Why Some Mediations Succeed and Others Fail

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Introduction:

To mediation diehards there is no such thing as a “ failed “ mediation, however in this paper and in my world a “successful” mediation is one that results in a legally enforceable settlement whereas a “ failed “ mediation is one in which a settlement is not achieved. Furthermore, my comments in this paper are limited to those mediations involving disputes that arise in the context of either a threatened or actual lawsuit or a rights grievance under a collective agreement. Therefore I am not addressing my musings to mediations involving workplace issues that do not involve a legal component.

Popular Myths of Why Some Mediations Fail:

I thought it might first be useful to talk about factors that seem to have little or no effect on determining whether or not a specific mediation will succeed or fail.

First and foremost the amount of money in dispute seems to have little or no effect on the likelihood of a successful mediation. Cases involving large amounts of money are neither easier nor harder to settle than cases involving smaller amounts of money. The dynamics and pressure points are very different in large dollar cases as compared to modest dollar cases, and therefore the approach of the mediator should change to some degree depending on the amount in question.

Secondly, the degree to which there are differences in the factual underpinnings of the case is usually a small factor in determining whether or not mediation will succeed. One reason for this is that although the parties almost always differ on some of the facts, the degree to which those different versions of the facts will make a significant difference on the legal outcome is often overestimated by the parties. Secondly, dealing with disputed facts in a mediation simply becomes another risk factor to be taken into account in assessing whether or not it makes more sense to settle the mater than proceed to Court or arbitration. Thirdly, even if there is a disagreement over the facts, a discussion about how each party would prove those facts in Court or arbitration often leads to some rude

awakenings for one or both of the parties. For instance if one parties' case depends on proving a fact through a witness that may be adverse or unavailable for trial or not able to be subpoenaed because they live outside the jurisdiction, then this can have a profound effect in a mediation. Proving a fact in Court may prove damaging to the business interests of the employer to such a degree that the Company will lose more money by winning the case than if they lose. For instance, if an employee was terminated because they were apparently rude to customers, and the only admissible evidence would have to come from the customers themselves, few businesses would want to involve their clients in a lawsuit. Moreover, how would you like the plaintiff's lawyer calling your clients, interviewing them, and contacting other clients to see if they will say that the ex-employee was not rude, etc?

Third, the degree to which there are disputes on legal issues is generally not a significant barrier to settlement. Again, after thoroughly analyzing the legal risks, competent and reasonable parties simply factor into the settlement equation the risk of winning or losing on the legal issue. Part of the job of the mediator can be to explore with the parties the thought processes of legal decision makers (i.e. judges, juries and arbitrators), in an effort to better assess the risks.

Well if money, the facts or the law are not major barriers to settlement, then what is? The answer, surprise, surprise, is the human behavior of the participants to the dispute. This includes not only the clients at the actual mediation but also the lawyers, and people who do not actually attend the mediation but nevertheless exert an influence on the actual participants.

Overview of the Human Relationships in a mediation

I start with the premise that all of the participants in an employment or labour mediation are human beings, with the usual baggage of wants and fears that we all possess to various degrees. We all view our roles in a certain way and also conduct ourselves with a view to how we believe others view us.

For example, a dismissed employee is obviously going to be upset about losing their job, but why do some take it in stride and others seem to literally fall apart? To a person who views their primary identity as coming from their work, loss of the job will be much more than a loss of income. To a person who is unable to accept criticism, the issuance of a letter of reprimand will be seem as an act of constructive dismissal. For people like this it is extremely difficult for them to accept that their pain and anguish is trying to be " bought off " with an offer of reasonable notice

On the Company side, one must always remember that unless the decision maker is paying the settlement out of his or her own pocket (like an owner operator would), then the real issue will usually always be how does this settlement affect my own job? If settling the case for X dollars will jeopardize the Company parpticipants' career path more than going to trial and losing, then it will be extremely difficult to convince the VP HR or the CFO that accepting the settlement is best decision he or she can make..

Lawyers are key players in the mediation process and they too have personalities and interests that must be taken into account in the mediation process. The dynamics between opposing lawyers is a vital issue for the mediator to understand and observe. One of the first questions I usually ask each of the lawyers separately is how they have got along so far on this case. I usually get one of three responses:

1. She is a good lawyer, I am sure that she and I can do business.
2. I have dealt with him on other files, he was a jerk on those files and he is being worse on this one.
3. I have not dealt with him or her before but I hear from my partners that…

Lawyers also have relationships with their own clients and the other lawyers' clients that need to be understood and perhaps managed at the mediation. Each of there relationships can affect the outcome of the mediation.

In summary, in addition to understanding and managing the factual and legal disputes, a competent mediator must also be aware of and work with the following relationships:

- Employee and the Company
- Employee and the representatives of the Company, both those at and those absent from the mediation
- Employee and his own lawyer
- Employee and Company lawyer
- Employee and his spouse and or family
- Employee and the mediator
- Lawyer and other lawyer
- Lawyer and the mediator
- Lawyer and opposing client
- Company representative present at mediation and those back at HQ
- Company representative and mediator
- Company representative and Company lawyer, perhaps both in-house and outside counsel
- Company representative, both present and absent, and mediator

The odds are going to be that one or more of these relationships are going to be either dysfunctional or at least problematic. The more problem relationships, the less likely the mediation will be successful.

In a labour arbitration context, you also have the extremely important involvement of the trade union with all the other parties set out above.

I will now deal with some of the issues that arise in dealing with the various participants and how the ability to deal with issues can increase the likelihood of a successful mediation .

The Mediator:

I am assuming in this scenario that the parties may have been forced to use the mediation process (either in the course of a Mandatory Mediation under the Rules of Civil Procedure or pursuant to a mediation clause in a collective agreement) but that they have chosen the mediator on consent. This would not be the case where the parties have been assigned a mediator by the Court where they failed to agree on one themselves or where a governmental agency provides the mediator (like the Ontario Human Rights Commission or under the Canada Labour Code unjust dismissal provisions).

The ability of the parties to choose their mediator can go along way to set the tone of the upcoming mediation. Mediators have a variety of different styles and approaches. In a very general sense the varying factor is to what degree a mediator uses evaluative techniques in the course of the mediation.

At the highest end of evaluative scale is the mediator who listens to the parties and their lawyers and then tells the parties what he or she thinks is the right settlement. The mediator then uses his or her power or influence each party to accept his or her proposal.

The other end of the evaluative scale is the mediator who sees his or her role as completely non-evaluative so that they would never offer any opinion on the legal merits of the case or any position of the parties. They might offer an opinion as to a process issue, but even then would take great care to insure that the parties agreed with the process suggestion.

Most successful mediators are at neither end of the evaluative scale, and instead adapt different techniques to different situations, but generally feel more comfortable towards one end or the other. In my own practice, if I am mediating an employment or labour case, I tend to emphasize the evaluative aspect, as I feel very comfortable with my knowledge of the legal, business and human aspects of these types of cases because I practiced as a lawyer in this area for over 20 years. On the other hand, if I am mediating a commercial dispute, I am less likely to use evaluative techniques.

Evaluative vs. non-evaluative is only one aspect of the mediator makeup. Some mediators intentionally adopt a quite informal atmosphere in the mediation, others find that a more formal structure works best. In my opinion, an important factor in choosing a mediator is the degree that the mediator is prepared to work really hard at working with the parties at trying to get a settlement, call it " mediator doggedness ". Some mediators view their role as quite passive, and will emphasize that it is strictly for the parties to determine if the mediation is progressing. Other mediators are prepared to immerse themselves more in the process and take a much more active role in trying to get the parties to arrive at an agreement.

As an more evaluative type of mediator, I view the relationship between mediator and lawyer and mediator and client as perhaps more critical to the likelihood of success than a non-evaluative mediator might.

From my point of view the important aspects of the client/lawyer relationship with the mediator are based largely on the following attributes:

- Everybody wants the mediator to be unbiased and neutral. This does not mean, in my opinion, that the mediator is never to express an opinion about anything, rather it means that mediator does not come into the process having prejudged the situation or the parties.

- The parties want to know that the mediator has listened to and understood their story.

- The parties want to feel that when the mediator goes to convey an offer that he or she will do as that party's strong advocate.

- Lawyers often want to use the mediator to deliver bad news to their client that they feel unable or are unwilling to do themselves. This can also involve having the mediator expressing reluctance to deliver a certain offer or position if the mediator thinks that it will be counterproductive to the settlement prospects.

- Lawyers especially want a mediator who will tell them what is going on in the other caucus room, i.e. are they angry, who is doing the talking, who is the stumbling block, does the other lawyer "know his stuff".

- Clients appreciate seeing that the mediator understands and can communicate to the other party their feelings and pain. If the case involves allegations of theft, this can be explaining to the employee how hurt and betrayed the employer feels that this once trusted employee has seen fit to rip them off. An employee who after 15 years of service was given 5 minutes to clean out his desk and leave may be much more willing to pour his heart out in front of the mediator is a separate caucus meeting about how humiliated he was, than to do so in front of the employer in a joint session.

From the mediators' point of view, he or she is generally looking for the following attributes from the clients and lawyers:

- From the lawyer, the mediator wants what I call " intellectually honesty". In other words, if you truly believe that the reasonable notice period is 6 to 9 months, don't tell me in the separate caucus that you have told your employer clients that the range is 3 to 5 months. I firmly believe that the first obligation of a lawyer to his own client is give honest and frank

advice, and then advocate the position as instructed by his client. Telling the client simply what he wants to hear as opposed to what he should hear is a disservice to the client. This intellectual honesty also entails sharing with the mediator any insight into the client that may help me understand the conflict. For instance, if the lawyer is taking instructions from a client who needs to bargain every point just for the sake of bargaining, then I may better understand why the Company's first position is out of whack.

- From the client, the mediator is looking for a willingness to appreciate that their own lawyer has a genuine interest in providing the best advise and counsel that he or she can and that to ignore their own lawyers' advise is a dangerous strategy which will often frustrate any settlement. Clients need to appreciate that they may well think that certain aspects (or perhaps all aspects) of the law do not seem to be fair to them in this particular situation, but that their emotional feelings towards the law is not going to cause the law to be changed. Similarly, clients often feel that no one understands what they are going through, whereas an experienced employment law lawyer or mediator often has a very deep understanding of the problem because they have helped many people through this difficult time in their lives. Moreover, lawyers and mediators are usually more astute than clients in objectively trying to determine what a judge or jury would likely do with a particular factual situation. Although this may at first blush sound contradictory, it is also extremely important for the client to remember that this is their conflict and not their lawyers, so that they have the prime responsibility to try to achieve a settlement. Lawyers give advice, clients give instructions.

- Mediations are often very difficult processes. The client needs not only to be prepared intellectually for the mediation but also emotionally prepared. Do not give up and walk out of the mediation the first time something does not go your way. Mediators need clients who will explore every possible avenue for resolution and not be afraid of going down a road that they have not traveled before. Remember if this was an easy process, then you probably would not need a lawyer and you certainly would not have needed a mediator.

The Employee or Ex-Employee:

The employee or ex-employee is one of the two key players in the mediation, however they are often the person who has the least direct contact with all the other participants in the mediation itself. Sometimes this lack of participation is due to an over controlling lawyer, but more often than not it is the clients choice to not actively participate in the mediation. I find that employees are often quite reluctant to participate in the joint session, usually held at the beginning of the mediation, but are more willing to participate in the separate caucus, especially if they started to form some sort of bond with the mediator.

As a key participant in the mediation process, the relationship that the clients have with all the parties is very important. Here are some of my thoughts on this topic.

- Honesty in expressing feelings may well be a virtue, but choosing when to express that opinion requires some tactical and strategic planning. For example, telling the VP HR in the joint session that being required to clean out your desk in front of your co-workers was an utterly humiliating experience is a good way of letting everyone in the room assess how sympathetic your story will appear to a judge or jury. On the other hand, telling your former boss in the joint session that you have absolutely no respect for him as a supervisor or as a human being is not likely to encourage him to open the corporate checkbook.

- Nobody likes an exaggerator or someone who accepts no responsibility at all for any faults. Therefore the employee who proclaims at the mediation that they are in no way responsible for any of the bad things that happened at the company but claims credit for all the successes quickly loses the usual sympathy that flows to a dismissed employee.

- The key issue for the employee to keep in mind is that the emotional pain of the termination will not be wiped out by going to court or in a settlement. The employee may still be unemployed after the resolution of the case or their retirement plans may well have been permanently altered by the dismissal. However by settling the case the employee can at least start rebuilding their life. The ability to close this chapter in their life and start to move on usually provides the push at the end of the mediation to close the deal

The Company Representatives:

- The single most important thing that the Company can do at mediation is the thing that they most often do not do, that is to bring the real decision makers to the actual mediation. Unfortunately this is rarely an HR person. Having authority to reach a deal means that if you think that a certain settlement is acceptable, then you can sign the deal. It does not mean that you have spoken to the decision maker before the mediation and he or she has given you an upper limit. Lack of authority at the table leads to more failed mediations than any other single factor, in my opinion.

- The Company representative who attends the mediation is going to be the focus point of the employee's anger. Responding in kind is counter-productive, especially in the joint session. Trying to justify or rationalize inexcusable employer behavior is also counter-productive. You are better off apologizing to the employee for the way something was handled poorly.

- Furthermore recognizing that the company has legal exposure because a poorly drafted employment contract or a illegal overtime policy should lead the Company to change those practices to avoid future liability, as opposed to worrying about the floodgate effect of settling this one case. If you do not settle the case, there will be a public judicial finding of your poor practice, instead of a confidential settlement in which the Company admits to no liability. The "floodgate" argument or the "it is a matter of principle" arguments are often used by people who are simply afraid to make difficult decisions.

The Lawyers :

- The relationship between lawyers can have either a helpful or harmful effect on the chances of success at the mediation. If you are having problems with the other lawyer, either from this case or from prior cases, then talk to the mediator about it. The mediator was chosen primarily by the lawyers, so presumably that is the one thing the lawyers did agree upon. The mediator might give you from valuable insight into the other lawyer that will help you get a deal in this case.

- Remember that especially in the joint session that you are being carefully observed by the other party. You want to convey the image that if necessary you will take this case to trial, but like most fair minded people you would prefer to settle it upon terms satisfactory to your client. Try to resist the natural temptation to simply act tough and give the usual “you are dying to take this case to trial “ speech.

- Making needless threats rarely brings people around to wanting to settle. Think about how you react when someone makes a stupid threat to you. Why should they respond any differently?

- Clients seek and pay for your advice. If they ask you whether they should accept a certain settlement, they actually want your opinion. If you think they might do better in Court, tell them that but also tell them honestly what the risks are and what they need to expend in time, effort and money to get there. On the other hand, if you know that in the circumstances that the offer is a good one, tell them that and encourage them to accept the settlement. They want to know once they take that big step to close the deal, that you are behind them and support them in their decision.

- Even if at the end of the day the best you can do is to present your client with an offer which in your opinion is inferior to what he or she would get in Court, remember that clients have other non-legally based reasons for wanting to settle. In my opinion, the job of the lawyer is to first advise their client, then to advocate for their case so as to achieve the best settlement position on that day, and then let the client decide whether to resolve the matter at that time or continue with the litigation.

Points for all participants to remember:

- Breaking up is hard to do. Employment cases often involve the termination of long-standing and intense relationships. It always involves emotions, usually on both sides of the table. You cannot ignore emotions at the mediation, nor should one become obsessed with them.

- Closure and a clean break are often what both sides need and want. Therefore settlements that involve a high degree of future involvement (salary continuance, consulting contracts) often do not satisfy this mutual interest. Most employers will pay a little more and most employees will take a little less to ensure that neither ever has to deal the other again.

- Keep your eye on the prize; meaning focus on getting a settlement that is as good as or better than the alternative. It is very easy to get caught up with the "dance of negotiations " where you care more about what the other side is doing than realizing that you have already reached an acceptable settlement. Be selfish, if the deal is good for you, don't worry if it may be better for the other side. Remember that it is perfectly acceptable to say, "yes" to the other sides offer.

- The last 5% of most negotiations is usually pure ego. No lawyer can tell you with that degree of precision what a Court outcome might be. No one will remember six months from now who "caved in " to the other persons offer at the end, but they sure will remember who couldn't close the deal that then led to the trial.

- If you trust the negotiation judgment of the mediator, seek his or her input on how to conduct the negotiation. The mediator gets to see what goes on in both rooms; he or she is sensitive to the changing dynamics of the negotiation.

- Principled negotiations usually work better than simple positional bargaining. Settling a legal dispute is not like buying a fridge. In a pure market economy there is no final arbiter of the price other than what a seller and buyer can agree upon. In a legal dispute, the parties are negotiating within the framework that if they do not agree on a settlement, a judge or jury will decide the issue.

- Having extolled the virtues of principled negotiations, also recognize that at the end, if the parties are close enough, most cases settle by "splitting the baby in half"

- You will probably not get a settlement within the limits that you may have set upon yourself before the mediation started. Don't worry too much about this, as the odds are neither will the other guy!

Conclusion:

Mediation has been proven to be a powerful and effective tool in resolving employment and labour disputes. The point of this paper was to try to illustrate that the likelihood or a successful mediation is primarily dependant on the behavior of the participants and only secondarily related to the actual dispute in question.

Reasonable people can solve very complex problems together, whereas unreasonable people cannot solve the simplest problems.

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