Med/Arb in the Labour Relations World

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Introduction:

The purpose of this paper is to introduce the reader to certain issues regarding the use of the med/arb process in the labour relations context. It is intended to form a basis for discussion of the sort of issues that face the labour relations practitioner in first deciding whether or not to engage in the med/arb process and then once he or she is in the process, how to do so effectively.

Definitions, or What exactly is Med/Arb and how is it different from Mediation and Arbitration : By Jules Bloch with comments by Barry B. Fisher

Even among experienced practitioners, there is often a lot confusion over the terminology used to describe the various dispute resolution methods. Jules Bloch has set out the following very useful common sense and lingo free definitions.

Definitions

The following are practical working definitions of Arbitration, Mediation, Mediation/Arbitration and Arbitration/Mediation/Arbitration. All are forms of dispute resolution mechanisms.

Arbitration:

Understood purely and simply, arbitration is the most formal kind of dispute resolution mechanism. In an arbitration scenario, representatives of conflicting parties, typically appear before an Arbitrator or an Arbitration Panel and adduce evidence. The parties make submissions on the basis of the evidence adduced and the Arbitrator or Arbitration Panel renders a binding decision based on the evidence tendered and the legal submissions.

Mediation:

Mediation is a more informal dispute resolution process devised to resolve issues in a less adversarial manner. Essentially, mediation is assisted negotiation. The conflicting

parties request a mediator to help facilitate communication and to generate a solution oriented dialogue between the parties. Like an arbitrator, a mediator is a neutral third party however, unlike an arbitrator, a mediator does not impose a solution on the parties. With the mediator's assistance, the disputants attempt to arrive at a solution. If the disputants are unable to arrive at a solution, they have not affected their rights to arbitrate the matter in the manner indicated above. In a pure mediation process, the mediator would not also serve as the arbitrator in the event the mediation fails. The parties would choose a different person to arbitrate the matter.

Mediation/Arbitration:

Mediation/Arbitration ("med/arb") is a dispute resolution process which includes aspects of both mediation and arbitration. The parties agree in advance that the individual will be chosen to mediate and, should the mediation fail, to then arbitrate. Because mediation/arbitration, is a variable hybrid of mediation and arbitration, the process cannot be precisely defined. Parties usually agree to a specific mediation/arbitration system which outlines the role of the mediator/arbitrator. Depending on the approach of the mediator/arbitrator and the agreement of the parties, the process can be very informal and is typically solution driven. If the parties are unable to achieve a satisfactory resolution, then the mediator/arbitrator imposes a decision which settles the matter. When the med/arb process is more formal and the mediator/arbitrator is unable to assist the parties to resolve the issues in dispute, then the mediator/arbitrator will convene a formal arbitration hearing and render a decision based on findings of fact and law.

Arbitration/Mediation/Arbitration

Arbitration/mediation/arbitration as an *ad hoc* dispute resolution mechanism. Typically, conflicting parties agree to an arbitrator. On the arbitration date, the parties arrive to present their case. Sensitive to the nature of the dispute, and seizing the opportunity, the arbitrator or the parties may wish to engage in some form of assisted negotiations prior to commencing the formal arbitration. When the assisted negotiations fail to resolve the issues in dispute the arbitrator renders a decision based on the evidence and the legal submission. Another variant can occur when the parties actually begin the formal presentation before the arbitrator. During the course of the hearing on the merits of the case, the parties or the arbitrator might suggest that the parties consider mediation. In this scenario, if the mediation fails, the parties continue the arbitration hearing before the same individual who then renders a decision based on the evidence and legal submissions.

It is very important for the neutral, the lawyers and the clients to know exactly what process is being engaged in at any given time, especially when engaging in the med/arb process. Prior to entering into a med/arb there should be a discussion around what happens if the mediation process does not result in a settlement. By definition, med/arb means that the same person who was acting as the mediator will now act as the arbitrator. However there are still a number of important process issues that need to be discussed. These issues include the following:

- ❖ Does the arbitration start immediately after the mediation or the next day or do the parties schedule the arbitration for a later date?

- ❖ In terms of evidence, is the slate wiped clean after the mediation so that all evidence must be led at the arbitration in the normal fashion or can there be an agreement that evidence will only be led on those issues in dispute and that the arbitrator can rely on non-contentious facts that arose in the mediation?

- ❖ Is the arbitrator to ignore all settlement discussions that arose in the mediation and award whatever he or she feels is right based on the evidence and the law or is the arbitrator restricted to making an award within the confines of the parties respective last settlement proposals?

Preparing the Employer Client for Med/Arb by Jim Henderson

Preparation Of Your Client:

At the initial interview, it is our firm's practice to fully discuss the legal process including alternate dispute resolutions such as mediation or arbitration. Therefore, at the very beginning the client has been advised not only of the traditional adversary steps but of the alternate dispute resolution processes available to them. It is particularly important to do it at the initial interview, so that the client is not surprised when, later on, you or the other party suggest that ADR may be worthwhile exploring.

Once a decision has been made that mediation might resolve the matter between the parties it is important that you properly prepare your client for the process.

Pre-Mediation Meeting with Client:

Review the process – what to expect from the Mediator – what to expect from the other side.

You will review such things as:

- The confidentiality of the process and the fact that there is no precedent.

- Preservation of the relationship between the parties.

- The legal and practical issues.

- What is important to your client and what are the (business) objectives in attending the mediation.

- The strengths and weaknesses of the case and where you currently stand with respect to the process i.e. any settlement offers etc.

- Review with your client the possible outcomes of a trial - and what are the pros of avoiding a trial.

- Issues related to costs, both with respect to your own costs, and the operation of the rules of procedure related to costs.

After a thorough discussion and once your client has had an opportunity to mull over the strengths and weaknesses of the case it is important to have a frank discussion with respect to settlement expectations. In this regard, I tell my clients that in attending a mediation session they will be giving up something in order to achieve a settlement and if they cannot live with this we should not be attending. However, I also explain to them that they may be able to achieve through mediation some of the things, which they may not be able to achieve in court.

Additionally, I tell my clients that in going to mediation they have a greater say in the process. That is:

(a) The parties select the mediator (other than court appointed);

(b) The parties have input into drafting the Mediation Agreement, which lays out the basis and procedure for the mediation;

(c) The parties select the time and location, which is most convenient to the parties;

(d) By agreeing that statements made at mediation are inadmissible in subsequent proceedings and are without prejudice the parties are allowed greater latitude in expressing their feelings and dealing with issues, and,

(e) The client will have a greater level of actual participation at the mediation.

Lawyer's Preparation:

After having had your pre-mediation meeting, you should have a full understanding of your client's interests and objectives. You may have identified that such things as your client's dignity, respect in the industry etc. are important.

With this in mind, I then discuss with the client the value of obtaining an apology or ensuring that my client's reputation remains intact in the industry. Obviously, there will be a monetary value placed on such things during the process.

After having explored all of the non-monetary issues you should then move to the monetary issues. In discussing the monetary issues factor in the legal costs, the lost

opportunity costs etc. and have a general discussion with the client concerning what might be awarded by the court at trial. I do not attempt to get a particularly firm figure but rather a monetary band in which settlement would be acceptable to my client. I do this deliberately as, in my opinion, if a client attends a mediation with a fixed figure in mind, they are less likely to move off of that figure and anything less is seen as a loss.

To What Degree Do You Do Legal Research:

I would suggest that you should already have done your preliminary legal research. Furthermore, in your pre-mediation meeting you will have discussed with your client the caselaw in the area in order to ensure that your client is fully informed of what the possible outcomes at trial may be.

When attending the mediation, I want the other counsel and the mediator to know that I know the law in the area. As a result, I bring a few cases that strongly support my client. Note: I do not believe that it is necessary to pull out these cases or attempt to brow beat the other counsel with caselaw at mediation, however, in caucus with your client and the mediator it may be necessary to refer to the caselaw. I then ensure that the mediator shares this information with the other side.

Do You Prepare Witness Statements?

I do not believe that preparing witness statements adds anything to the mediation process, as these are statements that are not subject to questioning at the time. In my opinion, providing the right parties are present, it is better to have information that would be contained in witness statements expressed through your client in their own words. I also believe that presenting such statements to the other side makes the process more adversarial rather than settlement oriented and I avoid it for that reason.

Do You Bring Witnesses?

Like witness statements, in bringing a witness to the mediation session may result in the procedure becoming unnecessarily adversarial in nature. Therefore, I would generally recommend against bringing a witness to mediation. However, I will take a witness to a mediation in instances where the individual will be seen by the other party as being objective and listened to by the other party. Again, I would caution counsel in using a witness to brow beat the other side. Though you will already have prepared the witness, it is important to keep in mind that they should not be seen as being closely aligned with your client. Witnesses should be introduced to the other side and only brought into a session when required to objectively stress your client's point.

Do You Prepare A Written Brief?

While it is important for counsel to be prepared, I think that a written brief is not necessary (those of you that have attended a court appointed mediation will be familiar

with the Statement of Issues and under the circumstances, I feel that this is more than enough). If in fact, you wish to prepare a written brief this should be agreed to by counsel on the otherside prior to the mediation and done on a without prejudice basis. If it is not agreed to by the otherside do not do it. You do not want to make counsel look ill prepared in their client's eyes.

Opening Statement:

This is the most important aspect of the mediation, in my opinion.

Prior to making your opening statement, you should speak with the otherside. When speaking with the other party, you should ensure that you come across as a respectful and caring individual with a pleasant demeanour. When making your opening statement speak to counsel and the parties on the other side, not to the mediator as he/she has no authority. You must sell the other party!!

An opening statement should not be a speech, but a succinct statement:

(a) Reviewing the issues;

(b) Highlighting your client's position – in putting forward your client's position you should do so in a reasonable and fair manner i.e. do not use language that offends or would be seen as adversarial – stay away from character assassinations and personalizing the matter – deal with the problem.

(c) Refer to objective criteria and evidence combined with studies/reports and other types of objective evidence that supports your client's position.

(d) Acknowledge the other party's issues and their case.

(e) Comment on the meritorious parts of their case, acknowledge any fault or wrong on your client's behalf. If a client's actions may not have been appropriate, acknowledge this at the beginning of the mediation session.

(f) Assign a certain portion of the opening statement to the client. This gets them involved in the process – shows that they are serious about the process and commited to it. I found that this is particularly important when the client is a corporate entity, as it puts a human face on the business – it is not just a corporate lawyer speaking on behalf of his client.

Arb/Med/Arb: Some Trite Thoughts by Scott Thompson

1. As a general rule, parties should explore settlement and seek to resolve the dispute before arriving at the arbitration hearing. It is too expensive to prepare for a hearing

and then settle it on the morning of the hearing, unless there is strategic reason for waiting for the last minute.

2. In any dispute there are a number of dispute factors that have an impact on whether or not a dispute can be settled or mediated. Some of these dispute factors include the parties' objectives, the counsel representing the parties, and any factual and legal issues involved.

3. With today's enthusiasm for mediation, it must be remembered that there are many occasions in labour relations when an arbitrated solution is the best solution for the parties, including the party that loses.

4. Mediation does make sense where one or more of the dispute factors is prolonging a dispute that could or should be settled. Mediation should be explored before arbitration unless the parties have agreed to med/arb the dispute.

5. As a general rule it should be assumed that parties who arrive at arbitration intend to arbitrate. In the absence of a clear signal from counsel, arbitrators should be careful not to waste hearing time with mediation, particularly at the commencement of the hearing.

6. During the hearing, the dispute factors can and will change which can generate an opportunity for a mediated solution where one did not exist before. This will often give rise to an opportunity for the arbitrator to resolve the dispute as a mediator. Whether this can be done and how will depend on the various dispute factors involved. In the end all participants need to be left with the perception that the process, whether it ends with an arbitrated or a mediated solution, was a fair process.

7. A positive mediated solution should deliver to both parties something that they could not achieve through an arbitrated solution, without extracting something that they would not have to give up through an arbitrated solution. If this goal cannot be achieved through mediation, then an arbitrated solution may be preferable for both parties.

Dealing with the power of the Neutral in a Med Arb by Barry B. Fisher

In this section, I use the term "power " to simply refer to the ability of a person to effect change in the behavior of another person

The obvious difference between the role of a neutral in a mediation as opposed to a med/arb is the power of the neutral. In a pure mediation, the neutral has various powers:

- Power over process. The mediator is a "process engineer" who has a key role in both the design and the actual operation of the mediation. This can include deciding whether to use a joint

caucus model ,a separate caucus model or a variation , who should be at the mediation, who meets with who, when to break and when to call off the mediation.

- Power of persuasion. An effective mediator is a good persuader. The persuasion may go to the substantive elements of the dispute, the risks and costs of litigation , the emotional trauma of a litigious matter , or the like.

However in a med/arb, the neutral also has the ultimate power to decide the issue in question. This extra power affects the whole process in a number of ways, some of which are as follows:

- Whereas in a pure mediation, the parties are trying to influence the opposing parties behavior or opinion and the mediators opinion is largely irrelevant, in a med/arb the parties are trying to influence both the opposing party and the neutral. The desire to influence the neutral is twofold: First, if the lawyer can get the neutral to see the case his or her way, then the neutral is more likely to try to pressure the opposite party into accepting the lawyer's offer. Secondly, if this case is going to be arbitrated, most lawyers would rather start getting the arbitrator over to their point of view as soon as possible.

- Knowing that the arbitration will be decided on issues of law and relevant facts, whereas a pure mediation tends to focus more on the " true interests " of the party, there can develop a greater tendency in a med/arb to discuss the law and the facts and less of the human and emotional aspects of the case.

- The neutral in a med/arb faces the dilemma as to whether he or she will reveal to the parties his or her opinion of the merits of the case, and if so, when to do so, how to do so and whether to do so only when invited to do so. A properly timed peek into the neutrals' mind can often greatly assist the parties ability to settle the matter, while a premature uninvited assessment of the case by the neutral can not only defeat the chance of a settlement but lead at least one party to believe that the neutral can no longer render a fair and just arbitration award.

- More often than not, two qualified lawyers or professional presenters do not seriously disagree with what they each think the likely result of an arbitration will be and what an appropriate settlement should be. However, their clients are often not as clear thinking or reasonable. In situations like this, the neutral may be asked to be the " bad cop " to the lawyer as

" good cop" when the issue of likelihood of success and reasonableness of a settlement proposal is discussed in a private caucus with the client. Some lawyers do not to present bad news to clients, especially if it contradicts the good news opinion they gave to their client before the med/arb. In these situations, the nasty neutral becomes the conveyor of the bad news. Other lawyers have clients who do not seem to care what their own lawyer's opinion is, as they know better. In these situations, it can be helpful for the neutral to sit down with the client, stare him or her in the face, and say " You know, you should listen to your lawyers' advice, he is right on this one ".

- In a pure mediation, the parties tend to be quite candid with the mediator in terms of what they want, their true bottom line , and their analysis of the strength and weakness of their own and their opponents case. They can afford to be this candid as the mediator has no decision making power and nothing that is discussed with the mediator can be brought out at the trial or the arbitration. In a med/arb , anything you tell the mediator you are also telling the arbitrator, so the parties tend to be somewhat less candid in discussing their innermost fears and desires. This makes the mediation part of the process more difficult as most mediators find that the more open the parties are with the mediator, the more likely the mediator can help the parties achieve a settlement.