

BULLETIN

## Mediation and arbitration of grievances

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What is the difference between mediation and arbitration? What role does mediation play in arbitration?



Labour relations can often be an adversarial process, but parties are encouraged by the Labour Relations Code to try to resolve their differences in a more conciliatory manner.

Unlike other forms of litigation where the parties to a dispute may be strangers, in labour relations, disputes are usually between people who often have a long history together and can anticipate working together long after a disagreement. The Labour Relations Code, which empowers arbitrators to hear and decide arbitration cases, clearly and strongly encourages all parties and persons involved in arbitration to use mediation as an alternative to fighting the case in arbitration.

Mediation is a process by which parties to arbitration try to settle an issue without having to proceed with an arbitration. In mediation the arbitrator will assist the parties to try to settle the issues involved rather than hear a case, decide on a winner and a loser, and write an award. The result is usually a written agreement containing terms and conditions upon which the matter is to be settled.

Section 2 of the Labour Relations Code encourages mediation as an alternative to arbitration:

2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

...

(h) encourages the use of mediation as a dispute resolution mechanism.

The duties under the Code also state that arbitrators must encourage "cooperative participation" in resolving workplace issues.

According to section 89(h) of the Code, which sets out the powers of arbitrators, an arbitrator is given the power to "encourage settlement of the dispute and, with the agreement of the parties, the arbitration board may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement."

It is not an uncommon occurrence in labour arbitration for an arbitration to begin as a full arbitration and then turn into mediation at some point in the process.

An example of this is a hybrid called a "Med/Arb", where the parties embark upon a mediation process which results in a written arbitration award at the end.

But why is mediation encouraged by the Labour Relations Code?

The parties have to live with one another after the arbitration. If arbitration is bitter and contentious, this may negatively affect the ongoing relationship between the parties which can preclude reaching agreement in other matters.

A settlement agreement reached through mediation allows all parties to "save face" and walk away from the process with dignity and respect. An arbitration award often results in winners and losers which can lead to further bitterness and conflict between the parties.

Though arbitrators are highly trained and experienced in labour disputes, they are often strangers to the collective agreement and the history of the parties and can occasionally come up with anomalous or unexpected results which can be an unpleasant surprise to the grievor and the union. Accordingly, a further benefit to a settlement achieved through mediation is that the parties know what they are getting in a settlement as opposed to gambling on what the result might be in an arbitration

award. 

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