Employment Law Mediations
Some Helpful Pointers
2003 Edition

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

This paper is an update to an earlier paper that I delivered entitled " A Mediators Views on Wrongful Dismissal Mediations" and another one entitled " Employment Law Mediations: Some Helpful Pointers".

I have been involved in the field of employment law my entire legal career, that is, since 1979. In that time frame I have acted as counsel for employees, counsel for employers, as an arbitrator and lastly as a mediator. Every time I changed roles, I picked up a new perspective and was shocked to learn that my preconceptions of the " other side" were often way off the mark. The purpose of this short article is to save the reader some of the heartaches that I experienced in discovering these insights, in the hope that they can avoid some of the mistakes that I went through.

I define "employment law mediations " as those mediations involving the disputes of non-unionized employees. This includes matters such as wrongful dismissal actions, employment standards or human rights disputes, and class actions.

Employment law mediations share a lot of similarities with other types of mediations, but also have some important differences. These differences include the following:

- Generally, there is an inequality of resources available to finance the litigation.
- This is probably the first time that one of the parties, usually the employee, has been involved in a litigious matter in his or her life.
- Employment relationships, although contractual in nature, are much more relationship based than contractually based.
- As cruel as it may sound to employees, the fundamental basis of employment law is that the employer has an almost absolute right to terminate whomever it wants, as long as they pay the right amount of compensation. The only difference between a wrongful dismissal and a rightful dismissal is the quantum of money that the employer has to pay to the employee. In a non-unionized setting, the employee has no virtually no right to a job. Please note that there are many exceptions to this general rule, i.e. certain employees in the Federal sector, or employed in Nova Scotia or Quebec, human rights violations, parental and pregnancy rights violations, etc. This basic principle often comes as a severe shock to the terminated employee who only wants to focus on the reason why the employer let them go and can't seem to get beyond that issue.
- Like family law matters, employment law matters deal with issues that affect the way in which people view themselves. To a lot of us, our identity flows primarily from what we do. If you take that from us, it can greatly affect how we look at ourselves.

- Loss of a job is not just the loss of money, it creates a time void and changes your pattern of life. For the first time, in some people's life, they are idle. This can be very upsetting to many people. As a famous judge once remarked as to why he was continuing to work after retirement, he said that his wedding vows promised that he would be with his wife through sickness and in health, but not necessarily for lunch every day.

Therefore, not only is it useful for the mediator to have a good background in the "product knowledge" of employment law, it is as important, if not more important, to have a good sense, and to be able to communicate it to the parties, that you have a good understanding for the human and business aspects of the employment situation.

We can all readily appreciate that a recently terminated employee is likely to have a lot of negative feelings and emotions about the employer coming into the mediation. Funny as this may sound, the fundamental thing to remember about employers is that they are human too. Corporations may often be large monolithic entities, but ultimately decisions are made by real human beings, each with their own real human wants and fears. Once you start to understand this basic premise, you will to start to better understand the reasons why employers act as they do not only in reaching termination decisions, but also in how they settle these disputes.

Key Points

From that basic principle flows a number of observations and comments on the mediation of employment disputes.

1. **Nasty demand letters piss off employers. Nasty Statements of Claim piss off employers. Adding personal parties to the lawsuit pisses off employers. PISSING OFF THE EMPLOYER DOES NOT LEAD TO SETTLEMENT, IT JUST PISSES THEM OFF.**

   False accusations of cause piss off employees. Baseless counterclaims piss off employees. Sabotaging an employee's chance of getting another job pisses off employees. PISSING OFF THE EMPLOYEE DOES NOT LEAD TO SETTLEMENT, IT JUST PISSES THEM OFF.

   Many lawyers and their clients believe that aggressive tactics will intimidate the other side into submission. In fact most people's reaction to aggressive behavior is to respond in kind and to raise the ante. I cannot tell you the number of times that I have seen the following situation:

> *While the employee is being dismissed, he is not treated properly by the employer and is given a severance proposal that just complies with the Employment Standards Act. He is angry because of this mistreatment and goes off to see a lawyer. The lawyer sends a nasty demand letter to the President of the Company, accusing the Company of among other things, racial discrimination and intentional infliction of mental suffering. He also demands a lump sum settlement of 36 months pay for his client, who was a front line supervisor with 13 years service. The Company responds through their lawyer that of course all the plaintiff's allegations are ludicrous and besides, the employee was fired for just cause, namely gross incompetence. Plaintiffs counsel starts a lawsuit for 1.2 million dollars, naming the Canadian employer, the US parent, the Canadian President and the employee's direct supervisor as defendants. The Employer files a Statement of Defence that alleges just cause and also files a counterclaim for 2.5 million dollars in which it is alleged that due to the plaintiff's negligence, the employer lost a major customer.*

Faced with this situation at mediation, we are now required to spend valuable time and energy at the mediation disposing of each party's frivolous and unsustainable claims so that we can deal with the real dispute. Each party inevitably blames the other for escalating the conflict. Claims and defenses that never had any merit in the first place now have taken on the air of respectability and rationality because they are set out in documents that were filed in court. Remember that the only difference between a claim for $10,000 and $10,000,000 is that the lawyer hit the keyboard three more times.

This can be a difficult situation to handle in a mediation depending on who it is was who had the brilliant idea to escalate the conflict with the over the top accusations. If a previous lawyer handling the file recommended the action or a company representative who is not involved in the mediation did so, then everyone can easily blame him or her for unnecessarily escalating the conflict. If both lawyers escalated the conflict in response to the others perceived unreasonableness, then I as a mediator try to get both parties to back down from their extreme positions at the same time, as a sort of trade off. In other words, I might suggest that for the purpose of the mediation, would the employer drop the counterclaim if the employee agrees to drop his punitive damage claim. If only one side resorts to this escalation tactic, then it can be a challenge for the mediator to try to get the offending party to back off while at the same time convincing the non-escalating party that he or she should not amend their pleading to add an equally outrageous claim or defence.

Experience has taught me that where employees make unreasonable and over the top accusations against the employer, the usual reaction of the employer is a quick hardening of their position. In most organizations, terminating an employee is a difficult decision, usually accompanied with some degree of guilt about having to do it in the first place. Utilizing this initial guilt effectively can be a useful settlement technique. However, once the employee attacks the organization with perceived outrageous demands or claims, the lingering guilt quickly evaporates and an aggressive attitude takes over. I am sure that there is some psychological term for it, but there seems to special

venom involved with the dynamics of people who were once close but are now apart. Moreover, there may well have been two camps within the employer prior to the dismissal, those who wanted to "blow the employee away" with minimal or no compensation, and those who were prepared to make a reasonable and respectful proposal. Once the employer feels that the organization is under attack, the hard-liners viewpoint usually prevails.

Just like vicious attacks against employers decreases the likelihood of settlement rather than encouraging it, the same applies to employees. It does not matter how nice and caring the employee is treated at the time of termination or how generous the employer is on severance, most employees will not thank the employer for their kindness in handling this most difficult situation. Anger is the number one emotion often felt by recently dismissed employees. The last thing the employer wants to do is to make the employee even angrier by making needless accusations of cause, giving bad references and the like.

Sometimes the motivation behind these actions is pure malice or revenge. " We should have fired that guy two years ago, instead we kept him on and then, when we have no alternative, we let him go with an extremely generous severance package. Now he is suing us! Revoke our offer and sue the jerk! "

Sometimes the motivation is strategic: " I know that we cannot prove cause in Court, but if we allege cause, launch a million dollar counterclaim and refuse to give him a reference, he will give up and accept our offer because we will starve him into submission. "

One problem with this tactic is that it depends entirely on the fear factor to work. The employer is counting on the plaintiff not being able to withstand the legal expenses and the time delay of taking the matter to Court. Sometimes this does work however, often it does not. An intelligent plaintiff's lawyer can prosecute a wrongful dismissal case in such a way that the delay and expense of getting to trial is minimized, through procedures such as keeping the Claim simple, using the Simplified Rules, using the summary motion procedure, skipping discoveries or using written interrogatories. The other thing to understand about plaintiff's lawyers is that they know that they are acting for the legal underdog and that sometimes you have to fight a case all the way and risk not getting paid just to prove your point. As a plaintiff's lawyer, I did not get ahead in this field and become well known until other lawyers learnt that I would not give up on a case that I believed had merit just because my client could not afford to litigate it to the end. I would rather risk my fee before I would ever recommend a settlement to my client that was premised on my client was not being able to risk the costs of litigation. As a plaintiff's lawyer, 90% of my cases that went to trial were because the employer had no serious offer at all on the table. Once the word got around that Fisher would go all the way to trial if he had to, my settlement rate went way up.

Therefore, these highly aggressive tactics run the risk of bringing up the "Knight in Shining Armour Complex " in the plaintiffs' lawyer. Most plaintiffs' lawyers, when

they were in law school, at least had an inkling that the purpose of becoming a lawyer was not just to make money but also to defend the rights of the weaker members of society. If you push them to far, you will bring that part of their personality to the surface. If on the other hand, you approach the case from the beginning as a matter to be resolved, then the plaintiffs' lawyer can suppress the KSA Complex and allow his or her business side to come out, as in " How can I settle this case at a fair amount for my client, get paid and get on to my next file?"

Another major problem with this tactic is that if it does not work and you end up actually going to trial, the Court will undoubtedly punish the Company for this behavior by a combination of determining reasonable notice to be at the higher end of the range, adding a number of months notice to the already high notice period (called in the business being " Wallaced ", after the Supreme Court of Canada case called Wallace v United Grain Growers), and then throwing in punitive, exemplary and mental distress damages. It also matters little whether you drop the allegations of cause before trial, as many of the post Wallace cases involve the situation where cause was dropped by the employer as an issue well before the trial.

2. It is not always the money, it may be what money represents:

Call me a cynic, but I find that people view spending money very differently depending on whether or not it is coming out of their own pocket. A self employed dentist facing a claim for wrongful dismissal is bound to look at a $40,000 severance payout differently than a General Manager of a multi-billion dollar corporation.

Where the money does not actually belong to the person making the decision, the critical factor in deciding how much money to spend may be figuring out whose budget the money will come from. For instance, some organizations require the department from which the employee came from to bear the coat of the termination while other organizations pay termination costs out of the HR budget. It may well be that the pay in lieu of notice portion is paid from the operational budget but job retraining or relocation counseling is paid from a different budget. This is especially important in governmental organizations where money can be extracted from departmental budgets, institutional budgets or ministry-wide budgets.

Even where finding the money is not the problem, it is often amazing how seemingly uneconomic corporate decision-making can seem to be. I recently mediated a case where the company's own lawyer told his client that if the company lost the case it would cost them approximately $70,000 and if they won the case it would still cost them $20,000. The employee was prepared to settle for $25,000. Their lawyer also told them that they had a 25% chance of losing. This employer was a huge multinational company. The company was not prepared to settle at that number because they felt that the employee had quit, whereas the employee claimed that she had been constructively dismissed. It seemed to be of utmost importance that this company not be seen to reward someone who, to them, simply decided that they no longer wanted to work for the company. The sense of paternalistic loyalty was very strong in this corporate environment. However,

when the employee made an alternative proposal of reinstatement without back pay, the company jumped at the offer as it confirmed their sense of loyalty. In other words, the employee could now be seen not as some money grabbing disloyal employee, but rather as the formerly disobedient child, who having stomped out the house in a fit of anger, begs forgiveness and asks to return to the ancestral home. The father (in this case the President) could then accept the employee back, not out of a fear of losing a lawsuit, but rather as an act of paternalistic compassion. This would only serve to reinforce the corporate culture of loyalty.

3. Fear of the Floodgates, or the dreaded " Matter of Principle "

Rarely a case comes before me that either one or both parties strongly believe that the case cannot be settled on any terms other than their own because 'it is a matter of important principle " or " if we settle this case, we will be faced with numerous other similar cases ". The employee may express some concern that " what happened to me not happen to other employees".

Sometimes there are actually important questions of principle, in fact I remember at least one or two over the last 200 mediations that I have done. More often than not however there is a perception that a principle is at stake but really that principle is simply a code word for " I do not want to settle, and either I do not know why or I don't want to tell you". As a mediator I do not try to get people to change their principles, rather I leave that to the religious authorities. However I do try to find out exactly what the person perceives is the principle at issue. Once that principle is articulated and defined, I try to persuade the holder of that principle that he or she can settle this particular case without affecting that principle. Another tactic I use is to suggest that there may be more than one principle at play here. For instance, I may suggest that another principle worthy of consideration is that it is better to resolve disputes than to prolong them. We then have to consider how to balance those two principles. This opens the door to accepting compromise without seeing it as a compromising of a single principle.

The "floodgate " argument is another common problem at mediation. The argument usually goes something like this " Sure we know that we may have violated the Employment Standards Act by not paying overtime to this person, but if we pay her then all the other employees will file complaints too." The fear is that the settlement will somehow cause other people to take the same course of action. When faced with this argument, I have a number of strategies. The first, and most obvious, is to make the settlement confidential. This is of limited use in so far it depends largely on the honesty of the employee. Secondly, I may point out to the employer that the best way to avoid further lawsuits is to change their way of doing business so as to avoid future liability. If you are open to frivolous overtime claims because the employee keeps records of their hours worked but you do not, then institute a proper time keeping system so you are not at the mercy of the employee's creative record keeping. This will not solve the historical problems but it may avoid future problems. Thirdly, it is always useful to point out to them that if you are worried about the floodgates being broken because of the leakage of a confidential settlement, think of the nightmare when you lose the case in court and there

is a public record and precedent that you violated the law. Even the most timid employee may feel empowered to take you on when he or she reads in the newspaper that his colleague just won an overtime claim with facts very similar to his own.

When it is the employee who feels that they have an obligation to champion the rights of his or fellow downtrodden employees, I first remind them that there are appropriate legal mechanisms in place to allow employees to bargain collectively. These are called trade unions. If the ex-employee really wants to change the workplace, then go organize their former workplace. Secondly I remind the employee that his fellow co-workers are also responsible adults and that if they want to work to change the workplace, it should only be done with their express knowledge and consent and that this ex-employee should not presume that he or she can speak for others. I also remind the employee that social activism can take many forms, so that if they really want this employer or this industry to change their behavior regarding the treatment of employees, that they could write letters to newspapers, start a Website, petition or lobby for legislative change or the like. I finally remind the employee that they are entitled to be selfish and to look out solely for themselves and their family as no one else is taking the risks that they are.

4. Blaming the " Deceased Manager".

It is always difficult for an employer to settle a case where to do so will imply that one of their managers made a poor decision or did something wrong, especially when the potential wrongdoer is an important person within the organization. If it is necessary to find someone to blame in order to allow a decision to settle to be made, then it is important to cast blame on someone who no longer has power within the organization. Convenient scapegoats are former employees, recently demoted employees, outside consultants, lawyers and when all else fails, the Human Resources Department. Once blame has been pinned onto a powerless person, the employer can offer a heartfelt apology to the employee for the manner in which that now powerless person mistreated him or her. The subtext, of course, is that current management takes no responsibility for the mistreatment.

Similarly, where the employee has told their lawyer one set of facts prior to the mediation but at the mediation it appears that they omitted or lied about a relevant fact, the employee's lawyer can use this as a rationale for changing their previously rendered positive opinion. For instance, most lawyers tell their client about the obligation to mitigate their damages and the effect of mitigation right at the initial client meeting. Many clients then forget all what was told to them. At mediation we then find out for the first time, that either the employee did next to nothing to look for a job in the first six months after they were terminated, or found a somewhat lower paying job 10 weeks after they were fired. If this comes up at the mediation for the first time, counsel should have no trouble telling their client that based on this new information, he or she will have to modify their opinion of the damage assessment.

5. Internal Equity v External Equity

It is very common for both sides in an employment law case to say that their main goal is achieve a fair and just result, and then to totally differ on what that result should be. For example, in a situation where the only issue is the quantum of reasonable notice, we may have a situation where the case law is quite clear that a court would likely award 12 months notice. However the employer is adamant that they see anything over 30 weeks as outrageous while the employee feels that anything less than 18 months is a grave injustice. Neither party seems to be very interested in what the lawyers are telling them about the likely result in Court. What is going on here?

As the mediator probes the reasons behind the positions, certain things start to emerge. The employer feels strongly about their 30 weeks because this conforms to their long-standing practice of providing three weeks of notice per year of service. They have applied this formula on numerous occasions and this is the only time that an employee has objected. The employee is adamant about 18 months because his brother in law was awarded 18 months in his recent wrongful dismissal case that just went to Court.

What is happening here is what I call the application of the principle of " internal equity". People determine what is fair and just based on their personal world view. The common law is premised on that very principle, so that to a large degree a trial judge will determine the notice period based on what other judges have done in similar situations. In this case, the employers' world view is initially limited to its own workforce, so that if everyone else accepted their termination formula, by definition it must be fair and just. The employee has even a more limited experience that the employer, but he clings to the fact that is in his eyes if his brother in law got 18 months , then why shouldn't I?

How do you deal with this at mediation?

One technique, sometimes viewed as blunt, is to say " I understand that you feel the way you do but the judge will not care because ultimately it is what the judge thinks is fair, not what you do.' This approach often has limited success because it does not satisfy the need for the party to feel that the 12 months is fair, only that they are being forced into accepting it. This simply adds to the feeling that the court-imposed award is inherently unjust.

Another technique is to further probe the basis for the belief and to point out how this case differs from the other cases that they are referring to. With a little bit of questioning we find that all the other terminations carried out by the employer in which the three weeks per year of service were accepted were short service clerical employees. In this case we have a longer service executive. With this little tidbit, you can explain to the Employer that because this case does not involve a clerical person, to pay more in this case does not necessitate changing their view that for clerical personnel, paying three weeks pay per year of service is fair and just. While talking to the Employee, we find out that although his brother in law did receive an 18 months award, in fact 6 months of that award was because the employer in that case falsely accused the brother-in-law of fraud. Absent that issue, which does not exist in this employee's case, the judge would have found that reasonable notice was 12 months.

Now, hopefully the parties will come to realize that their own sense of what is fair was based on a set of facts different than the one they are facing in this case. Since they no longer have any preconception as to what is fair, they are more willing to accept their lawyers assessment as to what a Court would do, and to accept that as being fair and just.

6. No one is going to risk his or her own career so this case settles.

No matter how good a settlement looks, you cannot expect an employee, be they the Human Resources Manager or the Vice-President of Sales, to propose or authorize a settlement which may result in that person getting into trouble back at the office when his or her boss hears about it. Therefore, even if the employer spokesperson at the mediation agrees that the plaintiff's offer is a good one and should be accepted, he or she will be extremely reluctant to accept it if the result may that that manager gets dumped on by their own boss. In some organizations, employees are not rewarded for making decisions unless they are the right decisions. Making the wrong decision will lead to punishment. The lesson is therefore, unless you are sure that you are making the right decision, you are better off making no decision. Assume your lawyer tells you that there is a 50/50 chance of success, that a loss will cost the company $100,000 and that the ex-employee is prepared to settle for $35,000. On a simple risk analysis basis, the deal makes sense. You properly factored in the risks of litigation, you assessed both the cost of a win and of a loss and the offer properly reflects those criteria. However, if you stand to be critiqued because you accepted the offer, then you must ask yourself the following question:

" What is going to hurt my career more, settling this case for $35,000 or going to Court and costing the Company $100,000?"

Unfortunately, the answer is often that there is less risk to one's career in going to Court and letting the judge take the blame for a loss. In fact, if you can blame the judge for the loss but take personal credit for the win, then there is a huge systemic motivation to not settle at mediation on any other than your own terms.

How does one deal with this at mediation? The easiest way is to have the real decision-maker at the mediation so that that person does not have to fear what someone else will think of his decision. Unfortunately, this is usually also the hardest thing to do because the real decision-maker will not attend the mediation. Typically the Human Resources person or the in-house lawyer at the mediation is told by the real decision maker that the mediation is not important enough for him or her to personally attend but too important for the HR professional or the in-house lawyer to make the final decision. This leads to the common situation where the real decision maker and the HR professional meet, usually a day or two before the mediation, and the real decision maker gives the HR professional the company's bottom line number. At the actual mediation, the HR professional then learns something new about the case, which causes both the HR professional and the employer's lawyer to change their perspective of the case. The plaintiff makes a settlement offer, which, in light of the new information, is a good one, but it is in excess of the real decision-maker's bottom line number that was proclaimed

the day before. This usually comes out late in the mediation, undoubtedly after the employer's lawyer and the HR professional have told the mediator and the other side that they have full authority to make a deal that day. Now the HR professional is in an very uncomfortable situation, for if they admit that they need to check this with the real decision maker, they have more or less admitted that they lied earlier on when they represented that they had full authority. If they refuse to admit this lack of authority, then their refusal to move off their previous bottom line looks to the other side (and perhaps the mediator also) that they are either plain stupid, stubborn or both. Either way, the message to the other side is that either capitulate to my unreasonable demands or I will see you in Court. Faced with that alternative, most plaintiffs and their lawyers would take it to Court rather than settle on the basis of what appears to them to be a blunt attempt to use economic force to force a lousy settlement down their throats.

This problem of not having the real decision maker at the mediation is a real and growing problem in my experience. I have closely examined a number of my own mediations that did not result in a settlement, and the most common characteristic of these cases is the failure of the employer to bring the real decision maker to the table. Whether a case settles or not at mediation has virtually nothing to do with the amount of money at stake, little to do with the factual or legal complexity of the case, but very much to do with the personalities of the real decision makers. As a mediator I welcome the difficult litigant to the mediation, because if he or she is at the table, I can deal with him or her. The real decision maker will see the ebb and flow of the mediation, rather than be sheltered from the process.

Phoning the boss during the mediation to get increase authority is often ineffective. He or she has not experienced personally the sense of negotiations. Rarely does the " person on the phone" even talk to the mediator as there is often this idea that the boss should be shielded form the process. What counsel sometimes do not realize is that sometimes the mediator can talk to the decision maker in a way different, and hopefully more effective, than anyone else in the organization. In my experience, the type of boss who is feared by his subordinates is often the type of boss who send representatives to the mediation who are least likely to be honest with him or her in their opinion of the reasonableness of settlement positions. Mediators generally do not have the same restrictions as employees, thus we are much better able to be straightforward with the difficult boss. In fact, I usually find that these difficult bosses often find a frank discussion with a mediator as refreshing, and although they seem to argue with you, that is only their way of sizing you up. These people are often used to getting their own way through force of character, and actually respect someone who will not be intimidated by these tactics. Only after you first show that you will not be intimidated by them , do they then sit down and engage you in a respectful conversation as a peer. This type of meaningful engagement can only be done effectively in a face to face meeting.

7. " I was wrongfully dismissed because they had no right to fire me "

or

"I understand that the Company had to let someone go, but it should not have been me "

Employees often fail to appreciate, or more often refuse to appreciate, that absent some very particular situations (almost always involving a breach of a statute), a non-unionized employer has a unlimited right to terminate the employment of anyone they please for any reason they please. The "wrongful " part of a wrongful dismissal case is not the act of dismissal, but the failure to pay the proper compensation. In other words, the only real difference between a wrongful dismissal and a rightful dismissal is money.

The reluctance to accept this legal principle often expresses itself in the plaintiffs' refusal to accept a seemingly appropriate settlement offer. From the plaintiffs point of view it would be akin asking them to sell their house for fair market value when they have no intention to move in the first place. In the house situation, the purchaser has no way to force the employer out of their home, no matter what the price, thus the vendor can hold out for a price well in excess of fair market value. However in the employment situation, the employee can be forcibly removed from their position, and the most they ever have to pay is the fair market value, as determined by a judge.

This refusal by the plaintiff to accept the employer's legal right to terminate one's employment is often because the employee either does not know why he or she was terminated, suspects that the real reason has not been given or disagrees with the rationale behind the reason. The mediation process can be a useful mechanism to explain why the company did what they did and how they made the decision.

I was recently involved in a case where the employee was convinced that the reason she and her co-workers were chosen for termination was based in part on race and gender. She came to that conclusion based on three essential facts: One, 80% of the people laid off in her local office were what she categorized as visible minorities. Two, the Company had not applied seniority as a factor based on the fact that in some situations junior people were retained and senior people were laid off. Third, and most importantly, the Company had indicated in a group meeting announcing the layoffs that performance had not been a basis for making the decision as to who would go and who would stay.

At the mediation the Employer of course denied that the decision was based on race or gender. When asked what criteria they did use, they said that in fact the decision was based on an overall assessment of individual employees' past performance reviews, with each level of the Company required to cut back staff by 10%. When asked why the Company did not say that to the employees at the time, they answered that it was felt at the time that to announce that information in a group meeting would be publicly humiliating to those chosen for the layoff. The plaintiff herself, when asked by the mediator what she thought a fair way to make this decision would be, answered that it should have been based on relative ranking of performance. Obviously the problem here

was that the employer should not have had a group meeting to explain (or in this case to mislead) the selection criteria, rather it should have been done on a one on one basis. You do not need to tell the people who are staying that their co-workers were chosen for layoff because you are better than them, in fact you do not have to tell the people staying anything other than get back to work. Had the Company told this highly intelligent employee the truth at the time of termination, she would have likely accepted the logic and rationale, negotiated a fair severance package based on the usual factors and got on her way. Instead, we now have an employee who is being asked to now believe an ex-employer who admits lying to her in the first place. Not exactly a credibility builder! Now the employer was required to go through a lengthy and costly fact gathering process to show that the reasons for her termination were based on the assessment of relative merit, and not race or gender. Until that was done however, there was no way that this plaintiff was ever going to accept a "fair market " termination package.

8. Do not ignore the emotional component of the case

Terminations are almost always emotional events for employees and that emotion often comes out at the mediation. Some mediators do not feel that emotion should be shown at the mediation, especially in the group setting. Others recognize that there is a place for emotion at the mediation as long as it is properly managed. Part of the purpose of the mediation can be for the employee to vent their anger and frustration about the termination, their former employer and how they have tried to cope since their dismissal.

In my opinion the best thing the employer can do in this situation is to allow the employee to vent and listen empathetically. Listening to the employee without responding to the employee on every point can be helpful. Your silence does not mean you agree with their points, it just means you are listening, or at least giving the impression that you are listening. I call this "sympathetic head nodding".

It is okay to express a sense that you feel the plaintiff's pain but do not forget that the employee is the victim and may need to feel like one. Do not, as was done in one of my mediations, seek to say that you understand the difficulty the plaintiff must be facing having been fired after 30 years of service when you are 30 years of age and have worked for the company for 6 months. Do not, as happened in one of my cases, indicate to a long term employee that his employment had to be terminated because the company's debt equity ratio was out of whack in light of the recent multi-billion dollar takeover.

If you just sit back and actually listen to the employee tell his story, you can often pick up information that can be beneficial later on in the mediation. For example, where the employee goes on and on about how horrible it has been to have to sit at home with nothing to do while looking for a job, it might appeal to this employee to have the services of a relocation counselor that provides office space to its clients. This may fill a dual need of the employee; to get professional assistance in his job search and to get out of the house. If the employee mentions that he has had to borrow $20,000 from his friends to stay afloat since his termination, then that tells us that there may be a strong attachment to a settlement that allows him to pay off that debt. Now the settlement is not

just a number, it is a device that can be used to extract the plaintiff from a situation that is causing him pain, that is being in debt to his friends.

9. Understanding the true cost of litigation :

Everybody knows that employers can afford to litigate more than employees, however employees do not want to reminded of this unpleasant fact by the employer or its lawyer. The mediator can do this task more effectively than the opposing lawyer. A mediator will often not only set out the cost of losing, but more importantly the cost of winning. Plaintiffs are often unaware of the full financial effect that mitigation income, EI repayment, income tax and party and party costs can have on the net amount that they will actually receive from a win at trial. It is often possible to construct a tax effective mediated settlement that puts into the plaintiffs' hands about the same amount of money that he or she would see at the end of a successful trial but at a lesser cost than the employer would have to pay out after a trial.

10. The spouse at the mediation:

Typically plaintiffs come to the mediation session just with their lawyers and leave their spouses at home. I have always found this odd as the issue of settling a lawsuit of this nature always has a dramatic effect on one's family income, especially when the dismissed employee previously was the main breadwinner. Certainly in my household I cannot imagine either my spouse or I making such an important family decision without the direct involvement of the other.

As a mediator I encourage the plaintiff to bring their spouse along to the mediation. For one thing, it avoids the authority issue, in other words the plaintiff cannot seek to adjourn the mediation at a critical time with the reason that they now need to check with their spouse. Secondly, the spouse can be there to give emotional support to the plaintiff at the right time. A timid plaintiff may need to know that his spouse will support him in compromising the claim, as opposed to choosing not to settle because his spouse may get mad at him. An especially aggressive plaintiff may listen to the spouse who reminds the plaintiff of the non-monetary aspects of not settling, things like family stress, poor health and the effect on the kids. Everybody needs support in making difficult decisions and for many of us that person is our spouse.

Employers sometimes do not want the spouse at the mediation, especially when the perception is that the spouse is a difficult person who will push the plaintiff to extreme positions. First of all, in mediation everybody gets to decide who will be on his or her team and this normally is not subject to the veto of the opposing party. Secondly, as a mediator I welcome the spouse, especially the difficult one. I know that the spouse is going to have a hand in the deal anyway, and I would always rather deal with the decision maker or co-decision maker directly rather than as a ghost back home, or in the case of the employer, back at head office.

You see, the missing spouse is very much like the missing corporate decision-maker. The mediation works best when they are both in the mediation session.

11. American Employers are not like Canadian Employers

Canadian employment law is premised on the principle that absent just cause or an employment contract which deals with the issue of termination, every dismissed employee is entitled to what the Court determines is reasonable notice or pay in lieu of notice. American law is the reverse, the so-called doctrine of 'employment at will', or I call it 'employment at whim', which provides that absent an obligation in either a contract or implied from other documents, there is no obligation on either the employer or the employer to provide any notice or pay in lieu of such notice when the employment relationship is brought to an end.

This fundamental difference between Canadian and American law, combined with the natural surprise of some Americans that Canadians are not merely Americans with funny accents, leads to some interesting dynamics at mediation. First of all, depending on whether or not the employer has had previous exposure to this aspect of Canadian employment law, you can spend an inordinate amount of energy at the mediation explaining why their US lawyer drafted employment contracts or Employee Handbook, which undoubtedly refers to the doctrine of "employment at will" on numerous occasions, is irrelevant in a Canadian courtroom. Then when you tell them that the eight weeks referenced in the Employment Standards Act is only a minimum and has virtually no relevance in a wrongful dismissal case, they think you are either stupid, or a ultra liberal, or both.

Then once you get them to realize that Canada is not the 51st state of the Union, you come to realize that Americans tend to view litigation in somewhat more adversarial terms than most Canadians. Remember, there are few television shows emanating from the US, (or for that matter Canada) which show legal disputes being resolved by way of patient understanding or compromise at mediation. Rather litigation is shown on TV as highly adversarial where the litigants and their lawyers usually despise each other and the winner at trial wins real big and the loser looks he is going to sue his own lawyer and then quit their own job and join a monastery. Since most people in litigation strongly believe that they will win, they tend to believe that real litigation will produce a clear winner (themselves) and a clear loser (the other party). Faced with that predictable outcome, why bother to compromise.

Thirdly, where the employer decision maker is a US resident up to Canada for the day, it is more likely than not that they do not personally know the plaintiff and therefore have had to rely on other people's information and analysis of the plaintiff's psychological makeup and motivations. They in fact may not have even met their own Canadian lawyer before the mediation.

The combination of these factors means that mediating between an American based employer and a Canadian based employee can be different than when the dispute involves two Canadians. I do not find any appreciable differences between the rate of settlement between the two groups but the dynamics and expectations of the parties differ, thus the mediation techniques utilized also differs.

12. The Outrageous Position

In the overwhelming number of cases that come before me as a mediator, there are valid and reasonable disputes between the parties, which carry some risk to both parties. However there is a small but difficult group of cases where it is painfully obvious that there is absolutely no legal merit to one of the party's position.

This can take a number of forms, some more difficult that the other.

A boilerplate claim in a Statement of Claim for a million dollars punitive damages is not a problem because I know, and the defendant's lawyer hopefully knows, that this is often just thrown in to every case and is not pursued at all.

More problematic is where the pleading or the mediation brief deals with an issue that is not legally relevant, but of apparent importance to one or both of the parties. It may well be that this represents an important mediation interest (i.e. the employee wanting to know why they were terminated, even though cause is not alleged) in which case it should be dealt with, otherwise it may be a barrier to settlement. On the other hand the issue in dispute may simply be an attempt by each party to make the other look bad. In this case the mediator can often remind the parties that this particular aspect of dispute is not necessary to resolve at mediation and furthermore, it will not be dealt with at the trial as it is not legally relevant. At this point I usually remind the parties that we do not have to solve any particular legal or factual dispute, we only have to come to a settlement.

The difficult scenario is where one party's legal position is simply ridiculous. The plaintiff who claims 48 months notice. The employer who claims that mere dissatisfaction with an employee's performance is just cause even where there has been no communication of that dissatisfaction. In this case I first try to find out whether this strange position is shared by the lawyer for the party holding the position. If it is, then I may ask the lawyer what legal theory, principle or precedent he or she is relying upon. Depending on the situation, I may or may not engage in this conversation with the client present. Obviously this would take place in the separate caucus stage. Whether I would then offer my opinion on the position depends on a number of factors such as, what type of relationship I have with that lawyer and whether I am asked for my opinion. If someone acknowledges that the current law is against them but they wish to use this case to change the law, even if it means going all the way to the Supreme Court of Canada, I remind them that the likelihood of settlement in those situations is minimal.

The most common type of outrageous position is where the client is the proponent and the lawyer, who knows perfectly well that it is a stupid position, feels that part of job

as being his client's advocate is to advocate stupid and indefensible positions. I try to gain a deeper understanding of why the client is taking such a position and then work with that. The refusal to acknowledge the legal realities may be a cover for deep anger or hurt that the one party feels towards the other. It may also be an effort to appear to be tough, so as to scare the other side into submission. Often when one gets to understand the real reason behind the outrageous position, then you can work with it and often achieve a settlement in spite of the position of the difficult litigant.

Conclusion :

The law is definitely an important part of the mediation process in employment law cases, but it is not usually the only consideration. These cases often involve aspects of human behavior and motivation that have little to do with the legal rights and obligations of the parties. To be effective at mediation requires an understanding not only of the procedural and substantive aspects of employment law, but also a thorough understanding of what motivates employers and employees in matters involving disputes regarding their employment relationships. It is my hope that in some small way this paper has given the reader some insight into this fascinating process.