

## MEDIATION AND THE NEED FOR NEUTRALITY

Some years ago I acted for an employee who had taken sick leave from her job at a life insurance company in Toronto. My client had tried to claim her available sick leave benefits and for unexplained reasons her claim was neither accepted nor denied. It simply was not processed.

Frustrated with her employer's lack of response, she instructed me to issue an action in the Superior Court of Justice at Toronto. After exchanging pleadings, both parties agreed to mandatory mediation under Rule 24 of Ontario's Rules of Civil Procedure. The mediator who was appointed was a former justice of the Superior Court of Justice who had retired from the bench several years before upon reaching the age of 75.

During his many years on the trial court bench his reputation as a judge was one of compassion. He was clearly a small 'e' equity judge and was very well respected by counsel both for his courtroom manner and for his well reasoned judgments.

The Plaintiff was in her forties at the time and was under medical care for depression. One of her medical reports cautioned about the risk of suicide. While preparing for mediation I advised her to seek a reasonable offer which would compensate her just for her sick leave benefits and some costs without seeking to punish her employer for its conduct. I purposely got her to agree to omit any aggravated or punitive damages claim in order to demonstrate her reasonableness.

The mediator had all the parties' productions and after reading them he addressed the defendant's counsel and loudly berated him for the defendant's position. And so it went for close to fifteen minutes. I remained silent largely stunned by the mediator's remarks to defence counsel. At the end of what had turned into a verbal donnybrook, defence counsel advised the mediator that he had come to the mediation intending to make a settlement offer but in view of the mediator's posture felt like

walking out. It was difficult to tell whether he was merely posturing or whether he meant it. The redness of his face told me that he meant it.

At that point, I edged into the discussion and suggested that caucusing separately might assist us. If nothing else it was an opportunity to let the mediator and defence counsel cool down.

I met first with the mediator in caucus and reviewed our claim and an initial offer to settle. Because we had agreed to an evaluative mediation the mediator expressed his view of the fairness of our offer. That came as no surprise given his earlier comment in plenary session that the Defendant was fortunate not to be facing a punitive damages claim. Talk about throwing a grenade into a settlement discussion!

We did settle about an hour later and the Defendant accepted our offer. It was obvious that my client was not emotionally prepared to go to trial and was willing to overlook the way in which she had been treated.

What happened in caucus when my client and I met with the mediator alone is instructive. My document brief contained my relevant correspondence on letter head listing my university degrees including my LL.M in (ADR) obtained from Osgoode Hall Law School.

The mediator confided that he was making his way through some of Osgoode Hall's prescribed ADR course materials and he then told me that he was embarrassed by his earlier outburst and could not understand how he allowed himself to aggressively criticize defence counsel.

Knowing his reputation as a former trial court justice, and that he had retired not more than three years before, I gave him my perspective. And that very simply was that once a judge, always a judge. His instinct for fairness overtook the need for him to remain neutral regardless of his view of the parties' positions.

The take away was that as mediators we are not there to judge but only to facilitate and we can't mediate effectively if we aggressively take sides and show hostility to the less persuasive party, especially in the most emotionally difficult cases.

All we can do is try to persuade a party to do the right thing being careful never to act as an advocate for one side or the other, much less as a judge. When we mediate, we are neither.

Jack Zwicker

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