ADVANCED STRATEGIES FOR MEDIATION

MANDATORY MEDIATION OF EMPLOYMENT DISPUTES:

PERSPECTIVES FROM ACROSS THE BORDER

Prepared for AELC 2024 Annual Conference

October 16, 2024

Jeffrey E. Goodman and Prateek S. Awasthi

MATHEWS DINSDALE AND CLARK LLP

Toronto, Ontario

INTRODUCTION

1. Most civil proceedings in Canada do not go to trial,[1] and this is especially true of employment litigation.

2. In Ontario, civil proceedings commenced in the cities of Toronto, Ottawa, and Windsor, are subject to a requirement for parties to attend mediation before trial. Mandatory mediation was found to be successful when it was first launched twenty years ago,[2] and remains popular to this day, with prominent voices within the legal community calling for expanding mandatory mediation to courtrooms across Ontario.[3]

3. As a result, a majority of employment disputes resolve at mediation, or shortly before or after mediation, and it has become necessary for Ontario lawyers to become skilled advocates at mediation.

4. This paper shares some reflections from two Ontario litigators on strategies for mediating employment disputes that may be relevant to Canadian practitioners, as well as those across the border, and internationally.

UNDERSTANDING THE TERRAIN

5. All good strategy begins with an understanding of the "terrain". It is therefore important to briefly review some key procedural aspects of mandatory mediation in Ontario, and certain other Canadian provinces,[4] which are as follows:

    (a) Parties and their lawyers are required to attend a mediation session prior to a pre-trial conference.[5]

---

[1] Department of Justice, Canada "The Effectiveness of Using Mediation in Selected Civil Law Disputes: A Meta-Analysis", https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_3/p3.html
[2] Hann, Robert G.; Baar, Carl; Axon, Lee; Binnie, Susan; and Zemans, Frederick H, "Evaluation of the Ontario Mediation Program (Rule 24.1) Final Report: The First 23 Months" (2001). Books. 115. https://digitalcommons.osgoode.yorku.ca/faculty_books/115
[3] Ontario Bar Association, "Expanding Mandatory Mediation in Ontario" 2022. https://www.oba.org/CMSPages/GetFile.aspx?guid=4f756ca7-2962-417b-aec6-18e1ae760d12
[4] Ontario *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rule 24.1; Alberta *Rules of Court*, Alta Reg 124/2010 Rule 4.16(1); Saskatchewan *King's Bench Regulations*, SR 100/2023, Part 3
[5] This is in contrast with Rule 16 of the US Federal Rules of Procedure, by which settlement discussions can take place at the pre-trial stage.

(b) Parties can decide when they attend mediation. They may do so before or after pleadings close, or before or after examinations for discovery (the Canadian version of depositions).

(c) Parties may agree upon a mutually acceptable mediator, or if they are unable to do so, a mediator is assigned to them from a roster maintained by the court.

(d) A mediator cannot impose a settlement, nor are parties obligated to agree to any settlement, but they are obligated to participate in good faith and treat the process seriously.

(e) A mediation can take place for a few hours, a full day, or over multiple days.

(f) A mediation can be virtual (via videoconference), in-person, or a combination of the two methods (either with parts of it virtual and in-person, or with some people attending by videoconference and others in-person).[6]

(g) Parties must submit a written statement of issues seven days in advance of mediation.[7]

(h) All communications at mediation and the mediator's notes and records are confidential and deemed to be *without prejudice* settlement discussions.[8]

(i) A mediation must be attended by a representative of each party with authority to settle the matter.

(j) An insurer must attend mediation if they could be liable under the terms of their insurance policy with the employer to pay all or a part of a judgement, either directly or indirectly.[9]

---

[6] Post-pandemic, there has been a strong tendency among employment mediators and members of the employment bar to do mediations entirely by videoconference, with Zoom being the preferred videoconferencing platform used by Ontario mediators.

[7] In practice, this one week deadline is rarely observed, since many full-time mediators will only read the parties' briefs a day or two before the scheduled mediation.

[8] Similar to US Rule 48 of the Federal Rules of Evidence

[9] In practice, insurers rarely attend mediations, partly because most Employment Practices Liability Insurance (EPLI) policies do not cover the underlying wrongful dismissal claims, which are contractual, and partly because the plaintiff bar is largely unaware of the existence of EPLI coverage.

(k) A matter cannot proceed to trial without a certificate from the mediator attesting that the parties attended mediation.

(l) Where a party does not attend mediation, a court may order them to do so, or may strike out their pleadings, dismiss the action, order a party to pay costs, and/or make any other order that is just.[10]

(m) An agreement reached at mediation can be enforced by a judge on motion.

6. Along with the above procedural features, it is also important to review certain substantive elements of employment law in Canada, which form unique considerations while considering strategies for mediation:

(a) Most wrongful dismissal disputes in Canada tend to focus on the length of notice periods owed to employees upon termination, both under minimum standards legislation (absent wilful misconduct, in Ontario) and at common law (absent just cause).

(b) The duration of the notice period, or amount of pay in lieu of notice, owed to any particular employee depends on that employee's age, years of service, level of responsibility, availability of similar employment, and a number of other well-established factors.[11]

(c) Damages owed for the employer's failure to provide an employee adequate notice of termination are subject to a duty to mitigate.[12] Situations where an employee finds a comparable job during the claimed notice period, resulting in a crystallisation of potential damages, are particularly well-suited for a negotiated settlement through mediation.[13]

---

[10] Typically, the court will deal with this issue at the ultimate hearing in its costs decision.
[11] *Bardal v. Globe & Mail Ltd*., 1960 CanLII 294 (ON SC), https://canlii.ca/t/gghxf.
[12] See *Lake v. La Presse*, 2022 ONCA 742 (CanLII), https://canlii.ca/t/jspth. See also *Humphrey v. Mene Inc*., 2022 ONCA 531 (CanLII), https://canlii.ca/t/jqj18.
[13] Winkler, Warren C.J., "Access to Justice, Mediation: Panacea or Pariah?", Canadian Arbitration and Mediation Journal 16 (1):5-9 (2007) https://www.ontariocourts.ca/coa/about-the-court/archives/access/.

7. Motivations with regard to mediation are also influenced by Ontario's "loser pays" principle in awarding costs, and the role that formal offers to settle play in determining the proportion of costs a party can hope to recover at the conclusion of proceedings.

8. The party that is unsuccessful in a proceeding is required to pay a portion of the legal costs of the party or parties that are ultimately successful. The proportion of costs awarded depends on whether formal offers to settle were exchanged, and whether one party did better on judgment than their formal offer to settle.

9. Where offers to settle have not been exchanged, the winning party is usually awarded "partial indemnity" costs, which represent between forty to sixty percent of that party's actual expended legal costs.[14] On the other hand, where offers to settle have been exchanged, a plaintiff who obtains a judgment as favourable as, or *more favourable* than, the terms of their offer to settle is awarded "substantial indemnity" costs, which are closer to eighty percent of the plaintiff's actual expended legal costs.

10. A defendant who wins the case outright, or where the plaintiff obtains a judgment as favourable as, or *less favourable* than, the terms of the defendant's offer to settle, is only awarded partial indemnity costs, but the court retains its inherent discretion to award them substantial indemnity costs.[15] As a result, parties and their lawyers are usually motivated to make and accept reasonable offers to settle.

11. Mediation remains a popular option to resolve employment disputes in Ontario, due to a variety of other incentives and motivations, which are as follows:

    (a) Employers are motivated to reach settlements at mediation due to the sympathetic treatment employees receive in Ontario courts, and the uncertainty regarding the enforceability of termination clauses. In theory, a well-drafted employment agreement can rebut the presumption of reasonable notice at common law and limit an employee's entitlements upon termination to their statutory minimums. In

---

[14] The Ontario *Rules of Civil Procedure* limit the hourly rates a court will approve for legal costs, in accordance with a Tariff that sets pre-determined rates based on a lawyer's year of call to the bar. Under Rule 58, a party can request an assessment of costs by a court-appointed officer.
[15] Ontario *Rules of Civil Procedure*, 1990, Rule 49.

practice, however, Ontario courts routinely declare termination clauses to be invalid for an increasing number of novel reasons.[16]

(b) Most plaintiffs are naturally motivated to settle their disputes through early mediation, since they have an interest in avoiding the delays and stresses of litigation, and receiving monetary settlements sooner rather than later. This is especially true given the extraordinary judicial delays in Canada, and particularly in Toronto, which is by far the busiest judicial region.

(c) Plaintiffs' counsel are also motivated to resolve the matter early on, as many of them are retained on a contingency basis, and are usually paid not an hourly rate but as a percentage of the improvement in the total severance package. They have little financial incentive to lengthen litigation, and every motivation to achieve a favourable and early settlement.

(d) For employers, mediation offers the opportunity to negotiate a settlement rather than having one imposed on them, as well as the ability to include specific terms and conditions in the settlement that benefit the employer's business interests, such as non-disclosure agreements, non-disparagement clauses, or a release of all claims, not just those being litigated.

(e) Last but not least, the ability to negotiate an agreement allows both parties to increase the overall value of the settlement to the plaintiff without a corresponding loss to the defendant by managing the tax consequences of different types of lawful allocations. Court-ordered damages for wrongful dismissal are considered "retiring allowances,"[17] which are subject to withholdings by the employer and are taxed as income in the hands of the employee. Through a negotiated agreement, parties can split payments across tax years or direct funds towards registered

---

[16] See *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029 (CanLII), https://canlii.ca/t/k46k4. See also *Henderson v. Slavkin et al*., 2022 ONSC 2964 (CanLII), https://canlii.ca/t/jrhjl.

[17] Canada Revenue Agency, "Income Tax Folio S2-F1-C2, Retiring Allowances" https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-2-employers-employees/series-2-employers-employees-folio-1-specific-plans-offered-employers-employees/income-tax-folio-s2-f1-c2-retiring-allowances.html

retirement savings plans or allocate payments towards legal fees, all of which may provide tax benefits.

(f) In addition, in cases where there are allegations of discrimination and/or tort claims, and there is some factual and legal basis for such allegations, it may be appropriate for the parties to allocate some of the settlement amounts towards "general damages," which are neither required to be withheld on by the employer, nor taxed as income in the hands of the employee.

12. As a result of all of the above, mediation is becoming more and more popular, even in relation to disputes that are not subject to a requirement for mandatory mediation. For instance, disputes regarding workplace discrimination are covered by omnibus human rights statutes at the provincial and federal level in Canada,[18] providing exclusive jurisdiction to specialised tribunals, such as the Human Rights Tribunal of Ontario ("HRTO"). The HRTO now offers and encourages early and voluntary mediation to parties.

13. Similarly, labour disputes between unionised employees and their employers are outside the scope of mandatory mediation under the Ontario *Rules of Civil Procedure*, since they are subject to the exclusive jurisdiction of arbitrators appointed under the Ontario *Labour Relations Act*.[19] However, there is now a common practice in Ontario for labour arbitrators to use the first day of a hearing to attempt mediation, and proceeding to an arbitration hearing only if mediation is unacceptable to either or both parties, or unsuccessful.

14. Overall, mediation is no longer the alternative, but is now the primary way to resolve civil disputes in Ontario. The remainder of this paper discusses key strategic considerations for employment lawyers engaging in mediation.

STRATEGIC CONSIDERATIONS

15. Given the number of choices available to litigants regarding the timing, manner, and structure of mediation, there are several opportunities to make strategic decisions that can

---

[18] *Canadian Human Rights Act* (R.S.C., 1985, c. H-6)
[19] S.O. 1995, c. 1, Sched. A; *Weber v. Ontario Hydro,* 1995 CanLII 108 (SCC), [1995] 2 SCR 929, https://canlii.ca/t/1frj9.

maximise the likelihood of a favourable settlement at mediation. Some key strategic considerations are discussed below.

Timing of Mediation

16. Mediation can take place before or after the close of pleadings. It is permissible for parties to agree to pre-litigation mediation even before a statement of claim has been issued. In such a situation, parties usually agree in writing that the mediation will fulfil the requirement for mandatory mediation under Ontario's *Rules of Civil Procedure* in relation to the litigation that ensues if mediation fails.

17. Pre-litigation mediation may be useful in low-stakes disputes involving disagreements over a narrow range of notice periods. It may also be useful in high-stakes disputes where either or both parties have a reputational risk if the allegations contained in pleadings (which are public documents) are reported in the media or publicised online.

18. Pre-litigation mediation may also be useful in situations where an employer intends to make serious allegations of wilful misconduct or just cause (in which case there is no entitlement to notice of termination under minimum standards legislation or at common law, respectively), since courts penalize employers who are unable to prove such allegations at trial, or who subsequently withdraw such allegations, by awarding "bad faith" damages.[20]

19. Pre-litigation mediation may not be useful where the issues in dispute have not been properly defined or the allegations are unclear due to a party not having committed itself to its version of alleged facts. It may be necessary in such cases to wait until after the commencement of litigation and benefit from the clarity provided by the exchange of detailed pleadings. Where parties decide to proceed to pre-litigation mediation in the face of unclear allegations, they can commit to providing detailed statements of issues well in advance of mediation.

20. Where no pleadings have been exchanged, it makes logical sense for the plaintiff to provide its statement of issues first, and for the defendant to respond. However, where a statement of claim has been issued and served, and parties agree to mediate before a

---

[20] *Humphrey v. Mene Inc*., 2022 ONCA 531 (CanLII), https://canlii.ca/t/jqj18.

statement of defence is delivered, the order should be reversed, since the defendant would already have notice of the plaintiff's case, but not vice-versa.[21]

21. Once pleadings have closed, parties may go to mediation or proceed to discovery. In Ontario, discovery involves exchanging affidavits of documents and examining (or deposing) a representative for each party (usually the employee plaintiff and one representative of the employer whose answers bind the employer).[22]

22. Early mediation may not be useful where there are a large number of factual issues in dispute, for example, in cases involving commercial matters such as minority shareholder oppression claims, allegations of breaches of non-competition covenants, or allegations of financial fraud or data theft. In such situations, parties can agree to first develop a discovery plan, and commit to a fulsome disclosure and production of documents prior to mediation, with the understanding that they would be obliged to do so anyway in the course of litigation. In such cases, where the majority of evidence is likely to be documentary, parties could also choose to go to mediation after documents are exchanged, but before examinations for discovery are conducted.

23. In other cases, where there are questions of credibility that could determine the matter at trial, it may be advisable for parties to complete examinations for discovery prior to engaging in mediation. Transcripts from examinations are useful, not only to evaluate the effectiveness of a potential witness, but can also as evidence of prior inconsistent statements during trial.[23]

24. In some cases, timing may be an issue. In cases where an employee has mitigated their damages by getting a job with a comparable salary, it sets an upper limit on the maximum notice period that can be awarded, and such disputes are ripe for settlement. Considering that the exchange of pleadings does not usually take more than a month or two, and in the absence of any preliminary issues requiring motions, it may be helpful to allow litigation to take its course without rushing to mediation, with the expectation that the employee

---

[21] Where a defendant agrees to mediation before delivering a defence, it should be agreed in writing that the plaintiff will not take steps to note the defendant in default pending mediation.
[22] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rules 29 to 31.
[23] Ontario *Evidence Act*, R.S.O. 1990, c. E.23, sections 20 and 21; Ontario *Rules of Civil Procedure*, 1990, Rule 31.11.

might find another job in the meantime, making a negotiated settlement easier to achieve by the time parties end up before a mediator.

25. In cases where an employee has not mitigated their damages, or where the claimed notice period is significant,[24] an employer may not want to be in a situation where they provide a sizeable settlement only to find that soon thereafter, that the employee is fully employed, and maybe even working for a competitor. It is usually possible to negotiate a settlement with a claw-back provision, which requires an employee to pay back a certain portion of the settlement amount in the event the employee finds a comparable job, however, such clauses are typically difficult to enforce. For all the above reasons, the timing of mediation is an important decision.

Choice of Mediator

26. Most employment mediators tend to be retired employment lawyers or judges, and they tend to apply a fully or partially evaluative approach to the mediation. This is because most employment disputes do not lend themselves to interest-based mediation, since the relationship is usually over and the dispute involves the terms of ending that relationship. This is contrasted with labour law or family law where the relationship may be ongoing and there is more room for interest-based mediation.

27. Often, lawyers maintain a list of mediators they are comfortable working with, or with whom they have had success in the past. Prior to proposing or agreeing to a mediator as a matter of routine, it is important to consider the role a mediator will be asked to fulfil in the particular circumstances of the case.

28. Where a party is motivated to reach a settlement at mediation, the following considerations regarding the choice of mediation can help maximise the likelihood of success:

    (a) Some mediators may have extensive experience in determining the appropriate notice period given the usual set of factors, or may have a good understanding of whether a certain set of facts constitutes just cause for dismissal (in which case

---

[24] Notice periods under common law can go up to 24 months in most case, or higher, in exceptional situations. This can mean 24 months of total compensation including variable compensation and benefits. See *Dawe v. Equitable Life Insurance Company*, 2018 ONSC 3130 (CanLII), https://canlii.ca/t/hs6kc. See also *Lynch v Avaya Canada Corporation*, 2023 ONCA 696 (CanLII), https://canlii.ca/t/k0qrd.

notice is not owed at common law). Such mediators are ideal for simpler disputes regarding the appropriate length of reasonable notice, or whether there is just cause based on facts that are largely not in dispute.

(b) Other mediators may have specialised knowledge or experience on issues involving libel or slander, employment disputes involving commercial transactions, or executive compensation, and are more appropriate for cases where a plaintiff has raised these types of claims. Former judges who have broader experience determining these type of disputes are well suited to mediate such claims.

(c) In some circumstances, a certain mediator may be particularly suited to "manage" a difficult client or opposing counsel, in which case it might be strategic to choose such a mediator.

(d) In all cases, it is important to choose a mediator who will put in the time and effort to understand the facts, read the parties' mediation briefs thoroughly, listen attentively, apply their mind to the caselaw, maintain neutrality, respect confidentiality, and be willing to drive home to each party the weaknesses in their respective cases.

29. An important consideration regarding the choice of mediator is that many successful mediators are often very expensive and booked for many months in advance. The cost of mediation (which, in Ontario, is split equally between parties if mediation is unsuccessful, but typically borne by the employer as a part of the terms of settlement) must be justified by the amounts in dispute. For parties with lower budgets, there are some skilled mediators who offer a roster rate. With some exceptions, these are typically mediators who have recently started their practice and are trying to grow their client base of counsel.

30. In other cases, even where the cost of mediation is not a barrier, a party might not be motivated to settle the dispute at mediation, and may decide to appoint a roster mediator, and choose a half-day mediation, which does not unnecessarily consume parties' time and resources.

31. Where parties cannot even agree on a mediator, and a roster mediator needs to be assigned to them, it is usually a reliable sign that the matter will not settle at the mediation.

Length of Mediation

32. In simpler disputes, a half-day may be sufficient to agree upon the appropriate length of notice period, but ordinarily, most complex disputes require a full-day mediation.

33. A full day allows a mediator enough time to hear the parties, deal with roadblocks to settlement, including animus between the parties and/or their counsel, and to then convince them to move towards a potential settlement. In cases where there are multiple parties, a half-day may not be sufficient for each party to make its case to the mediator, and for the mediator to make their rounds through each room to bring parties together, and to agree upon the terms and conditions of settlement.

34. A full day also provides sufficient time for counsel to draft, negotiate, review, and sign a written settlement agreement after the mediator strikes a verbal deal between the parties. Counsel often underestimate the time associated with completing this critical and final step.

35. Where parties reach a verbal agreement on key issues at mediation, such as the length of the notice period or the amount of money in damages that needs to be paid, it is crucial that a written settlement agreement be signed immediately, or at the least that very day, so as to avoid the possibility of parties second-guessing their negotiations or resiling from their verbal agreements, which are difficult to enforce because of the privileged nature of mediation. For this purpose, many mediators will remain available to assist parties until there is a signature on the dotted line, and a full-day mediation ensures that this crucial step does not result in the entire day's effort being lost.

36. If parties find that they are making promising progress, or if a deadlock is resolved late in the day, and it is likely that another half-day or full-day might result in a settlement, parties are free to agree to a additional day of mediation with the same mediator, or a second mediation with a different mediator. In practice, however, such additional or second mediations are uncommon. Usually, if parties were unable to settle their disputes in the course of a full-day mediation, they are unlikely to be able to settle prior to the pre-trial conference (which is held closer to the trial date), unless there is a major development in the litigation, such as a damaging document coming to light.

Refusal to Participate in Mediation

37. It is rarely a good strategy to refuse to participate in a mandatory mediation, since a court may order the party to attend, and will likely punish that party through an additional order of costs.[25] However, in jurisdictions where mediation is voluntary, or in the case of specialised tribunals such as the HRTO which encourage opting-in to mediation, there may be strategic considerations that justify a refusal to participate.

38. In general, a party is not penalised for not entering into voluntary mediation,[26] however, where each party has an arguable case, a party's refusal to participate in mediation may be considered as a factor by a court in determining whether the party engaged in unreasonable conduct causing unnecessary costs to be incurred, and whether such conduct warrants rebuke by means of a costs sanction.[27]

Written Submissions

39. Even though a written statement of issues is mandatory, parties should take advantage of every opportunity to advance their advocacy. A well-written mediation brief can equip the mediator with all the information needed to help achieve a favourable outcome for that party. The brief should not only contain all the basic information about the case, but it should also contain the party's strongest arguments. It should point out the other side's weaknesses, and identify for the mediator the most convincing documentary evidence. The brief should also reference the most favourable caselaw and distinguish any caselaw relied on by the other party.

40. Mediation briefs are protected under settlement privilege, and a party has the option of putting arguments or materials into a brief that it would not include in its pleadings. Where parties exchange all relevant documents prior to mediation, not just those favourable to their positions, they may be able to successfully pre-empt discovery, which can be amongst the most expensive steps in litigation, particularly in more complex cases.

---

[25] *Williston v. Hamilton (Police Service)* 2013 ONCA 296 (CanLII) https://canlii.ca/t/fxbhb at para. 25.
[26] *Osmani v. Universal Structural Restorations Ltd*. et al., 2023 ONSC 1041 (CanLII), at para 32, https://canlii.ca/t/jw3cm#par32.
[27] *Canfield v. Brockville Ontario Speedway*, 2018 ONSC 3288 (CanLII), at para 46, https://canlii.ca/t/hs7v0#par46.

41. A mediation brief should not be excessively lengthy or voluminous. Most specialised mediators will charge between $4000 to $6000 for a full-day mediation, inclusive of time required for preparation, and may not feel properly remunerated if they are required to read hundreds of pages of documents. At the same time, a mediation brief should not leave out information or documents necessary to prove the party's case. Most importantly, the mediation brief should align with the party's settlement strategy and include all the material necessary to encourage the opposing party to resolve the matter early in the litigation.

Virtual or In-Person

42. As a result of the COVID-19 pandemic, mediations transitioned overnight from being almost entirely in-person to being almost entirely "virtual" via videoconferencing. Most mediators in Ontario prefer to continue conducting mediations virtually in order to minimize delays and expenses associated with travel, and in the case of half-day mediations, to allow them to more easily conduct two mediations per day.

43. A virtual mediation may be preferable where the parties or their lawyers are in separate locations, or where it is not worth the expense, time, and effort to meet in person. However, there are several circumstances in which in-person mediations are preferable, including where the matters involved are complex, there are multiple parties, or it is particularly crucial or challenging to reach a settlement. This is for the simple reason that it is more difficult to walk away from a physical room (especially where travel is involved) than it is to click the "Leave Meeting" button on a Zoom window. Either party is entitled to insist that a mediation be conducted in-person,[28] although, in practice, that rarely happens.

Format of mediation

44. In most cases, a mediation begins with the mediator welcoming parties with a recital of the ground rules for mediation.

---

[28] Guidelines To Determine Mode of Proceeding in Civil, Ontario Superior Court of Justice, April 19, 2022 https://www.ontariocourts.ca/scj/practice/guidelines-mode-of-proceedings/guidelines-civil/.

45. Parties can decide whether they will make opening statements in a plenary session (which is rare in employment mediations), or whether the entire mediation will be conducted with each party in its own breakout rooms (which is more common).

46. A small number of mediators will open for the parties by making a presentation setting out the alleged facts and legal arguments of each party in a neutral way, thereby establishing credibility with the parties. The mediator will then allow parties to correct errors or omissions, without making opening statements or arguments. Such a practice tends to be reserved for larger and more complex cases.

47. In some cases, there may be a tactical advantage in the other party hearing certain statements, in which case, the parties can propose starting with a brief plenary session. However, in most cases, it is better for parties to remain in separate breakout rooms and avoid direct contact, since the antagonism that commonly occurs between litigants can get in the way of their willingness to settle the dispute.

48. In most mediations, the mediator shuttles between breakout rooms, facilitating the exchange of offers between parties and pointing out weaknesses in parties' positions in the hopes of encouraging compromise. While exchanging monetary offers, it is not uncommon for opening offers to be far apart, and for offers and counteroffers to get closer to a zone of settlement as the day progresses. It is beneficial for counsel to be prepared with their calculations for a range of scenarios acceptable to their client.

Deal or No Deal

49. Where a party receives an acceptance to its offer, or an a counteroffer within an acceptable range, the decision to agree is simple enough. A tougher decision is whether to go beyond the scope of what a party and their lawyers initially agreed was a reasonable settlement, in order to end the litigation with a negotiated settlement. A crucial consideration in making such a decision is whether any of the calculations made by a party prior to mediation have changed due to any new information received from the opposing party, or any perspectives shared by the mediator that were not previously considered. Where there is nothing new that affects a party's calculations, there is usually little reason to change its strategy.

50. Parties must consider, of course, the time and expense of litigation, as well as the inherent uncertainty in going to trial. In most cases, a negotiated outcome will be preferable to a court-rendered decision. Where employment disputes involving only the determination of reasonable notice do not settle at mediation and go to trial, it's usually because of the unreasonableness of one or more parties or their counsel.

CROSS-BORDER PERSPECTIVE

51. In American jurisdictions where employment relationships are subject to the "at will" doctrine and can be terminated without notice, employment disputes tend to involve issues of statutory rights, for example under Title VII or the Americans with Disabilities Act. In Canada, on the other hand, most employment disputes do not typically involve claims of discrimination, since those are within the exclusive jurisdiction of specialised tribunals, such as the Human Rights Tribunal of Ontario (HRTO).[29]

52. Surprisingly, mediation has been very effective in resolving discrimination disputes in Ontario. At the end of 2023, over 50% of HRTO cases settled through alternative dispute resolution.[30] The reasons for this success is likely found in the following circumstances, many of which may be unique to Canada:

    (a) The legal principles based on which tribunals award damages in human rights claims are well-established and well-articulated.[31]

    (b) The jurisprudence of human rights tribunals is clear that the purpose of damages is remedial and not punitive.[32]

    (c) Claims before human rights tribunals are heard by adjudicators, not juries.

    (d) The quantum of monetary awards by human rights tribunals have been within predictable ranges, depending on the type of discrimination. Most awards under the general heading of "injury to dignity, self-respect and feelings" are between

---

[29] In Ontario, an employee can sue for discrimination in civil courts as long as the claim includes another recognized claim, such as wrongful dismissal.
[30] Tribunals Ontario 2022-23 Annual Report – HRTO https://tribunalsontario.ca/documents/TO/Tribunals_Ontario_2022-2023_Annual_Report.html#hrto.
[31] *K.L. v. Ko*, 2023 HRTO 385 (CanLII), at para 62, https://canlii.ca/t/jwg47#par62.
[32] *Graham v. Enterprise Rent A Car Canada Company representing Enterprise, Alamo, and National Car Rental*, 2020 HRTO 424 (CanLII), at para 70, https://canlii.ca/t/j7w38#par70.

$10,000 to $45,000 for discrimination on the basis of disability,[33] for example, or between $12,000 to $50,000 for workplace sexual harassment.[34] In cases, involving extended sexual exploitation, the HRTO has awarded up to $200,000.[35]

(e) Last but not least, mediation for such matters have become more attractive due to unprecedented backlogs in the tribunal system.[36]

53. As a result of the above, even in cases involving allegations of discrimination or failure to accommodate disabilities at the workplace, mediated resolutions are becoming the norm.

CONCLUSION

54. Despite mediation being "mandatory" in Ontario, there are no substantive limits on parties' rights to have disputes determined at trial. Parties retain their independence relating to practically all aspects of mediation – from its timing, format, the choice of mediator, and whether to agree to a settlement. These choices present a variety of strategic options for consideration that can maximise the chances of achieving a favourable settlement or benefiting the litigation strategy overall.

55. Given delays in the court system in Canada, it has become even more important for lawyers to become skilled advocates at mediation. Lessons learned by Ontario lawyers may hold valuable insights for practitioners of mediation in other jurisdictions.

---

[33] *Mazzariol v. London District Catholic School Board*, 2024 HRTO 141 (CanLII), at para 36, https://canlii.ca/t/k2zq6#par36.
[34] *Sharpe-McNeil v. Swaby*, 2023 HRTO 872 (CanLII), at para 54, https://canlii.ca/t/jxmtx#par54.
[35] *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 (CanLII), https://canlii.ca/t/hq89q.
[36] In 2023, the HRTO had a backlog of 9,500+ cases. The average case processing time was 588 days.