetings. Personally I find the most successful mediations are where the mediators are allowed to sit in as many of the private meetings as possible, although there may well be times you do want the mediator present.

### **How do I prepare for mediation?**

Depending on when the mediation takes place, there may or may not be a need to gather information prior to the mediation. If there is already a lawsuit underway and discoveries have been completed, in all likelihood there is probably already an overabundance of information and documents. The real job here will be edit out and decide what information is really necessary to know at the mediation. If the mediation takes place early on, then you and your advisor should carefully think through what sort of information you and the employee need to have an effective mediation. If you intentionally withhold information that the other side needs to make a decision, then the other side may assume that the information in question is helpful to them and harmful to

you. It will also create or add to a feeling of distrust, which will only further diminish the chances of achieving a settlement.

Of course the type of information you need will depend on the type of case being mediated. The following is a list of information you may need in a case in which just cause is alleged.

- If the case involves the calculation of commission income or other variable income, you will need a complete compensation history of the employee, together with T4's and a breakdown of the various components of the compensation.
- List of benefits and their monthly cost to the employer
- Witness statements
- History of previous discipline
- Performance reviews
- Pension information
- Text of profit sharing and bonus plans

You should also have a strategy for the mediation. This does not necessarily involve coming up with a "bottom line figure" which will become your final position. Rather you should start to think of a settlement theme that will also address the interests of the other side. For example, I recently was involved in a mediation as counsel for the employer in a case involving the dismissal of an employee due in part to the company's allegation that she was permanently disabled. The employee in question had been through sheer hell in the past five years since her termination, fighting with WCB, UIC, the employer, Legal Aid and the Ministry of Labour. My clients' initial position was that they questioned the legitimacy of the employees' injury as well as her actual level of disability. However we agreed, prior to the mediation, that in the mediation we would not question her injury, in fact we would acknowledge it openly, and show how we understood how difficult it must have been for her over the last five years. We did this in the first 30 minutes of the mediation, and it took the plaintiff completely by surprise. Her whole attitude completely changed and we were able to settle the matter within five hours within the parameters that my client had already agreed with me were acceptable.

You should be cognizant of the “ebb and flow” of mediations. Knowing your final position is only part of the process. It is equally important to discuss your opening position, plan which items to throw out and when, decide whether or not you should make the first offer, and how many rounds of negotiations there will probably be before it is the real decision time. You should try to plan for the unexpected, anticipate the stumbling blocks and recognize ahead of time that mediations can be very emotional and stressful events. Knowing that these events will occur ahead of time should make it easier to deal with it when it actually happens.

### **What actually happens at the mediation?**

Most mediations start with what is called a “**joint caucus**”, which simply means a meeting of all the participants, including clients, lawyers and the mediator. The mediator usually starts off with some brief introductory remarks about the process, the mediator role, issues of without prejudice and confidentiality and the simple ground rules of the mediation.

The mediator then usually asks one party to give a brief outline of its case. Sometimes the mediator will ask that the client, not the lawyer, give the opening. This can be either quite useful or a disaster, depending in a large degree on the personality of the client. I find that the most effective openings are where both lawyer and client speak. The lawyer can give the more formal part of the opening, setting out the important facts and the legal issues, after which the client can add the more personal information.

After one side has presented their opening, the mediator will ask the other side to reciprocate.

Often the joint caucus will go on for quite a while, with clients and lawyers talking back and forth to each other. The parties are allowed and in fact encouraged to talk directly to each other. The mediator will usually only intervene if he or she feels that progress is not being made or if someone is being rude or offensive. This joint caucus can be a very useful time to gather and share information, start to understand the other sides motivations and goals ( what mediators love to call the clients “ interests “ as opposed to their “positions”), and understand where the areas of agreement are. If, at the end of the joint caucus the parties can agree on what the real issues in dispute are and the realistic parameters of those issues, then the joint session will have been quite successful. For example, if at the end of the joint session the parties can agree that the chances of proving just cause are poor but so are the odds of the employee obtaining punitive damages, then they can agree to focus on the real issue of appropriate notice and “park” those other issues.

When the maximum usefulness of the joint session has been achieved, the mediator will meet separately with each party, in what mediators call a “ **separate caucus** “. In this separate caucus, the mediator will often take a more active role than before. In the mediators’ opening, the parties would have been told that

anything the mediator is told in private, can be used by the mediator as he or she feels fit, unless you tell the mediator that he or she is not to disclose it to the other side. In this separate caucus the mediator will probe more deeply into trying to discover the parties real interests, as opposed to their stated position. She will perhaps question the lawyer on a legal principle, not to give her opinion on the point but to try to discover how sure the lawyer is of the law as it affects the parties' case. The mediator may try to get to understand the risks inherent in the position of the party by asking questions like "If you were to allege theft and then be unable to prove it, what effect do you think that may have on the judges assessment of the proper notice period?"

This is where the party can share their concerns with the mediator about either their case or their opponents. The employer may for instance have a very rigid stance that under no circumstances will it pay a bonus that becomes due during the notice period, notwithstanding the lawyers advise that there is a good chance that the Court would find that it was owing. The mediator needs to know this so that she can understand the clients' continued refusal to compromise on this issue. The mediator may suggest a way around that problem, for instance by increasing the notice period, paying a higher level of costs or changing the structure of the termination offer. The mediator can also, to a degree, give a party information about her perception of how the other side is dealing with the issues. It can be very helpful to determine if the employee is very emotional, if her lawyer is giving her sound advice, which proposes the offer, and what sort of questions are they asking about their opponents' position.

The main feature of the joint caucus is to allow the parties to formulate and then present offers and counteroffers. Offers can be presented in a number of different fashions, including:

- Single dollar lump sum with no breakdown
- Offers dealing with only one issue , for instance notice but no comment on costs and interest
- Multiple number offers with different amounts for different items
- Concept offers , for instance “ we will drop our claim for year end bonus if you drop the allegation of failure to mitigate”

The offer can be presented by the mediator, the lawyer or the client. I personally find that an effective way to present an offer is for the lawyer to do so in a joint caucus meeting with a explanation as to how and why the offer looks like it does. If the other side has any questions about the offer, they can ask them right then and there. The other side will then usually retire to consider the offer.

Hopefully the process leads to a settlement, either in whole or in part. If there is a comprehensive settlement of all issues, it is critical to write down and sign off on a **Memorandum of Settlement**, which is a legally binding agreement. The mediator will work with the lawyers in completing the Memorandum of Settlement, as it is very common for other issues to arise at this time either because they were not yet discussed or one of the parties is getting cold feet.

If a full comprehensive settlement is not achieved, then you still may be able to achieve something from the process, like:

- Settlement of some issues
- Agreeing to a further mediation date on terms like neither party to take any steps in the lawsuit until mediation is exhausted.
- Agreeing to arbitrate instead if litigating the case.

**Conclusion**

Mediation is a method by which the determination as to whether or not a case goes to trial and on what terms a settlement will be achieved are taken back from the lawyers and judges and given to the people that matter, that is, the clients. It is a powerful dispute resolution tool that often produces results much more satisfactory than traditional litigation. It is also a procedure where a well-informed and skilled human resources client can make a significant difference in the ultimate outcome.