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management labour and employment law

Effectiveness at Arbitration

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Executive Summary: Effective Advocacy at Arbitration

1. During pre-hearing correspondence with the opposing party or counsel, do not understate your position and be candid about your opponent's position. Use of terms such as "high handed", frivolous, ridiculous, and misleading will clearly communicate your position and, when copied to the arbitrator, will say much about your style.

2. When dealing with pre-hearing disclosure, don't give up any documents without a fight, no matter how relevant they are to the fundamental issue.

3. Do not arrive early for the hearing in order to avoid being pressured into settlement discussions.

4. As the hearing is about to commence, talk to the arbitrator about both of you attending the same school or club.

5. Use your opening remarks as an opportunity to lay out your case, but do not pass up such a valuable opportunity to demean your opponent, their case, and their client. Try and avoid profanity.

6. In order to ensure that the arbitrator truly understands the case he or she is about to hear, repeat your themes multiple times. When they tell you they understand, repeat it one more time for good measure.

7. Litigation is like race! The fastest wins. Therefore, speak as fast as you can at all times.

8. Opposing counsel's opening remarks are an excellent opportunity to get caught up on your texts and emails.

9. Use visual cues to reinforce your case. Rolling your eyes and sighing deeply is very telling.

10. Don't prepare your witnesses before they give testimony in order to avoid any appearance of manipulating the evidence. Remember, this is the witnesses' chance to talk about whatever he or she wants for as long as they want.

11. When your witnesses are being cross examined, constant interruptions or objections on your part will throw your opponent off. The merits of any objection are secondary.

12. When cross examining witnesses, remember to frequently raise your voice, waive your arms, and bang the table. Ask multi-part questions and make sure they are long and meandering. Someone will appreciate your sophisticated tactics.

13. During closing argument, do not abandon any position or argument. Advance every possible argument and submission. Your client will thank you for leaving no stone unturned.

14. Given your lengthy experience, impress upon the arbitrator as often as possible how you have never seen a case so ridiculous or a grievor less worthy of belief.

15. If you have the right of reply argument, use it to repeat your entire argument. The arbitrator will be impressed you remembered it word for word.

The Arbitration Procedure

Collective agreements contain internal dispute resolution procedures, often called "grievance" procedures. If a grievance is not resolved during the grievance procedure, it will be referred to binding arbitration.

Most arbitrators are appointed by mutual agreement. It pays to "research" your arbitrator and factor in any input from colleagues. There are circumstances where the parties are unable to come to an agreement. In these circumstances, a governing statute will typically provide the next step. In Ontario, the *Labour Relations Act* provides a remedy. Where agreement cannot be reached, the Minister of Labour shall appoint an arbitrator. This is a last resort. Parties are encouraged to agree on an arbitrator, if at all possible.

Pre-Hearing Considerations

Before an arbitration hearing begins, there are numerous considerations that each party needs to contemplate.

Witness Preparation

Meet with your potential witnesses well in advance and educate them on the process. Below are common tips for witnesses:

- Be prepared
- Use "contemporaneous" notes made by the witness
- Tell the truth
- Speak slowly and clearly.

- Ask for clarification of questions where needed.
- Only answer the question put to you.
- Do not guess or speculate.
- Do not "fence" with opposing counsel
- Do not attempt to memorize your evidence
- Do not lose sleep the night before. You just have to tell your story truthfully, in an organized manner.

Analysis of Your Case

Many arbitration cases are "won" at the time of an event such as during an investigation. Identifying and interviewing key witnesses early on is critical. You need to determine what "admissible" evidence will be needed if you end up in an arbitration hearing. Obtaining contemporaneous notes of witnesses and relevant documents (e.g. Facebook screen shots) is critical.

Particulars

There are times when one of the parties is unaware of the true basis for the dispute. It is also common for unions locally to not have a full understanding of the relevant legal issues which only arises after union counsel or union staff representatives become involved.

In civil matters in the courts, there are examinations for discovery, interrogatories (written and verbal) and other mandatory procedural matters relating to disclosure. However, in labour arbitration, there are not the same detailed, binding procedures as exist in the civil courts.

Parties have the option of requesting particulars from the opposing party before a hearing begins to better understand the nature of the dispute, and, if necessary, to request an arbitrator to specifically order the production of particulars. Particulars, though, are not granted as a matter of course. For particulars to be ordered, the grievance form and discussions must be severely lacking. In *Devonian Electrical Services Ltd*, the arbitrator ordered the union to provide

particulars to the employer, because the grievance form merely provided a collective agreement clause as the basis for the dispute. The arbitrator held that it was clear that there was a dispute between the parties, but that it was impossible for the employer to know the case that it had to meet.

If particulars are ordered by an arbitrator, the order will apply to the facts surrounding the case. The order of particulars will typically not apply to the detailed evidence that would prove the alleged facts. However, it is becoming increasingly common in Canadian employment litigation (such as before Human Rights Tribunals) for the parties to be required to provide not only all arguably relevant documents (pro and con) but also "will say" type statements of what potential witnesses are expected to say when called to give testimony.

Pre-Hearing Disclosure

Pre-hearing documentary disclosure is necessary to be properly prepared and avoid seeking adjournments.

In Ontario, arbitrators are given the power to order pre-hearing disclosure through the *Labour Relations Act, 1995*.

An arbitrator, when faced with a request for pre-hearing disclosure, will consider whether a contested document is "arguably relevant" to the issues in dispute. Parties are not entitled to engage in a "fishing expedition" to try and see what documents exist. The arbitrator will also consider whether the disclosure of documents would cause undue prejudice on one of the other parties, or create privacy disclosure issues for others such as other staff, students and families.

These factors were all considered in *British Columbia Public School Employers' Assn. and British Columbia Teachers' Federation.* In that case, a teacher filed a grievance against the employer as a result of alleged harassment from the employee's supervisor. Initially, the employee complained to the employer and, in line with the harassment process set out in the applicable collective agreement, the employer hired an investigator to assess the merits of the complaint. After the investigation was completed, the investigator drafted a report outlining the findings. The investigator found that there was no basis for the harassment allegations. Accordingly, the employer did not discipline anyone involved. The employee then grieved the employer's lack of action. An issue arose before the hearing about the disclosure of the

investigator's report; the union and employee wanted to see it, but the employer maintained that the report was confidential. When the union requested pre-hearing disclosure of the report, the arbitrator found that the report was centrally relevant to the main issue in dispute, that the document was sufficiently particularized, and that the union was not engaging in a fishing expedition. Further, the arbitrator found that, despite the confidentiality of the report, the employer would not face undue prejudice if the report were disclosed. Accordingly, the arbitrator ordered that the investigation report be disclosed to the union.

When retaining external investigators and experts, employers must consider whether the report will ultimately be disclosed and including whether attorney privilege can or should apply.

Witness Subpoenas

In most circumstances, the parties request a witness come to a hearing in order for that witness to be examined and cross-examined. There are times when external witnesses need to be required to attend. In these situations, arbitrators have the power to issue subpoenas requiring the witness to attend. If an external witness such as a student does not wish to attend (or their family objects), you will have to make strategic decisions whether to issue a subpoena. This requires consideration of the evidentiary rules in each jurisdiction. A "missing" witness who is not under subpoena is generally not an acceptable reason for an adjournment.

Preliminary Matters

Preliminary Objections

In some situations, the "arbitrability" of a given case may be an issue. "Arbitrability" refers to whether an arbitrator has jurisdiction over the issue. As described above, arbitrators have the exclusive jurisdiction over matters arising out of a collective agreement and, in some jurisdictions, under relevant statutes. If a party contends that an issue is inarbitrable, they will proceed with a "preliminary objection". The other party should be advised early on of a pending objection, or risk having "waived" their objection.

An issue may be inarbitrable for any number of reasons: there may have been a delay in bringing the grievance causing prejudice, the issue may have already been dealt with by another arbitrator or through another forum, the parties may have previously settled the matter, or the

issue might have been brought prematurely. These are only a few examples of inarbitrable situations.

Consider the situation of a benefits denial grievance. Most collective agreements will include a clause or clauses that discuss employee benefit entitlements. On its face, if an employee raises a dispute regarding a denial of benefits, it may be seen as a matter arising out of the collective agreement, and would be seen as a matter that is within the jurisdiction of an arbitrator. However, that is not always the case. The Canadian case law suggests that, where a benefit plan is not included in a collective agreement, or where the collective agreement provides that the employer will only pay the premiums for the benefit plan, the matter will be inarbitrable. In those situations, any dispute about benefits would properly lay with the benefit provider or insurer, and not the employer.

The scenario above has been played out in many instances in arbitrations across Canada. In *P.S.A.C. v. A.E.U.* an employee was denied benefits by an insurance provider, and the employee brought a grievance against the employer as a result. However, the collective agreement merely stated that the employer would arrange for the plan, and would pay premiums. The insurance carrier, on the other hand, was responsible for the administration of the plan. The arbitrator determined that any dispute as to benefit entitlement must be pursued with the insurer, and not the employer, and therefore that the issue was inarbitrable.

The foregoing situation is just one example of a situation that was outside of an arbitrator's jurisdiction.

Bear in mind that arbitrators are loathe to dismissing claims because of a minor procedural defect.

<u>The Onus of Proof</u>

The concept of the onus of proof was succinctly summarized in the case of *Robins v. National Trust Co*. as follows:

> [O]nus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine

> the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

It is worth noting that the onus of proof refers to proving material facts, not law. The arbitrator has the responsibility of applying the applicable law to the proven facts, which means that no party has the onus to prove the applicable law in the situations.

The location of the onus in given cases will depend on the nature of the issue in dispute. In the vast majority of situations, the onus will rest with the grievor or grievant, following the general principle that "he or she who asserts must prove". However, in certain types of situations, the onus may rest with the party responding. For instance, the onus in unionized discharge and discipline cases in Canada lies with the employer because the employer has "special knowledge" of the reasons for the discharge or discipline and the reasons for the action.

Order of Proceedings

Typically, the party with the onus proceeds first with their case.

Some jurisdictions utilize processes involving the filing of written briefs, rather than the sometimes cumbersome process of calling witnesses to give oral testimony. Each system has its pros and cons.

The Standard of Proof

The standard of proof asks how convinced the arbitrator needs to be for a party to be successful. In criminal proceedings, the standard of proof is "beyond a reasonable doubt". This is a high threshold and is not applicable in labour arbitration.

In arbitrations, the standard of proof is on a "balance of probabilities". Proving a matter on a balance of probabilities requires that the arbitrator prefer one party's position or evidence over another. Put another way, the arbitrator must be satisfied that it is more probable than not that a party's view of an issue is correct to win on a balance of probabilities.

The Hearing Procedure

If, after all of the foregoing pre-hearing and preliminary matters have been dealt with and the dispute remains alive, it is time to commence with the hearing.

Opening Statements (Typical Case without Briefs)

To begin an arbitration hearing, parties generally provide an opening verbal statement. The opening statement is a good opportunity to succinctly describe your party's viewpoint to the arbitrator, and to "set the table" for the evidence that will follow throughout the hearing.

When presenting an opening statement, it is a best practice to provide the arbitrator with a verbal "roadmap". This will allow an arbitrator to follow your line of thinking, and allows the arbitrator to focus on the important issues during the hearing.

The opening statement is not a good time to dive into all of the specific underlying details of the case.

The opening statement is not the best time to present the law surrounding the matter. The law is best saved until the end of the hearing, when all of the relevant evidence has been elicited from witnesses, and can be easily applied to the applicable law.

Evidence (Where Witnesses testify)

At an arbitration hearing, evidence is presented to the arbitrator through the examination and cross-examination of witnesses, unless the parties or the collective agreement envisage the matter being decided by written briefs. That is not normal in Canadian education cases.

The laws of evidence can be complicated and are outside of the scope of this arbitration review. Suffice it to say that successful advocacy absolutely requires an understanding of basic rules of evidence.

When a person is first called as a witness, the party that calls the witness will proceed with an "examination in chief" where the witness will be asked questions to present the witness's knowledge as evidence, without "leading" your own witness. After that party completes their examination in chief of the witness, the opposing party then has an opportunity to test the witness's evidence and to ask their own questions through "cross-examination".

Examination in Chief

When completing an examination in chief of a witness, there is one specific rule that is of critical importance. The party who is completing an examination in chief cannot ask leading questions. A leading question is a question that suggests a desired answer. In *R v Rose*, the Ontario Court of Appeal restated the rule and the reasoning behind the rule as follows:

> 9 A leading question is one that suggests the answer. It is trite law that the party who calls a witness is generally not permitted to ask the witness leading questions. The reason for the rule arises from a concern that the witness, who in many instances favours the party who calls him or her, will readily agree to the suggestions put in the form of a question rather than give his or her own answers to the questions.

Cross-Examination

After the opposing party has completed an examination in chief of a witness, it falls upon the opposing party to conduct a cross-examination of the witness. The rules related to examination in chief versus cross-examination are different; parties cross-examining witnesses are given much more latitude in the questions they are able to ask.

There a number of purposes of cross-examination. A party may cross-examine a witness for a number of reasons, including: to try and elicit admissions or other facts that relate to the issues in dispute, to try and get the witness to concede that there is some doubt in their testimony, to use the witness's testimony to reinforce the positive aspects of your case, or to discredit the witness.

Often, a good cross-examination is one where the witness can only answer "yes" or "no" to leading questions. Meandering or lengthy questions must be avoided. Open-ended questions give the witness an open invitation to restate their view of the evidence.

If you do not know the likely answer to your question in cross-examination, be very careful.

Brief but well-prepared cross-examinations are often the most effective.

Cross-examination is an art that requires much practice before perfecting.

Re-Examination

After the cross examination has been completed, the party that called the witness in the first place may have a very narrow opportunity to re-examine the witness. Re-examination is not mandatory. Re-examination can only involve questions related to matters arising out of the witness's testimony in cross-examination that was not dealt with during evidence in chief.

Leading questions are not allowed in re-examination.

Real Evidence

While the majority of evidence in an arbitration hearing is presented through the examination of witnesses (i.e. *viva voce* or testimonial evidence), other evidence can have a significant impact on the result of the issue. "Real Evidence" refers to documents, physical objects, emails, photographs, and videos that are presented to an arbitrator to help prove an issue in dispute.

In order for real evidence to be introduced at an arbitration hearing, it must be relevant, and authentic. To be relevant, the evidence must be probative to a fundamental issue in the arbitration hearing.

Objections

Over the course of the arbitration hearing, there are some rules that parties must conform to (i.e. no leading questions in examination in chief). Advocates can become overly zealous and may forget that these rules exist, or may try to skirt or disregard the rules. In these types of situations, in is incumbent upon the opposing party to object.

Below is a small list of some of the most common objections that arise over the course of an arbitration hearing:

- Hearsay (second hand evidence introduced to prove the truth of the matter asserted therein) which may or may not be proper depending upon the jurisdiction and the relevance of the hearsay
- Leading questions in cross-examination
- Overly repetitive questions
- Privilege (inadmissible evidence because of one of the forms of "privilege")

- Relevance

When deciding whether to make an objection, the party should consider whether the objection is worth the time and effort it might take to make it. Making unnecessary objections is a quick way to alienate the arbitrator. Knowing when to object and when not to object is perfected through experience.

Argument and Closing Statements

Once all of the evidence has been entered, the parties will summarize the key parts of the evidence as part of their closing argument.

Do not advance every conceivable argument. Be responsive to questions from the arbitrator and indeed invite questions from the arbitrator during your closing argument.

During closing argument, the parties canvass the applicable law, using precedent cases from similar situations. Providing beneficial case law is of fundamental importance in convincing an arbitrator that your position is supported by the case law.

Arbitrators appreciate it when the precedent case law is "sparingly" hi-lighted. If you do that for the arbitrator, courtesy dictates you do the same for the other side.

Written Advocacy

Written, concise and persuasive advocacy is an art form that requires years and mentoring. Often advocates at the start of their career must "unlearn" writing styles developed during under-graduate and post-graduate programs. You must have a "thick skin" to accept that your written and sometimes lengthy writing needs improvement. Bear in mind Mark Twain's observation to a friend: "If I had more time, I would have written you a shorter letter."

Next Steps

After the hearing ends, an arbitrator will rarely provide a decision until sometime after the hearing. The arbitrator usually needs time to assess the evidence in their mind and issue a written decision.

Once the decision has been issued, the decision becomes binding on the parties.

In some situations, one party may be extremely unsatisfied with the outcome of the arbitration. While there is often a winner and loser, some parties may argue that the arbitrator did not proceed fairly or made a fundamental legal or jurisdictional error. In these situations, the party may apply to have the decision reviewed by the courts. This judicial review or appeal only occurs in an extremely limited amount of cases, and is a default action for a party who lost at arbitration.

Closing Comment

For those who are new to the arbitration process, bear in mind that brevity and conciseness are the key goals.

There is no such thing as a perfect case so do not stress about minor matters. After "researching" your arbitrator, you should be able to rely on the integrity and experience of arbitrators to arrive at a valid result. Successful arbitrators became that way by understanding the critical issues and rendering understandable and fair results. You just need to help them get there.

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