Dynamite Mediation Briefs and Minutes of Settlement

In

Wrongful Dismissal Mediations

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Introduction:

Ever since mandatory mediation has become standard in employment cases (at least for actions started in Toronto, Ottawa and Windsor) there has been a plethora of courses and articles focused on the elements of mediation advocacy. These articles have focused largely on the mechanics of the oral advocacy in the mediation.

The purpose of this article is to focus on the written elements of the mediation, namely the mediation brief and the minutes of settlement.

A) Mediation Brief

I find that I generally receive two types of mediation briefs; very helpful and terrible. The purpose of this paper is to help make your mediation brief one of the former and not the latter. Here are some useful practice points .

Practice Point No. 1

Key to writing any mediation brief is to first ask yourself the question " Who is my primary audience? " or " Who are I am trying to influence in this mediation brief?"

These are four following possible audiences:

- The mediator
- The opposing lawyer
- The opposing client
- Your own client

The style of mediation brief that you choose will depend largely on who you consider your primary audience. In other words, a mediation brief written to influence a mediator may be very different from one seeking to influence opposing counsel.

In an informal survey I conducted among lawyers a few years ago, when I asked them who they thought was their primary audience, most responded that they considered the opposing counsel as the primary audience and the mediator as the secondary audience. Classic interest based mediation theory would have you think that the primary audience should be the opposing party, but in fact this informal survey revealed that many lawyers do not even send their clients the opposing lawyers' mediation brief before the mediation . As a mediator, I can attest to the fact that I often receive mediation briefs less than 24 hours before the mediation, in which case it would next to impossible for the opposing client to have read that brief before the mediation. Often the first time the client sees the opposing mediation brief is at the mediation itself. Needless to say, at that time the client is probably focusing on the oral aspects of the mediation so your brilliant written advocacy has little or no effect on the opposing client.

So here is Practice Point No. 1:

If your primary audience for your mediation brief is the opposing client, serve the other side with two copies of your brief as soon as possible, preferably before your opponent has done his or her mediation brief . This will improve your chances that the opposing client will actually read your brief. By providing the other side with two copies of your brief, you avoid the delay that may occur if you expect the other lawyer to photocopy your brief and send it to his or her client.

Practice Point No. 2

Although Rule 24.1.10 requires that the mediation brief (or as it called in the Rules " Statement of Issues") be in the form prescribed in Form 24.1C, there is effectively no sanction if the mediation brief is not in compliance with the form. Personally, I think that the prescribed form is next to useless for the following reasons.

1) The fill in the blanks format impinges on the lawyers' creativity as the lawyer tends to concentrate on filling in the form, rather than creating a persuasive document. The best advocacy is story telling, and no one ever told a story by filling out a form, rather we tell stories by a narrative.

2) The form starts by asking the parties to list the issues in dispute even before the reader knows what the case is about. I do not even read this section until I have understood the narrative .

3) The section about stating the clients position and interests is completely useless and conveys nothing of use to the reader . Typical clauses inserted in this section are as follows:

> " Settlement of this matter"
> " The Plaintiff should realize that he has no case and should agree to a dismissal "
> " Although the Plaintiff is prepared to negotiate over the damages, he will never compromise his claim that he has been treated unfairly"

So here is Practice Point No. 2:

Ignore Form 24.1C. You can do a much better job on your own

Practice Point No. 3

Now lets us talk about what should go into a mediation brief. I openly approach this topic on the assumption that the mediator is a very important part of the audience for the brief. First of all, everything the mediator knows about your case before he or she walks into the room is found in that brief. Secondly, if you choose to use an evaluative mediator, as opposed to a facilitative mediator, it is important that the mediator thoroughly understand the factual, legal, personal and business aspects of the case. If you state your position in a fair and balanced manner in your brief, this can only positively affect the impression that the mediator has of your case. On the other hand, if you routinely overstate your case, claim outrageous damages in every case and throw up ridiculous defenses, don't be surprised if the mediator inadvertently misses those few nuggets of wisdom mixed in with the rest of the garbage.

We all know that lawyers spend most of their time filtering through information, disposing of the irrelevant and uncovering the relevant. The mediation brief should be a distillation of that process. You know that for there to a rational discussion of certain issues, there must be disclosure of certain facts. For instance :

1. If one issue is reasonable notice, the mediator needs to know the age of the plaintiff, her length of service his position, his compensation package, and any other relevant factors . Put that information up front, preferably in bullet form like this :

Profile of the Plaintiff John Smith:

Age : *55 (DOB December 5, 1953)*
Length of Service: *30 years (January 1, 1979 to December 31, 2008)*
Position: *Sales Manager, responsible for 7 salespersons and over 15 million of sales in Ontario, held present position for last 12 years .*
Compensation : *Base Salary : $50,000 ,bonus plan (see below for details) , usual health benefits (no employee contribution, company car (taxable benefit as per 2008 T4 = $2,800)*
Special Circumstances related to Notice *: John has a health problem which affects his re-employability (chronic insomnia) , inadequate educational background (John only completed high school) and was engaged in the sale of a very specialized product (ear wax removers) for his entire career. Furthermore, the ear wax industry has recently moved offshore so there is little or no prospect of reemployment in this industry .*

2. The mediator cannot do his job if he doesn't even know what the facts and figures are regarding compensation issues . For example, if there is a bonus, we need an outline of the bonus plan, a history of payments and preferably a copy of the plan document .

The Plaintiff's brief may look like this

Management Incentive Plan :

John has been a member of the MIP for 12 years . He has received a payout in every year, except 2001, when no one in the entire company received a bonus apparently due to the fact that senior management made some speculative purchases in the ear wax removal futures market, which turned out to be a disaster .

Johns' MIP in the last 3 years was as follows :

2006 $12,000
2007 $15,000
2008 $14,500

As the MIP year is the calendar year, John as been paid all MIP owing up to his last day of work. However, even though the MIP was an integral part of his compensation, the defendant, in their severance offer, offered only payment of the MIP at 50% of John's historical three year average, citing a sudden downturn in the ear wax removal market. The plaintiff remains skeptical of this, but is willing to engage in a discussion about how we can replicate in the settlement what would have occurred had the defendant given John working notice. Absent such evidence, a three year backward average is the only data a Court would have in which to calculate his bonus entitlement over the notice period.

Notice how this lawyer has not only put the facts in his brief , but has also starting setting forth not only the issues in dispute , but a possible way to resolve that issue .

The defense response to this issue might look like this :

John has correctly set out his bonus history . The MIP plan (see attached at tab 3, page 2) makes it clear that the major component of the MIP bonus pool is based on the Defendants EBITDA. As this is a public company listed on the TSX , we have no problem showing John and his lawyer at the mediation all the financial information which would lead an educated reader to predict that this years' EBITDA will likely decrease by over 83%, which will lead to a corresponding drop in the 2009 MIP. As part of the mediation team, I will be bringing Joe Demers, C.A. , who is the CFO of the defendant. You might also might want to look at the Defendant's Ontario Securities Commission filings, which will give you greater insight into the defendants precarious financial outlook.

Defense counsel is not wasting his time putting forth silly defenses like, the bonus was discretionary, the clause says you have to be in the employ of the company at the time of the payout and we intentionally let you go one day before the payout or any of the stuff that the courts has continually rejected as largely bogus arguments . Instead, she focuses on the plaintiff's soft spot, the financial health of

the defendant and the industry. Remember, in the plaintiff's mediation brief, he wants to emphasize the dismal state of the ear wax removal industry as a factor to increase the notice period. The defendant is using that same fact against the plaintiff on the bonus issue. The defendant is then relying on the fact that the plaintiff and his lawyer are probably not financial wizards, so she states that the bonus is based on the defendant's EBITDA but does not explain what that is (the answer, according to Wisegeek.com, is "*Earnings before interest, taxes, depreciation and amortization* or, to give it its acronym, EBITDA, is a measure of a company's cash flow before certain deductions. It allows investors to see how much money a company is making before taxes, depreciation and amortization have been deducted.").

Perhaps the plaintiff's counsel will not even check this out before the mediation, as many counsel seem not even to carefully read their opponents' mediation briefs, and will be embarrassed at the mediation when this lack of knowledge will undoubtedly show. The willingness to show case the CFO at the mediation illustrates that the defendant takes their position seriously . If the CFO performs well at the mediation, but the case does not settle , then defense counsel will already have had his star witness perform once. If the CFO falls flat on his face, then perhaps the company will accept the three year average.

Referencing the OSC, but not providing copies in the brief, is also a strategic move. Will Plaintiff's counsel invest the time to actually look up these filings? If he or does not, can I make my point more effectively by bringing copies along to the mediation and having the CFO explain them ?

3) If the issue is just cause, and it is a real issue, the defense brief should spell out the evidence that it has to show it can prove cause . The allegation alone is useless, the evidence is what it is all about . If you allege theft and have a video, show it at the mediation. If you allege expense account fraud, show the reports , the receipts and why they are false. If you have real witness statements signed by real people, show them . If you hope that a witness you have not spoken to yet says what your client assures you he will say , then don't hang your case on this witness. Show the plaintiff's counsel that his client is probably lying to own lawyer. This allows the plaintiff's counsel to talk real litigation risk with his client. By the way, please don't tell me that you have a strong case because you know that your client is telling the truth and that the other side is lying. Unless you were in the room when the conversation took place all you know is what someone reported to you. Neither mediators nor judges assess credibility based on lawyers protestations.

If you are a plaintiff defending a cause case, stick with one reply and ride that horse all the way. If your client did some monkey business with his expense account but his real defense is condonation, don't weaken your case by first denying the improper expense and once that is proven, plead that everybody else did it also. Remember that upholding a discharge is a two step process; first, was the conduct improper, second was the conduct serious enough to warrant discharge or should there have been a lesser

penalty. You actually have a lot more credibility if you admit the misconduct but argue the penalty. Employers also are more apt to discuss a financial settlement if the plaintiff is admitting to some thing that they srongly believe is true. One other thing, plaintiffs, just cause will not go away just because you ignore it in your brief. If the issue is real, deal with it in your brief . Get your version out on the table first. It is very frustrating to read the plaintiff's mediation brief and be told that the only issue is reasonable notice, then to open the defense brief and find two warning letters and a culminating incident. In the mediator's eyes, that plaintiff's counsel just lost credibility points.

4) Mitigation is almost always an issue, so plaintiffs, just don't ignore it. I cannot count the number of times a plaintiff has failed to bring to the mediation any mitigation documentation, and then asked why not, says inane things like "I did not know I had to bring it", or "I left it home", or "My hard drive crashed last night and I lost all the records. "

A good plaintiff's brief contains a chart of all the plaintiff's mitigation efforts, identified by date, company applied to, position applied for, interviews, offers etc. The thicker the better. Note to plaintiffs' counsel. Read this list, no matter how boring. You do not want to find, in the middle of the mediation , that your non-English speaking client with a Grade 4 education, has apparently applied for a job as an architect (this is a real case, name withheld to avoid further embarrassment).

Defense counsel, we all know that no matter what the plaintiff does with respect to mitigation, it is never enough to satisfy your client. Luckily the only person the plaintiff has to satisfy on this issue is the judge, not your client. I find as a general rule, that the less help that an employer provides to an employee at the time of discharge (i.e. allege just cause, pay ESA only, no reference letter, no outplacement counseling) the more they will argue poor mitigation . Remember that the case law requires to show not only that the plaintiff did not adequately look for a job, but also that if he had done so, it is likely that he would have found employment. If you are serious about this, do your homework . One of the best examples of this was when a defense lawyer walked into the mediation with a big thick binder and started talking about mitigation. I thought that he had done a search of all the jobs that the plaintiff could have applied for in the last 12 months, however I almost fell off my seat when he showed us all that this was what was available on Workopolis for the plaintiff's job category for a single day! Needless to say, the plaintiff's efforts looked pitiful compared to the big binder.

So here is Practice Point No. 3:

Put in your mediation brief the evidence and arguments that best portray the strength of your case and responds to its weaknesses. No more and no less.

Practice Point No. 4

How to deal with legal arguments in a mediation brief depends on the mediator and the other lawyer. I do not need to read from the Bardal case the famous quote about the reasonable notice factors. On the other hand , I do like to see a report from say , the Wrongful Dismissal Database, available on line at www.wrongfuldismissaldatabase.com.

If there is a particular case that is helpful and maybe not well known, by all means summarize it and provide a copy in your brief with the relevant parts marked. Tell us all how it helps your case . Do not belabor the point because most of the issues about legal arguments work better when they are orally discussed at the mediation . The mediation brief is not a factum.

So here is Practice Point No. 4:

If your mediator and your opponent are knowledgeable about the legal issues, don't spend a lot of energy in the brief on pure legal argument.

Practice Point No. 5

In any employment mediation, the opposing parties used to have some sort of relationship . The history of that relationship is probably going to affect the mediation, so tell the mediator what he or she needs to know . I once had a case where I did not found out until two hours into the mediation that the President of the employer was the Plaintiff's father in law. Neither lawyer told me initially because it was not "legally relevant." True, but nonsense never the less. Do you think that the negotiation dynamics were affected by this relationship? Of course they were. After discovering this little tidbit of information, we stopped talking about notice periods, and talked about relationship issues, (the father was upset because his daughter had sided with her husband and not him in the dispute, the son in law wanted his wife to stop complaining to him that she missed her daddy) and the case settled on fair terms for both.

Even if the termination is without cause, the reason for the dismissal is still important to the parties emotional outlook about the mediation. The mediator needs to know if the termination was without cause because it was a legitimate shortage of work or because there were performance issues short of cause. If the plaintiff had health issues which may have affected her work performance but she did not discuss it in the workplace because of privacy issues, that is information that a mediator needs to know so that he or she can deal with it. For instance, it may explain to an employer why this employee's performance dropped in the last year, whereas without this information they just thought that she was getting lazy. Similarly if the defendant is legitimately going through tough economic times, show the plaintiff what steps the company has taken to reduce costs and raise revenues. When plaintiff's feel that the pain of the recession is not being borne just by themselves, they often are willing to moderate their demands.

So here is Practice Point No. 5

Don't forget the emotional and relationship issues in your brief, especially if such information would not be admissible in a courtroom . A mediation is not a trial. It is a negotiation and real people make tough decisions based on facts and emotion .

Practice Point No. 6

Pleadings are virtually useless in a mediation except to allow us to call some of the settlement monies things like general damages, tort claims, moral damages and anything else that we hope the CRA and EI will approve.

As pleadings are of limited value in a mediation, please don't regurgitate your pleadings in the brief. Save yourself the bother and paper and give me a letter saying that you were too lazy to do a mediation brief but I did do so some pleadings, so go read them yourself and then you should be able to figure out my case.

So here is Practice Point No. 6, with due credit given to Mark Twain ,

A short mediation brief is better than a long pleading.

Practice Point No. 7

As a mediation is a negotiation, the mediator needs to know what has gone on before to try to settle. If there has been no negotiations, tell me that. If there has been an exchange of offers, whether they are still on the table or not, tell me that Include copies of all Rule 49 offers. If monies have already been paid and benefits have been continued, tell me that . Dollar amounts referred to in pleadings and demand letters are not real offers. If that is all you have done, be honest and tell me that there has been no real negotiations.

So here is Practice Point No. 7

Include the negotiation history in the mediation brief

Practice Point No. 8

Courts award money damages, not declarations of liability. Settlements always involve money. Show in your mediation brief how you calculated your damages, down to every detail It is not hard. Look at this example :

Plaintiff's Calculation of 24 notice period for John Smith :

Base Salary			*$100,000*
Bonus over NP based on three year average			*$27,667*
Benefits at 10% of base			*$10,000*
Car Taxable Benefit			*$5,600*
Subtotal			*$143,267*
Less	*ESA Paid*	*$32,692*	
	Home Depot mitigation From Feb 09 to July09	*$12,600*	
	Subtotal	*$45,292*	*$45,292*
Total Damages (excluding coats and PJI)			*$ 97,975*

Now think how persuasive this will be if the following comment was made in the Plaintiff's brief .

In light of this calculation, the Plaintiff's Rule 49 offer delivered with the Statement of Claim of $87,500 plus costs and PJI is much more likely to be in the money than the defendants Rule 49 offer, delivered last week, of $50,000 all in. Moreover, a public Court finding of 24 months notice for my client would likely be read by all the other terminated employees of the defendants as well as the existing employees who are undoubtedly concerned about their own future severance packages. Of course, a settlement along the lines of my Clients Rule 49 offer could contain a very strict confidentiality clause, with an appropriate liquidated damages clause, if required.

That's how you get the Employer's juices flowing. Just wait until CEO in Alabama sees that. He will shut down the Canadian plant sooner than you can say " Jack Russell", or whatever they actually say in Alabama.

Now the Employers calculation might look more like this :

Defendant's Calculation of 18 notice period for John Smith :

Base Salary			*$75,000*
Bonus over Notice Period based on 83% reduction from 2008			*$3,697*
Benefits at $350 per month, Employers' actual costs			*$6,300*
Car Taxable Benefit based on T4			*$4,120*
Subtotal			*$89,117*
Less	*ESA Paid*	*$32,692*	
	Benefit coverage for 34 weeks At $350/ month	*$2,765*	
	Car provided for 3 months of Notice Period	*$686*	
	Home Depot mitigation From Feb 09 to July09	*$12,600*	
	Subtotal	*$48,743*	*$48,743*
Total Damages (excluding coats and PJI)			*$ 40,374*

It should be noted that as this mediation is taking place only 9 months after the termination, this damage calculation is based on an assumption that most favors the plaintiff, which is that in the next 9 months he will earn zero in mitigation earnings. This is highly unlikely given that he easily obtained part time work at Home Depot and can be expected to obtain such work again, especially in the busy Xmas season and spring renovation period. He could easily make approximately $20,000 over the next 9 months by simply doing part time work. This calculation ignores that likelihood.

In light of this, there is an excellent chance that the Defendant will beat its' Rule 49 offer of $50,00 all in. This would both deny the plaintiff most of his costs and leave him open to paying for the bulk of the defendants' costs . These facts, when combined with EI repayment obligations and income tax at 30% of the balance, make it highly risky for the plaintiff to hold out for his Offer to Settle. Of course, it goes without saying that if the Plaintiff were to accept the Defendants offer as is , he could choose to mitigate or not

as this money would be his to keep. Moreover the Defendant would be open to discussing the proper allocation of the $50,000, given the many and varied claims made by the Plaintiff in his Statement of Claim . I would ask that the Plaintiff bring along any medical documentation to the mediation that would in any conceivable way support his claim for general damages. This would be important information for us to discuss.

Furthermore, if our Rule 49 offer were accepted prior to the date of the mediation, we would absorb whatever outrageous cancellation fee Mediator Fisher imposes upon us.

Hold on, I thought that the Plaintiff had in the bag. How come these numbers now make the defense offer seem so fair? Amazing isn't, when you peel away the rhetoric and convert words to numbers, you see where the issues really are.

Moreover this defense lawyer wants the plaintiff to actually read her brief. She wants the plaintiff to start asking difficult questions of his own lawyer like :

- What is this EI repayment thing?
- I didn't know that the money was taxable
- You mean that money I earned at Home Depot saves the defendants the same amount? You mean I was working for free?
- You told me that because I was on a contingency fee, that it would cost me nothing if I lost, which you also said couldn't happen. Now you are telling that I may have to shell out and pay their costs?
- If mitigation income only benefits them, I not working anymore and I will tell Home Depot that I not working there this Xmas. Does it matter that they asked me back in a letter last week? Can I just throw that letter in the garbage?
- What is this Affidavit of Document thing we have to do before next weeks' mediation?
- Could the defendant pull their $50,000 offer without giving me chance to accept it first?

So here is Practice Point No. 8

Do a realistic damage calculation and have an argument justifying every number. Show the mediator and the other side why you could easily do much better in Court than your offer. Indicate some willingness to talk about the deal, even if it is only around the edges as you do not want to stop the settlement discussions.

B) Minutes of Settlement

Clients pay lawyers to get a deal. The deal is the ultimate work product that the client is paying for. Therefore, to leave a mediation without a fully executed and documented Minutes of Settlement is akin to producing nothing, other than a potential lawsuit about whether there actually was a deal and what was the deal.

Most litigation involving mediations and mediators involve the issue of not properly documenting the deal. This should be avoided at all cost.

A mediation often feels like an emotional roller coaster. After the deal is struck, there is usually a mutual feeling of relief but a sudden tiredness sets in . Now, at the worst possible time, we are forced to become what most litigators hate the most: a solicitor.

There are some tricks of the trade to make this task less onerous.

1) Come to the mediation with a draft Minutes of Settlement and Release both in paper form and on a USB memory stick (no floppies please) . Leave the numbers out but include all the usual terms and fill in the names of the parties.

2) Work on the Minutes of Settlement with the other lawyer. This can lessen the tendency to cling too closely to your own work product and avoids the other lawyer criticizing your drafting over style issues rather than content.

3) Divide up the work. One of you can do the Minutes of Settlement and other the letter of reference.

4) Mediators, in my humble opinion should not be drafting Minutes of Settlement for many reasons, including their own professional liability , practice of law vs. mediator roles, and most importantly, because their drafting could affect the outcome where the mediator sees something the lawyers did not which gives an advantage to one party over the other. For instance, in most wrongful dismissal settlements, the Employer and the Employee should obtain a EI clearance letter, However, not all defense lawyers know that, and not all plaintiff's are so concerned about their obligation to make the repayment. If I were to draft the Minutes of Settlement on my own, I would include such a requirement for the Plaintiff to obtain such a letter and to provide for the necessary holdback. This may upset the plaintiff as he had no intention of reporting same, no matter what his lawyer told him. I have effectively changed the deal by my drafting. That is not my job. Period.

Having said that, if asked, I will give advice on what I think should go in the Minutes and possible terminology to achieve that purpose. There are often real issues that need agreement while the drafting is going on, details which had not been discussed up to that point (i.e. payment date, dismissal order v Notice of Discontinuance, content of release etc) . The mediator can be invaluable at this point

because he or she will be seeking to calm down the frayed egos and tempers of the clients and their lawyers. The mediators job at this point is keep all eyes on the prize, getting the deal signed up.

5) Signatures on the Minutes of Settlement are required, but remember that lawyers can sign on behalf of their clients, although probably not on a release. If your client must leave the mediation before the paper work is done, either get the clients' approval for you to sign as their lawyer, or get their cell phone or email address. You can then either read the final document to the client or email him and receive a written or oral approval .

6) Bring a laptop or do the mediation at a facility that has a computer for your use. Most lawyers' handwriting is unreadable . Handwritten minutes of settlement also create an undue advantage for the drafter as lawyers may be less likely to request a change in another's handwritten agreement than a typed one. This can be especially problematic where the hand drafter is an older lawyer and the non drafting lawyer is young.

7) Keep the drafting simple. Do you really need a set of recitals that set the litigation history, and that the parties have a mutual desire to settle this matter? What else could Minutes of Settlement possibly do? Why refer to a date as "two weeks from today's date" when it is easier to type " November 15, 2009. " Everybody knows what a EI Repayment Letter is, so don't spend two paragraphs citing the section of the act and what happens after the letter is received.

Of course , what is really important is the contents of the Minutes of Settlement . Here is a handy checklist

1) All parties who have obligations under the agreement should be parties to the Minutes of Settlement, even if they are not parties to the litigation. Therefore if the parent corporation of the defendant employer is obligated to do something (like provide stock options) they should be a signatory to the deal.

2) I believe it is easier to refer to the global amount of the settlement in terms of new money flowing to the plaintiff and then to break down that amount into categories, rather than to have a separate clause for each payment. This way less math errors can seep into the agreement .

Here is an example ;

> *The defendant shall pay the plaintiff, by October 15, 2009, the global sum of $100,000 , allocated as follows;*
>
> *a) $65,000 as a retiring allowance, subject to statutory deductions as required by law. The plaintiff shall be permitted to put any lawful*

amount of these monies into her RRSP upon providing to the defendant the details of her RRSP, the bottom part of page 2 of her latest Notice of Assessment and a declaration that she still has the RRSP room set out in that Notice of Assessment. Any amounts subject to tax withholding shall be at the prescribed rate of 30%.

b) $25,000 as a contribution towards her legal fees, payable to her lawyers in trust. Plaintiff's counsel shall provide a letter to the Defendant certifying that she has billed her client at least that amount of money. No T4 shall be issued for this amount.

c) $10,000 payable to the plaintiff on account of her allegation of mental distress as set out in paragraph 3 of the Statement of Claim . No income tax shall be withheld at source nor shall a T4 be issued.

3) This example also illustrates how you specify which items are taxable and which are not. It reminds you to determine ahead of time the agreed to tax treatment and the fact that no T4 will be issued for amounts not required by law to have tax withheld at source. I have included the actual tax rate (as the retiring allowance is in excess of $15,000 and the Plaintiff is an Ontario resident) so that there will be no misunderstanding in the defendants' payroll department. There is also no EI or CPP deduction on a retiring allowance. If the retiring allowance had been less than $5,000, the withholding rate would be 20%, for amounts between $5,000 and $15,000, the rate is 20%. Different rates apply in different provinces and for non-residents of Canada.

4) As mentioned already, to deal with the EI issue, the agreement should either recognize no liability as the plaintiff did not receive EI or deal with the obligation to repay. Here are some useful clauses.

The plaintiff represents that she has not received any EI benefits since her termination from employment by the defendant

Prior to the delivery to the Plaintiff of the retiring allowance set out in paragraph 1(a), the Plaintiff shall deliver to the Defendant an EI Clearance letter setting out what amount of the settlement is to be repaid to EI. The Defendant shall make the necessary payment to EI and forward the balance if any, less statutory deductions for income tax, to the Plaintiff .

The Defendant shall holdback $10,000 of the settlement funds set out in paragraph 1(a) and upon shall deliver to the Defendant an EI Clearance letter setting what amount of the settlement is to be repaid to EI. The Defendant shall make the necessary payment to EI and forward the balance of the holdback, if any, less statutory deductions for income tax, to the Plaintiff .

5) Note that any time there is an obligation to pay, a payment date should be agreed to. More disputes arise about settlements that do not specify pay dates than for any other reason. What is reasonable for a starving plaintiff is not the same as what is reasonable for a defendant who routinely drags out payments of all of its receivables.

6) It is best to deal with the issue of confidentiality right in the Minutes of Settlement because if it is left to the not yet agreed to Release, there could be an inadvertent breach in the time frame between the signing of the Minutes of Settlement and the Release. Moreover, clients actually read the Minutes of Settlement, but the Release, not so much. Here is a common clause :

> *The Plaintiff agrees to keep the terms of this settlement strictly confidential, save and except to his spouse, his legal and financial advisors or as required by law. The parties acknowledge that this is a fundamental term of this agreement and that absent this clause the defendant would not entered into these Minutes of Settlement.*

7) If you are relying on a specific assertion of fact made by the other party in coming to an agreement to settle, which you would not have agreed to if that statement was not true, you may want to include a warranty to that effect, which means if you subsequently determine that the other side lied about this fact, you could seek to set aside the settlement. Here are some examples :

> *The plaintiff hereby warrants that he has neither received nor earned but has not yet received, any income from either employment or self employment, directly or indirectly, from the date of his dismissal to the date of this agreement*
>
> *The Defendant warrants that none of its employees received any bonus under the MIP in 2007.*
>
> *The Defendants warrant that the transaction referred to in paragraph 3 of the Statement of Claim did not close within the six months following the termination of the Plaintiff's employment.*

8) If on the other hand, you want to insure that the deal could not be set aside based on the accusation that someone in the course of mediation was somewhat less than forthright, then the following clause is useful:

> *Each party confirms that they have relied solely on their own sources of information in arriving at their decision to settle this matter on the terms set out and therefore have not relied upon any statement or representation made by the other party in coming to their decision to settle this matter on the terms set out in this agreement.*

9) The action must be disposed of by way of an order or the filing of Notice of Discontinuance. Specify who will take out the order. Here are two common clauses:

> *The Plaintiff shall file a Notice of Discontinance after the settlement monies have been paid in full.*
>
> *The Defendant shall take out a consent order dismissing the action without costs after the settlement monies have been paid in full.*

10) Don't forget the mediator fees. Either you share them or one party pays all. Here are some clauses:

> *Each party shall pay one half of the mediators fees.*
>
> *The Defendant shall pay all of the mediator's fees.*

11) Reference letters or oral references are common parts of many deals, but employers can only control what designated people will say, not what every Tom, Dick and Mary may utter. This issue can be dealt with as follows:

> *The Defendant shall provide the Plaintiff with a reference letter in the form attached. The plaintiff agrees to refer all reference requests only to Mr Brian Jones, Director of Human Resources or his designee. Mr Jones, or his designee, undertakes that all oral references will be answered in a matter consistent with the enclosed letter of reference. This undertaking does not apply to any other employee of the Defendant, past or present, who may be asked by the Plaintiff or a potential employer to give a reference.*

12) All deals need releases, either as a separate document attached to the Minutes or included in the Minutes themselves. Here are two examples, one where the Release is available, the other when it needs to be drafted . It is always preferable to agree on the form of Release at the mediation itself. If there are special clauses to be included, you must reference them or you run the risk that a judge determines that they are not part of a normal release.

> *The plaintiff agrees to sign the attached Release.*
>
> *The Plaintiff agrees to sign a Release in a form acceptable to both counsel. The release shall contain both a confidentiality clause as well as a tax indemnity clause. Defense counsel shall prepare the first draft.*

Putting it All Together

Mr Smith settled his at mediation for $80,000. Here is how we write it up :

Ontario Superior Court of Justice
Court File # CV-09-378278

John Smith (Plaintiff)

And

Canadian Ear Wax Removers Ltd (Defendant)

Minutes of Settlement

The parties agree to settle this matter on the following basis :

1. The Defendant shall pay the Plaintiff, by October 15, 2009, the global sum of $80,000, allocated as follows;

> *a) $45,000 as a retiring allowance, subject to statutory deductions as required by law. The Plaintiff shall be permitted to put any lawful amount of these monies into his RRSP upon providing to the Defendant the details of his RRSP, the bottom part of page 2 of his latest Notice of Assessment and a declaration that he still has the RRSP room set out in that Notice of Assessment. Any amounts subject to tax withholding shall be at the prescribed rate of 30%.*
>
> *b) $15,000 as a contribution towards his legal fees, payable to his lawyers in trust. Plaintiff's counsel shall provide a letter to the Defendant certifying that she has billed her client at least that amount of money. No T4 shall be issued for this amount.*
>
> *c) $20,000 payable to the Plaintiff on account of her allegation of mental distress as set out in paragraph 3 of the Statement of Claim. No income tax shall be withheld at source nor shall a T4 be issued.*

2. The Plaintiff represents that he has not received any EI benefits since his termination from employment by the defendant

3. The Plaintiff agrees to keep the terms of this settlement strictly confidential, save and except to his spouse, his legal and financial advisors or as required by law. The parties

acknowledge that this is a fundamental term of this agreement and that absent this clause the Defendant would not entered into these Minutes of Settlement.

4. Each party confirms that they have relied solely on their own sources of information in arriving at their decision to settle this matter on the terms set out and therefore have not relied upon any statement or representation made by the other party in coming to their decision to settle this matter on the terms set out in this agreement.

5. The Plaintiff shall file a Notice of Discontinuance after the settlement monies have been paid in full.

6. The Defendant shall pay all of the mediator's fees.

7. The Defendant shall provide the Plaintiff with a reference letter in the form attached. The plaintiff agrees to refer all reference requests only to Mr Brian Jones, Director of Human Resources or his designee. Mr Jones, or his designee, undertakes that all oral references will be answered in a matter consistent with the enclosed letter of reference. This undertaking does not apply to any other employee of the Defendant , past or present, who may be asked by the Plaintiff or a potential employer to give a reference.

8. The plaintiff agrees to sign the attached Release.

Dated at Toronto this Wednesday, October 21, 2009

_____

John Smith

_____

Canadian Ear Wax Removers Ltd by Brian Jones ASO