How to Present an Effective Labour Arbitration Case

An Arbitrator's Viewpoint

Barry B. Fisher
Barrister, Arbitrator & Mediator
393 University Ave., Suite 2000
Toronto, Ontario
M5R 1E6
Tel: 416 585 2330
barryfisher@rogers.com
www.barryfisher.ca

Introduction

Winning at arbitration depends primarily on two things; having the facts to support your position and having the law that supports your position. However that is not enough, because you also need to present those facts and law in an effective manner. It is rare that a party's position which is completely lacking in the right facts and law wins simply because they had a great lawyer. However, it is quite common that the side with the facts and law on their side loses the arbitration because the advocate could not present those facts and law in an effective manner.

The purpose of this paper is to set forth some of the good and bad advocacy practices that I have seen in my 16 years as an arbitrator and my 25 years as a lawyer in employment and labour law cases.

The Top Five Things that Most Arbitrators Like to See in an Arbitration:

1. A really good opening statement

The opening statement is a very important, but often sorely neglected , part of an arbitration. Typically an arbitrator showing up for a hearing knows nothing about the dispute other than the names of the parties. At best, the arbitrator has a copy of the grievance form, which usually reveals little or nothing about the issues in dispute. Therefore, the lawyer or presenter has a unique opportunity to set the stage in their opening statement by setting forth not only their version of the facts that they intend to lead, but also to frame the issues . The opening statement can become the roadmap for the arbitrator to help him or her understand the rest of the case.

If the opening statement is set forth in a fair and reasonable manner, it may create an opportunity to allow the other side to admit certain facts as stipulated by you. For instance, in a discipline case, if the grievor does not dispute the actual misconduct but only pleads that the penalty was too harsh, then it should not be necessary to lead evidence of the actual misconduct if the employer , in its opening statement, sets out in a fair rendition of the relevant facts. This will obviously shorten the hearing, resulting in cost savings to both parties.

The presentation of a really good opening statement also shows the arbitrator that you actually understand the relevant issues and facts in the case. It can be used to explain to the arbitrator what evidence is important and why it is important. It is much easier to follow evidence and make notes if you know why the lawyer is leading certain evidence.

2. A devastating cross examination of an arrogant witness

It brings joy to my heart to see a skillful cross examination of an arrogant or lying witness. I believe that cross-examination is one of the best ways that we have invented to find out whether or not someone is telling the truth. It is actually very hard to tell a consistent lie, thus a skilled and effective cross examiner can usually expose a liar. A skilled cross-examiner is not a bully, nor does he or she berate

or intimidate a witness. The most effective cross examinations are often where the lawyer simply points out the internal inconsistencies of the witnesses' story or shows that the witness is so blinded by his own distorted view of the world that he loses all credibility.

3. Respectful treatment of honest witnesses

Just like it is a joy to see a lawyer make a lying, arrogant witness squirm under an effective cross examination, it is equally important for the effective advocate to treat honest and impartial witnesses fairly and respectfully. Not only do you lose the respect of the arbitrator if you bully or attack honest witnesses, if your only method of questioning is an aggressive one, then it will rapidly lose it effectiveness.

Moreover, it is usually not a good idea to pick on a victim. For instance ,if you are cross examining the grievor in a discharge case and he testifies in chief that he has had a hard time financially since the dismissal, I would be very wary about cross examining him about why he didn't cash in his RRSP or sell his house after the dismissal so as to lessen the financial blow of the dismissal.

4. A lively closing argument which engages the lawyer and the arbitrator

Many arbitrators see the closing argument stage as more of an opportunity to engage in a lively dialogue with counsel than simply an opportunity for the lawyers to give speeches. The arbitrator may ask penetrating questions of both lawyers or ask the lawyers to answer hypothetical questions arising from their arguments. In the course of this discourse it may seem that the arbitrator has already made up her or his mind. I caution you that appearances can be deceiving. The arbitrator may simply be using these questions and statements as a sort of Socratic learning tool. When an arbitrator indicates that he or she understands your argument, that is not the same as saying that he or she agrees with the argument. Similarly it may well be that the arbitrator is simply playing the devils advocate with you to see if your argument stands up to close scrutiny.

Remember that the purpose of the closing argument is to marshal the facts and the law in order to persuade the arbitrator that their position is the more correct one. When the arbitrator enters into a dialogue with you, he or she is handing you a golden opportunity because you are getting some insight about where the arbitrator is having trouble with your argument. It is a lot easier to try to persuade someone when you know what they are thinking.

5. Presenters who use headings or titles in their examinations and arguments.

I love it when a lawyer gives me headings in his questions so that I can better follow the evidence. For instance, if the witness being examined is the manager who disciplined the grievor, and the lawyer is trying to bring out the factors that the manager considered before imposing discipline, the questions might go as follows:

Q: Mr. Smith, I would now to move onto the topic of the discipline imposed. Whose decision was it to impose a 5-day suspension?

A: Mine alone.

Q: In making that decision, did you look at any files within the company?

A: Yes, the grievors' personnel file.

Q: What, if anything did you note from that file that you considered in making your decision to impose a 5 day suspension?

A: He had received a written warning over an incident of insubordination just three weeks before this incident.

Q: Now, moving on to the issue about whether or not the Company properly issued a rule regarding fighting in the workplace, can you tell me whether the Company had ever issued a policy on the consequences of fighting in the workplace?

In closing argument it can also be very helpful for the lawyer to say something as follows:

“ The evidence led by the Employer shows clearly that in arriving at the decision to impose a 5 day suspension, the Employer considered the following three factors: the grievors prior record, the seriousness of the offence and the grievors’ false alibi given at the time of the initial investigation. Lets us review each of those three factors in detail.”

The Top 5 Things that Most Arbitrators Do Not Like to See at an Arbitration:

1. Lawyers or Witnesses who talk too fast.

The evidence at arbitrations is not transcribed by a court reporter. Furthermore, most cases that take longer than one day are not done on sequential hearing dates, therefore the gap between hearing days can be weeks or months. Therefore, if I cannot make decent notes of the testimony or argument because the person is speaking too quickly, I cannot make proper notes. If I don't have proper notes, then when it comes time for me to write the award, then I will not have that information before me.

Therefore it is important to watch the arbitrator's pen (or listen to the clicks of his or her notepad computer) to see if the arbitrator is keeping up with you. When preparing your witnesses, tell them to also watch the arbitrators' pen and to modulate their speech accordingly.

2. Preliminary Objections:

A preliminary objection is generally a strictly legal argument based on some alleged procedural or jurisdictional defect in the process. Common preliminary objections involve issues such as:

- Timelines of the filing of the grievance
- Failure to follow all steps in the grievance procedure
- Request for particulars
- Grievor should have brought his matter to a different forum
- Arbitrator has no jurisdiction to hear the case
- Party raising preliminary objection did not raise it until too late in the process
- Employer is expanding the grounds for discipline at the hearing

The purpose of bringing a preliminary objection is often to either prevent the other side from either bringing the case to arbitration or to limit the evidence that the other side can lead. In essence, it is a procedure intended to limit the information available to the arbitrator, in the hope that this limitation of information will enhance that party's case.

As a lawyer I loved bringing preliminary or procedural objections. They allowed me to show off my legal talent and run rings around my opponent. As far as I was concerned, if a lawyer could not find at least one preliminary objection per case, then he or she wasn't doing the job they were being paid for. In fact, the crowning achievement of a litigation lawyer was to have the other lawyer's case fail because of the preliminary objection and never even get to the merits. This was especially gratifying when you knew that if the case were ever actually heard on the merits, your case would go down faster than the Titanic.

When I became an arbitrator, I started wanting to try to actually understand what really happened to the parties in the dispute. I became less enamoured with the various legal battles over preliminary objections. I began thinking to myself " Why is this lawyer trying so hard to not let me know what really went on in this case?" I felt that if I was given access to the relevant facts, I could then fashion the right decision, both from the legal perspective as well as the labour relations one. I still naively think that that is what labour arbitrations are supposed to be all about.

I certainly do not want you to think that all preliminary objections are objectionable to arbitrators. We understand that there may be very important labour relations reasons for arguing issues of this nature. For instance, it may be very important for the Employer to try to stop certain types of grievances dead in their tracks because it is perceived that they are an attack on the management rights clause (for instance an allegation of improper scheduling of shifts where this is an exclusive management right). On the other hand, before you go trying to throw out a grievance because the Union President was two days late in filing the Step 2 grievance, remember that he or she is the same Union President who you have to deal with in the next round of collective bargaining.

3. Disorganized Documentation

In my mind a messy file shows a messy mind. If I see a lawyer come into the hearing with files scattered all over the place, documents which are being presented as exhibits without first being photocopied for the other side, the arbitrator and the witness, and then losing track of what documents have been marked exhibits, I know that I am in for a long and hard day.

At a minimum, when you walk into an arbitration hearing you should have:

- Thought through which documents you intend to present as evidence
- Determined whether you need to prove the document through a witness or obtain the consent of the other side.
- Determine the order in which the documents should go in
- Make sufficient copies of all relevant documents for yourself, the opposing party, the arbitrator and the witness.

An even better practice is to prepare a Book of Exhibits with all the relevant documents bound and tabbed. Again you need copies for yourself, the other lawyer, the arbitrator and the witness.

4. Lawyers who refuse or are incapable of presenting alternative remedy proposals

Say you have a discharge grievance where it is clear after the evidence has gone in that there is little hope that the discharge will be upheld, however the arbitrator will still likely issue some discipline. At some point in the midst of closing argument, the arbitrator is likely to ask the lawyers, “If I were to find that the grievor committed the offence as alleged but that discharge is too severe a penalty, what do you suggest the appropriate penalty should be?”

If you are acting for the Union, try to resist suggesting that an oral reprimand is the only reasonable penalty. If you are the Employer, then suggesting the substitution of reinstatement with no back pay and a suspension equal to the time off is probably not going to have much influence on the arbitrator.

You are doing your client a much greater service if you would say something like this:

" Well, Mr. Arbitrator, if you are inclined to not uphold the dismissal and therefore order reinstatement, we submit that there should be some very strict terms imposed. First of all there should be a significant suspension. I suggest 30 days. Secondly, because the grievor got into this mess because he couldn't properly control his anger, it is not doing anyone a service by simply ignoring the root cause of the problem. I would therefore suggest that it be a precondition of his reinstatement that the grievor enroll in an anger management course. The Employer would be willing to sit down with the Union and agree on the course. The course should be paid for by the grievor. Once we have agreed to the type of course, then the grievor would have to agree in writing to attend the full course before he could return to work. Upon his return to work he would have to continue taking the course for as long as the course lasts. Third, in order that the grievor simply doesn't enroll in the course, come back to work, then collect his backpay and quit, I suggest that the order contain a provision that the grievor is only to receive his backpay if completes the course and is still in the employ of the Company at that time.

5. Lawyers who ask witnesses way too many questions.

I once had a case where the issue was whether or not the grievor was driving a snowplow truck during certain months during the winter of 1994. I can't for the life of me remember why it was so important at the time.

The Union quite properly had to call many witnesses to prove this point, because snowplow crews changed often and thus it was difficult for one witness to testify about a significant period of time.

Every time the Union called a witness, he would ask him to tell where he lived, how old he was, did he work for the Ministry, how long and in what capacities. Only then would he ask the witness if he had observed the grievor driving a snowplow in the winter of 1994.

I let this go on for about three witnesses and then make the following suggestion to counsel. “Mr. Union Lawyer, I am sure that this witness, just like the other three that you have called, lives in this locality, has worked for the Ministry for a long time and is happily married with two kids. However the only thing I care about is whether or not he has personally observed the grievor driving a snowplow in the winter of 1994, and if so, when. Please ask that question and no more unless you tell me why I need more information.”

We then got through the rest of his witnesses in about an hour, just like Lenscrafters.

Conclusion

I left the most important matter to the end. Most arbitrators, if not all, sincerely want their award to reflect not just a result that is legally correct and defensible, but also one that reflects the arbitrator’s sense of what is right and what is wrong in the circumstances. I like to think that this is somewhat more than what used to called “palm tree justice”, but rather it is the result of looking at a case as having not only a strictly legal consequence but also a labour relations aspect. Most cases are not black or white in terms of the law. Often I will write an award up in draft form with two completely results, one where the grievor wins and another where he loses. Both are defensible in terms of legal reasoning, however usually I find that after a couple days of thought, one of the results “feels better “than the other. The determination of which result is the right one may arise from my own thoughts and beliefs of justice, labour relations, sympathy, need for finality, compassion or a myriad of other emotions and beliefs.

A good labour advocate never loses track of the fact that we are not dealing with disputes between faceless entities, but rather we are dealing with disputes involving a person’s livelihood and self worth. Therefore a good labour advocate does not shy away from or ignore the human aspect of his or her argument, rather he or she uses it as part of the argument to show the arbitrator why his position is the better one.