CHAPTER 31: NEGOTIATIONS

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A. Introduction

Negotiation is any conversation or exchange undertaken to try to resolve an issue. The objective may be to work out a process, deal with an interim matter, or bring a complaint to an end that everyone can live with.

The key point about negotiations is that participation in them is mostly voluntary. This means that any solution must be acceptable to both sides and that what the parties decide to include is up to them and is not limited by the remedies that a legal process can provide.

In particular, negotiations can result in an apology, which can be extremely meaningful to a client and will likely not be ordered by any decision-maker, since an apology made on order is not meaningful. The *Apology Act*[1] in BC provides that if an apology is made, it will not amount to an admission of liability. If an apology would be very helpful to a client, tell respondents about this Act, as it is not well known.

B. Exploring the Client's Objectives

In addition to developing an understanding of what the client says happened, work with them to understand what they are looking for both immediately and as a final resolution. This information will be key in developing a strategy to help them.

Use the following points to establish some general objectives:

- Establish what is happening with the harasser/assaulter. Are there immediate issues that need to be addressed?
- Establish if there are processes underway, and if so, what stage they are at and what results they might yield.
- Find out if the client is still at work, and if so, if they want to remain there or leave. Employees who are still at work are often engaged in a very difficult balancing act between trying to preserve their employment relationships, including with their employer, while saying that something very wrong has happened, or is happening, in their workplace. In reality, many employees will ultimately not be able to remain with an employer if they have had a serious experience of harassment or assault in the workplace.
- Determine if there is a union in the workplace and if there is a written employment agreement. This will be a collective agreement if the workplace is unionized. (See Chapter 21: Grievance and Arbitration (Unions) for more on this.)

[1] *Apology Act* [SBC 2006] c. 19. https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_06019_01

- Consider the time frame of the allegations and if there are time limit issues. This is especially important if the events are approaching, or are more than, a year old. (See Chapter 27: Advising Clients On Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, And Time Limits)

To determine more detailed objectives, ask the client what the harms, both monetary and non-monetary, have been to date. For example:

- Have the client's work and career, including current and future opportunities, been affected?
- Has the client lost earnings to date? If so, is the loss ongoing?
- What does the client's compensation package include? For example:
    - Extended health and medical benefits
    - Pension contributions, by the employer or by both the employer and the employee
    - Periodic payments or bonuses
    - Vacation pay
    - Allowances such as car allowances, expense allowances, or home office allowances
    - Employer contributions for EI and CPP?
- How long has the conduct complained of been going on?
- What has been the emotional impact of what has happened? (Ask how particular events made the client feel, as often people will not articulate that for themselves.)
- Has the client required health care or medical treatment or been prescribed medication?
- Do they have a medical diagnosis as a result of the sexual harassment/assault? Did they have prior mental health issues? (This can make establishing causation harder, but can also increase their vulnerability, increasing the harm to them.)
- Do they have other circumstances that make them particularly vulnerable? (This can make the harms greater as well.)
- If they are leaving their position, will they need further training or a letter of reference?

This can be a difficult conversation. Often clients have not really thought about all the losses they have suffered at one time, and it can be distressing to do so. Having this conversation will sometimes lead clients to look for more tangible financial remedies than they might have otherwise been inclined to seek. (See Chapter 24, Client Interview Guidelines, and Chapter 3: Trauma-informed Practice, for tips on working with clients who have experienced trauma.)

This exercise might also reveal that the person has suffered sufficient losses to justify looking for representation. It is easier to find representation if the complaint has a sound financial basis, because there may be money in the resolution to pay for legal fees.

As well as considering actual losses, which will be used to work out the legal position, think about what the client actually needs to move forward in their lives. The first is their *position*. The latter is their *interests.* While it can be confusing to think about both, it can be helpful in thinking about settlement offers to consider offers against the client's articulated needs at the present time as this helps to give money real meaning in people's lives.

Think too about broader or systemic remedies that a client may want to work for—for example, training for managers and staff, changes to employer policies, installation of safety equipment like security cameras, and creation of and training on safety protocols.

Finally, think about the client's interest in making what happened public. Foreclosing the threat of publicity can be a useful bargaining chip in a negotiation. To preserve this, no part of the complaint can be publicized. Conversely, if the complainant feels strongly that the incident should be publicized, creating negative publicity may make for a speedy settlement to limit the damage. However, publicity is highly unpredictable and this approach should be treated cautiously as it cannot be undone. Negative public comment of any kind is likely to make respondents very wary and mistrustful of the complainant and may make it difficult to negotiate release terms.

Sometimes it is useful to approach objectives in a step-wise fashion. At the outset, the client's objective may be to understand their circumstances and their options in terms of responses. Once this has happened, it may be easier to identify further objectives to guide them in choosing how to move forward.

The client's objectives will often drive the next steps in terms of process, timing, and the form of the negotiation. This conversation will also give a sense of what the client will be able to manage on their own, and what is therefore a realistic strategy if the client does not have representation.

C. Interim Negotiations

Before tackling the larger question of how to finally resolve a matter, it may be necessary, or advantageous, to enter into negotiations about interim matters—for example, interim work arrangements to separate the client from the person harassing/assaulting them, and details about any internal process that may be underway or planned.

It may be possible to negotiate improvements to an internal process where what is proposed, either in a policy or in a process designed for the client's particular complaint, will not meet the client's needs in some way. As noted in Chapter 30: Internal Workplace Processes, internal investigations may not meet the needs of, or protect the interests of, the client in numerous ways. If you understand what is proposed in terms of an internal investigative process, you may be able to request changes to the investigation so it better meets the needs of the client.

Before any communication with the employer occurs, discuss with the client who will do the communicating. Counsel might have more clout, but the client may not want it to be clear that they are getting legal advice and may prefer to use the available time in a different way.

D. Quantifying the Remedies Sought

Whatever format a negotiation over a final resolution takes, think of it in terms of the remedies the client might get if a formal complaint were pursued. Usually, the negotiation for a final resolution begins with some variant of:

- what has happened was wrong and illegal;
- it breached the client's legal rights in the following ways;
- if you do not settle, the client will take further steps to enforce their legal rights, at which time they will make the following claims; and
- at this point the client would accept the following monetary and non-monetary resolution.

Think about the downsides or risks both the client and the respondent face. For example:

- The time and expense required for a formal proceeding.
- The adverse publicity and loss of reputation for the respondent, both the individual and the company.
- The unwanted public commentary, potential embarrassment, and likely online trolling for the complainant.
- The risk of loss in a formal process for both sides.

The three main types of law that can provide compensation for sexual harassment or sexual assault are a human rights complaint, a grievance, and a lawsuit related to breach of contract, or perhaps tort. (See also Chapter 27: Advising Clients On Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, And Time Limits.)

Each law provides slightly different compensation.

1. Lost Earnings

In regard to lost earnings, both grievances and human rights complaints will provide actual lost earnings up to the time of a hearing, including all forms of earnings. Similar damages would be available for a tort claim.

By contrast, a lawsuit for breach of contract, which usually takes the form of a wrongful dismissal action, only provides earnings during a "reasonable notice period." This is a judge-determined length of time during which earnings will continue to be provided. The amount of notice payable depends on the *Bardal* factors[2] (see Chapter 20: Civil

[2] *Bardal v. Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont. HC).

Actions (Employment Law and Tort)). A rough rule of thumb is about one month per year at trial, and something less than that at settlement, except for short-term employees who often get three to six months' notice in any event in court.

Calculating monetary remedies for earning losses involves estimating what a person would have earned had the misconduct not occurred, and comparing that to what they will earn (excluding any EI or disability benefits that must be repaid). The difference is the loss. This can sometimes include future losses if, for example, a person takes a lower-paying job.

2. Mitigation

In human rights complaints and breach of contract suits where earnings might be recovered, an employee who faces lost earnings must take reasonable steps to find other employment to mitigate, or reduce, their losses. The employee bears the burden of proving that they have mitigated adequately. If a client is losing earnings, advise them to look for work and to document every step they take to do so by printing resumés, application letters, and online application forms, and keeping a log of their daily efforts to find work, including any interviews.

Union members who file grievances do not have an obligation to mitigate. Grievance arbitrators will provide full wage loss without evidence of mitigation.

3. EI and CPP

An amount should be added for the employer and employer contributions to EI and CPP at their current rates.[3] Asking for only the employer portion can leave an employee with a payable they were not expecting to have to cover.

4. Expenses

Sexual assault and harassment can create unexpected expenses—for example, paying for treatment, or expenses arising because of lost benefits, security changes, or relocating. These expenses are claimable at hearing and can be sought in a negotiation. Generally, any expense being claimed must be supported by receipts of some kind.

5. Injury to Dignity

A significant different between human rights complaints and either grievances or suits for breach of contract is the availability of damages for non-monetary harm, also called general damages. While grievance arbitrators considering grievances about human rights violations can impose human rights damages, they usually do not.

The BC *Human Rights Code* authorizes the Tribunal to award damages for injury to dignity, feelings, and self-esteem (s. 37(2)(d)(iii)). This is interpreted broadly to cover any non-monetary harm arising from discriminatory treatment. The amount that can

[3] See https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/canada-pension-plan-cpp/cpp-contribution-rates-maximums-exemptions.html

be awarded is not capped. Recently the Tribunal awarded $176,000 (*Francis v. BC Ministry of Justice* (No. 5), 2021 BCHRT 16) in injury to dignity damages, but its usual damages are roughly in the $10,000 to $25,000 range for sexual harassment cases, although they can be less.

The *Canadian Human Rights Act* authorizes the Canadian Human Rights Tribunal to compensate a complainant for pain and suffering to a maximum of $20,000 (s. 53(2)). The CHRT can also award special compensation up to an additional $20,000 if it finds that the respondent engaged in the discriminatory practice willfully or recklessly (s. 53(3)). In many instances of sexual assault or sexual harassment it would be reasonable to claim s. 53(3) damages from the harasser, but likely not from the employer unless conditions at the workplace were very poor, or the employer had notice of the conduct and did not act to prevent it effectively.

In *Behm v. 6-4-1 Holdings and others*, 2008 BCHRT 286, para. 66, the BC Human Rights Tribunal adopted a non-exhaustive list of factors from an Ontario case called *Torres v. Royalty Kitchenware Ltd.*, (1982), 3 CHRR D/858 (Ont. Bd. Inq.) as potentially relevant to assessing damages for injury to dignity in sexual harassment cases. These are generally referred to as the Torres factors:

- The nature of the harassment—that is, was it simply verbal or was it physical as well?
- The degree of aggressiveness and physical contact in the harassment.
- The ongoing nature—that is, the time period of the harassment.
- The frequency of the harassment.
- The age of the victim.
- The vulnerability of the victim.
- The psychological impact of the harassment on the victim.

In considering the application of these factors, remember that the Human Rights Tribunal includes sexual assault in its definition of sexual harassment.

It can be useful to characterize settlements as a lump-sum injury to dignity award, because they are non-taxable. If the respondents are resistant to this, characterizing funds paid as general damages, which injury to dignity is, will have the same effect, and may be more palatable.

6. Costs

Costs are an amount payable by a winning party to a losing party in a lawsuit. In court, they are assessed on the basis of a tariff where units accumulate based on the steps in the lawsuit and its complexity.

Costs of this nature are not payable in human rights complaint proceedings—except in rare circumstances with improper conduct by a party—or in relation to grievances but they are payable in breach of contact cases.

Even if costs are not strictly payable, it can be useful to include an amount for costs in a negotiated settlement if the client has legal costs, as this amount will not be taxable like income if it is offset by actual legal expenses. It can benefit both parties to make tax-advantageous arrangements in negotiating a settlement, including in this way.

7. Civil Suits

Clients claiming human rights violations are generally constrained from filing in court. The courts have said that human rights violations must be addressed by the statutory body created to hear human rights violations, which in BC is the BC Human Rights Tribunal or the Canadian Human Rights Commission. There is no civil action for discrimination under the *Code*.

An exception might arise if it can be argued that the sexual harassment or sexual assault breached fundamental terms of an employment contract, in which case a breach of contract case might be filed.

Another significant bar is the *Workers Compensation Act*, which provides that people who are injured at work cannot launch civil actions against any party for the harm.

If this constraint does not apply for some reason, a sexual assault can be the subject of a civil suit. If the *Workers Compensation Act* is not a bar, it might be necessary to consider the damages available for a civil suit, which might include aggravated and punitive damages as well as general damages. Civil suits are more difficult, expensive, and technical to pursue; carry a risk of costs against the client and the prospect of costs for the client; have stricter evidentiary rules; and require proof of lack of consent rather than proof of unwelcomeness, which in practice can be a more difficult standard to meet.

8. Claims Against Unions

A union's obligation is usually to provide proper representation. A claim against a union in a sexual assault or sexual harassment matter is usually that its representation has been so deficient that it amounts to its own form of discrimination. In such cases, the losses are usually the cost of being represented in a different proceeding (usually a Human Rights Tribunal proceeding), but they could also be other losses being claimed against the employer, if it can be argued that were it not for the poor representation, things would have gone better, and losses would have been less.

9. Non-Monetary Remedies

Explore to what extent the client may want to pursue non-monetary remedies like an apology, access to a position or opportunity they have lost, or a reference letter.

Many clients bring their complaint to ensure that no one else has the experience they had. They may therefore be interested in achieving systemic changes in a workplace—for example, employer-funded training for managers or staff, policy changes, or physical changes in the workplace. Remember that efforts to achieve these changes

may reduce the monetary benefits available to the client and agreements for these items can be difficult to monitor and enforce.

One non-monetary remedy that is theoretically available, but is rarely if ever provided, is an admission of liability or wrong-doing. While such an admission could be explored, it is unlikely to be provided, even though validation of their experience is one of the main things that the client wants.

E. Form and Timing of a Negotiation

1. Introduction

Negotiation involves contact with the other side, which will usually include one or more of the client's employer, the person involved in the harassment or assault, and perhaps the client's union.

The contact can take place directly—in person, on the telephone, or in writing—or can be part of an alternative dispute resolution process, usually a mediation. Mediations are usually done in person, but can also be done via the telephone.

Many clients do not want to deal directly with a harasser or assaulter under any circumstances. It is therefore often appropriate to deal with the employer, leaving the employer to deal with the harasser/assaulter.

Negotiations can begin with efforts to address some pressing interim or practical issue, or may be oriented towards a final resolution from the outset.

2. Demand Letters

It can be useful to begin by sending a demand letter setting out the main issues, the harms to the client, and perhaps a proposed resolution. This allows both the lawyer and client to establish for the respondents the details of the claim events, the legal wrongs, and the harms suffered in a form that the responding parties can review, and perhaps share with their lawyer, if they hire one. In terms of the tone of the letter, sometimes a more conciliatory approach can help to keep the negotiation more open.

If the negotiation is about a final resolution, consider including in the demand letter what the client would currently settle for, and what they are offering to provide to obtain that settlement. You must make the original offer against what would be claimed at hearing, otherwise the respondents are unlikely to recognize and give the client credit for any compromise proposed in their first offer.

Generally, respondents are bargaining for an end to the problem. This means they will want a release that brings all possible legal claims to a close. The client should generally indicate that they will sign a release "on reasonable terms" or provide a form of release that they are prepared to sign.

Sometimes a demand letter will result in a response, sometimes from the other party's lawyer. Once the other party has identified who is speaking for them, it can be useful to have a telephone conversation to see if immediate issues can be resolved, and to

begin exploring a final resolution. Often the response from the other side will include a request for further information, including about the client's mitigation efforts, and will suggest that the employer is investigating the claims.

In determining whether to proceed by a demand letter, consider who will write it. Generally, a letter on lawyer's letterhead is taken more seriously, but time constraints may not allow for this option. Consider too whether you and the client want the other side to reply to the client or their legal representative and who will conduct the rest of the back and forth should a negotiation get under way. Some of this back and forth is likely to take place by telephone.

If an initial contact like a demand letter is ignored, it may be necessary to initiate a formal proceeding to convince the other side that the client is not bluffing and the matter is not going to go away.

3. Without Prejudice Communications

Communications in the context of settlement of a civil suit, including a breach of contract claim, or a human rights matter are generally considered to be without prejudice, meaning they are off the record, and comments in such letters cannot be relied upon by either side. While this is likely to be enforced if correspondence is made in furtherance of a settlement, such letters or emails should be clearly marked "without prejudice" at the top of them. It can also be useful to say that a specific offer is being made on a without prejudice basis.

The Human Rights Tribunal and courts are very strict about settlement discussions being off the record and may well prevent both the writer and the recipient of a letter from relying on any part of the contents of a negotiation letter outside of the negotiation. If something in a demand letter may need to be relied upon later, send it separately in correspondence that does not deal with negotiating a resolution. Even though it is possible to redact actual settlement communications from a letter, this is not always acceptable to the extent that the rest of the letter can be relied upon.

Negotiations in the course of a grievance process, which usually involves several formal steps, may also be off the record, although practice in this respect seems to vary. Usually the parties to a collective agreement have a practice in this respect. It may be useful to inquire about this with the union.

Because of the requirement that settlement negotiations be off the record, they must be kept confidential. Talking about offers breaches the without prejudice rule and will severely damage the other side's trust. Warn the client about this before the negotiations begin.

F. Mediations

The purpose of a mediation is to create a meeting framework in order for all parties to explore the issues and consider whether they can find a resolution they can all live with. Most mediations are optional and require all the parties' ongoing consent to

continue, but some court mediations are compulsory, and the Canadian Human Rights Commission also holds compulsory mediations, albeit at later stages of the process.

The BC Human Rights Tribunal strongly encourages parties to settle and will make multiple offers to them to set up a mediation. Mediation may be a single session or multiple sessions. The Tribunal does not require parties to mediate and will not penalize parties who do not agree to mediate. Tribunal mediators say that their mediation notes are not kept on the complaint file or shared with other parts of the Tribunal.

The question of when to mediate is a significant one, especially at the Tribunal. Mediating early, in an early settlement meeting, usually involves a delay of four or five months for scheduling and means that each side knows little about the other's position. It can be tempting to wait until a response has been provided so that the respondents' positions are clearer, especially since later requests for mediation may be scheduled more quickly. However, preparing a response can solidify a respondent's opposition to the complaint and use up resources that may otherwise have been available for a settlement. Once the respondents reply, the complainant must disclose their documents, which can be a significant undertaking. After that it can be tempting to wait for the respondent's documents, but that creates a significant risk that the respondent will also make an application to dismiss. If that happens, it is very difficult to talk about settlements, because usually respondents believe at that point that their case is strong and their application will win.

Generally, any decision to mediate early depends on how time-sensitive the complaint is for the complainant, and how willing the complainant is to take further steps before settling.

At a mediation, both parties must listen respectfully to the other; they are encouraged to explain their own interests and explore the other party's interests. It is usually helpful to frame comments in terms of how each side felt or viewed things, rather than taking a more accusatory approach.

Generally, a mediation begins with the mediator doing a quick check-in with each side on their own to introduce themselves and find out if there are any major concerns, including about having a joint session. Complainants who go to mediations alone may want to flag any concerns they have about being aggressively questioned by the other side during the mediation. This will help the mediator to be proactive about this possibility.

After that, generally there is a joint session in which the complainant, or their counsel, lays out what happened and why it was bad for the complainant. The idea is that the complainant has information about what happened to them that the respondents do not have.

This part of a mediation is extremely important. The complainant's first-person account of what happened to them, and how they perceived what happened, can be critical in convincing the other side that the client's concerns are genuine and that the

complainant will be a compelling witness if the process goes ahead. Many respondents come into mediation with the cynical view that the complaint is overblown, the concerns are not real, and the complainant is engaged in some sort of shakedown of the employer. These challenges can be dispelled when the respondent hears the complainant's side of the story and may motivate the respondents to rectify the situation by settling.

If you attend mediation with a client, prepare a series of questions about the complainant's experiences, focusing on the main events and on how those events made the complainant feel, to lay out the history of the allegations. This creates a solid basis from which to discuss the legal analysis and legal claims that subsequently flow.

Sometimes, respondents have questions for the complainant. While it can be helpful for claimants to answer questions, it can also devolve into a form of cross-examination, which is not appropriate for a mediation. Sometimes this chance to question the complainant is the only reason the respondent is there. This is one of the chief risks of a complainant going to a mediation alone. You should make the complainant aware of this if they may go to a mediation unrepresented.

Complainants on their own may tell the mediator that they are concerned about being aggressively questioned; the mediator may then be prepared to be more proactive in preventing it from happening.

Generally, the respondents, or their counsel, respond with their version of events. If the respondent's counsel is present, they will generally do the talking at this point, explaining what they see as the weaknesses of the complaint. You must warn complainants that this will happen, and that while they do not need to agree with what the respondents are saying, it is useful to listen carefully to evaluate any risks associated with the respondent's position.

At this point the mediator generally separates the parties and meets with the complainant to find out what they are looking for to settle. (This may also happen in the general session.)

After this, the mediator shuttles between the parties, conveying to each side what the other is saying, and hearing each side's responses. This part of the mediation can involve a lot of waiting to hear from the other side. It may also include a meeting between only the legal representatives if counsel for both sides is present. This allows the mediator to discuss not only technical legal issues that may not be easy to explain to clients, but also discuss impediments to settlement more frankly than might be possible or practical with clients present. These meetings can be particularly useful if the information is very complex information or there is some concern about what the mediator may, or may not, be conveying to the other side. These meetings create some risk for the lawyer in that the client may lose some trust in them, as they may be seen as siding with the other side.

If the complainant feels they cannot be in the room with the other side, alert the mediator in advance, or at least address the issue in the check-in meeting before the

joint session. If the complainant prefers not to have a joint meeting, they tell their story to the mediator and set out what they are looking for, and the mediator decides what to convey to the other side.

Even if no legal representatives are going to be present at a mediation, they might be able to help with talking to the mediator in advance to lay out the complaint, any likely issues with the response, and any constraints on the complainant, including a desire not to be in the same room as some or all of the respondents. Ideally, a complainant who is very fearful of some or all of the respondents should not go to a mediation without knowing they will not have to meet face-to-face with any of those people.

However, refusing to meet with the other side carries risk. First, it can be empowering for complainants to lay out exactly what has happened to them directly to the respondents in a forum where the respondents must listen to them. This opportunity is lost if they do not meet with the other side. Second, refusing to meet face-to-face can signal to the respondents that the complainant may not be prepared to go to hearing, and therefore may settle for much less than they may achieve at hearing. Finally, not meeting face-to-face deprives the complainant of the opportunity to tell their story to the respondents and perhaps to convince them of their sincerity and the harm to them of their experiences.

The mediation may conclude with both sides agreeing on terms they can live with. The parties may write up the agreement on the spot, or one party may agree to write up the agreement later and have the other side approve it. If a party is unrepresented, they must have an opportunity to get legal advice on the actual language of a settlement. If a client is attending a mediation alone, tell them beforehand to bring any settlement language back to you for further advice, and to say at the mediation that they cannot give their final agreement until the agreement has been legally reviewed.

The settlement will certainly include some form of release. As this document protects, or mostly protects, the respondent, usually they draft or supply it. A complainant can also propose language for the release, and could bring release language to a mediation, or even supply it to the other party before the mediation.

The mediation may conclude with the parties finding that they cannot agree, in which case the file is returned to processing by the adjudicative body. Or it may conclude with one party going away to find out more information, find supporting documents, or get instructions from a lawyer, in which case, the processing of the case will pause and the mediation may resume later.

Generally, a formal mediation brief is not required at the Tribunal but may be required in some other forums.

G. Making an Offer

Consider all the elements that should be included in the offer. Perhaps make a checklist so none are lost or overlooked later in the process.

Ask the client what they want to end up with and leave room to compromise before that amount is reached; ask how much they are prepared to come down from what appears to be a reasonable outcome at hearing. This often means discussing pressing financial obligations with the client—for example, debt, future training costs, or moving costs. Looking at these issues, which are the client's interests rather than their position, can help in deciding if an offer is "enough."

Consider amounts that will be lost to tax on income and earnings, and any employment insurance (EI) or disability insurance repayments that may be required. Ensure that the gross amount of an offer will provide the net recovery the client is expecting after such payments.

A situation that can be tricky in employment law—negotiating for employees who are still working but want to leave their employment—is less tricky if there has been sexual assault or sexual harassment. If such claims are believed, they are sufficient reason to leave a workplace, and so the risk that lost wages will not be compensable if an employee leaves is much less than for other employment issues that can arise, where leaving—that is, quitting—can mean that no compensation is payable.

Lump sums from settlements will require tax withholdings at lump sum rates, which can be significant. Depending on the client's income status, some of that tax withholding may be refunded. It may be possible to split a settlement over two tax years to lessen tax payable, or confine the settlement to a tax year in which income is low. In respect of EI, the federal government will apply earnings in a settlement as though they were earned at the client's usual wage rate. Weeks in which there are thus "earnings" will trigger repayment of EI monies received. Because of this, income loss calculations should ignore EI received, as this money will be repayable by the client.

Amounts provided as general damages are not taxable as income. Consider this when deciding how to balance offers between income and general damages. It can be helpful to make a fairly high offer for general damages to leave this number high, as the overall settlement amount is lowered through compromise offers. Often employers feel uncomfortable about general damage numbers that are too high—$20,000–$25,000 tends to be about the acceptable limit—in case an audit from the CRA finds that the settlement was an unrealistic estimate of likely recovery for general damages, and therefore that more should be attributed to income and more tax should be paid. This is a very rare but not unheard-of issue.

Consider how aggressive or conciliatory to appear at the outset of a negotiation. Sometimes it can be useful to make a high offer to assure the client that money was not left on the table. On the other hand, a too high offer risks a punitively low reply, or no reply at all. Some compromise is always necessary in settlement discussions to account for the certainty a settlement represents, over the risk (and expense in time, money and effort) of a legal matter proceeding.

The objective in a negotiation is to appear co-operative but also resolute about proceeding with a complaint if a reasonable settlement cannot be reached. Sometimes this requires putting the negotiation on hold and returning to it later in a complaint process.

H. Evaluating Settlement Offers and Responding

Evaluate any settlement offer not only against what might be claimed, and achieved, at hearing but also against what the client needs to move on with their life.

Settlements always represent a compromise, often a significant one. In evaluating a settlement response, you must recognize and factor in the cost, risk, and effort to get to hearing, and the all-or-nothing outcome of hearings. In the face of the cost, risk, and uncertainty, a settlement represents certainty and closure.

It is very difficult for unrepresented clients to win at hearing. The process of most legal proceedings is so technical and time-consuming that most clients do not feel they can represent themselves adequately at hearing. If it looks likely that they will have to pay for legal representation at any point, it is nearly always more advantageous financially to settle than to go to hearing.

Often, the other side's first offer will be the biggest change in their position; later changes are usually smaller. If the complainant's first offer was very high, the response may be very low. This does not necessarily signal the end of a negotiation, or even serve as an indicator of how much they are willing to pay, but may simply be a rebuke for the original high offer.

Consider counter-offers against all parts of an original offer. It can be easy in a settlement negotiation to lose track of one or more elements if the settlement has many components. Often, as a negotiation proceeds, the demands become simpler, often one for wages and other taxable items, and one for general damages or injury to dignity.

Some employers do not like to make offers for injury to dignity because they feel it is tantamount to admitting discrimination. Calling the damages "general damages" may solve this problem.

A counter-offer should be low enough to keep the settlement discussions going, but not so low that the client appears desperate to settle, as that can seriously damage their bargaining position. It is relatively rare for the other party to walk away from a negotiation over an offer that is too high, but if they do, it creates a serious problem since the temptation then is to make a second offer without receiving a counter-offer. Generally, a reasonable counter-offer should be the price of a further discount. Making a second offer without receiving an offer back signals a significant desire to settle, which is likely to work against the complainant in the negotiations.

In negotiating it is also generally important not to backtrack on compromises already made. While backtracking can be tempting, especially for negotiations that take place over a long period, it may anger the other side and damage trust. Both parties need to

feel that they are making progress to want to continue with settlement discussions. Do not be tempted to push employers, who generally have the deeper pockets, into wanting to make an example of an employee or otherwise take a harsh approach with them. Better that the case remains only a business risk for the employer.

I. Releases

1. Introduction

Negotiating the language of a release can be problematic. Respondents often delay providing the release they want until after the monetary and other terms of a settlement have been agreed upon. Releases put forward by respondents often contain objectionable language and benefits for the respondents that the other party neither anticipated nor bargained for when money was on the table. At this point, the complainant has little bargaining power, and often little appetite to delay the settlement over language that appears abstruse and remote. While it is likely that the release will never be relied upon, the client should not assume this will not happen.

To avoid this scenario, the client could provide the release they will sign up front or stop the negotiation until the other side provides the release. Neither option is ideal. Contracts like releases are interpreted against the drafter. There is therefore some risk in providing the release. Also, it is difficult to take on the specific burdens of a release without being asked to do so, or to stop the negotiation, as the complainant is often as interested as the respondent in concluding the negotiation.

If the other party did not provide the release for discussion during a negotiation, watch for language in respondent communications that may hint at disadvantageous release terms, such as a "strong confidentiality provision."

2. Identification of Parties and Consideration

The principle purpose of a release is to provide assurance to the respondents that all the legal issues relating to the complaint have been fully concluded. Generally, releases are only signed by the complainant and only protect the respondents, but if there is any reason to believe that any of the respondents may start an action against the complainant, a mutual release may be the better option. Because only the complainant usually signs the release, it should not be the only document comprising a settlement. There should also be an agreement that fully sets out the settlement terms, or clear offer and acceptance correspondence.

The first paragraph of the release usually identifies all the entities that make up the releasor (the complainant and any person that could stand in the complainant's stead), and all the parties that make up the releasee (the respondents and all parties that could stand in their stead, usually including corporate entities and employees of those entities), and provides that there will be no further claims by the releasor against the releasees arising out of the employment relationship in any forum. The release should be limited to claims arising from the employment relationship, but this restriction is

sometimes missing. While such an omission is not ideal and should be addressed; assess any possible risks with the client to determine if revised wording is necessary.

The first paragraph also sets out the "consideration" that is being provided for the release—that is, the value the complainant is getting from the settlement.

3. No Third-Party Claims

The release usually contains a paragraph in which the releasor promises not to make claims against third parties who may claim against the releasees. Sometimes this is expressed as a promise to indemnify the releasees against all costs or claims if such an action is started. This means that if the releasor claims against someone in future who then claims against any of the releasees, the releasor will have to pay the releasees' legal costs and any orders made against the releasees. This clause is intended to prevent such third-party actions.

4. No Admission of Liability

There is generally a paragraph that specifies that the release is part of a compromise settlement and that nothing in the release amounts to an admission of liability by the releasees. This is a standard term. It is extremely rare for a settlement to contain any admission of liability by the releasees. Such admissions could be made, and might even be helpful, but they are very rarely made.

5. Confidentiality of Settlement Terms

Releases generally provide that the terms of the settlement, and even the fact of the settlement, are confidential. However, complainants must be able to say that the dispute with their employer has been resolved, since they have usually talked about it to various people before it gets settled. Confirm this point if the language suggests that they cannot say it has been settled. The confidentiality provision should contain an exception for immediate family members and financial, legal, and medical professionals, since clients often need to share the details of the settlement with members of these groups.

6. Confidentiality of Alleged Sexual Misconduct

It is not uncommon in matters involving sexual assault or sexual harassment for the respondents to want a confidentiality clause covering what is alleged to have happened. This is a *very* significant request to make of the complainant, and the complainant should give it very careful consideration before agreeing. These clauses are exceptional, and should be treated as such.

Most people who have had a traumatic experience like sexual assault or sexual harassment will find that issues arising from that experience will come up unexpectedly from time to time as they move forward with their lives. Putting a complainant in a position where speaking about what happened to them breaches, or may breach, their settlement agreement impedes this important part of living with and working through

what happened. Complainants can experience restrictions on their ability to talk about past trauma as a further trauma or abuse.

There is also a growing view that all the enforced and self-imposed secrecy around sexual misconduct is part of what makes the experience of sexual misconduct so humiliating and harmful for complainants, and a large part of what makes it possible for perpetrators to continue their behaviour. Thus, requiring the complainant to keep the events secret reinforces the larger social problem of silencing, and so further harming, complainants.

Some approaches to any discussion of this type of confidentiality requirement include, for example:

- refusing to provide this kind of confidentiality on the basis that it is harmful to the complainant or otherwise a wrongful practice in its own right;
- refusing to provide this kind of confidentiality on the basis that it is unnecessary given that under defamation law any public comment by the complainant creates a risk of a defamation claim where they will have to prove the truth of their comments about disputed events, which can be difficult to do;
- agreeing to this kind of confidentiality provided express additional settlement funds are paid to compensate for providing it;
- limiting the confidentiality to no broad public discussion, which allows for private discussion of the experience, usually with a promise that anyone told about the experience must agree to keep the information confidential as well; and
- permitting discussion about what happened so long as the respondents are not named.

The success of any of these approaches depends on the interests in play. Respondents are often most concerned about being the focus of some form of shaming campaign on social media. It is difficult for a complainant to satisfactorily promise this will not happen.

In considering confidentiality clauses, bear in mind that in defamation, which is the underlying law, “publication” is any communication to a third party, with very few and limited exceptions. That communication does not need to reach a wider part of the public.

Before agreeing to this type of confidentiality, complainants must think about whom they have already told or who may already know about the events in question—that is, how realistic is secrecy at this point—whether any of those people might want to make it look like the complainant has breached their agreement, and how strong their desire to talk about what happened, in more or less veiled terms, is likely be in the future. As people increasingly decide that secrecy has been a significant contributor to sexual misconduct and expect to be able to share their lives online, being required not to speak about an experience will become a more serious burden on complainants.

7. Indemnification

Some releases contain indemnification language of some sort, usually in relation to government taxes. The idea behind these clauses is that if any liability over issues of taxation arises in the future, that liability will be borne entirely by the complainant, including any additional charges or penalties.

Usually, the justification for these clauses is that the agreement has been structured in a tax-advantageous way from which the complainant benefits, and that the complainant should therefore take any risk associated with this. This is generally untrue. *Both* parties benefit from finding a number that both can live with; the employer pays less and the employee keeps more. Moreover, these clauses usually cover more than any advantageous tax planning.

While it is reasonable that the complainant pay tax owing by them on any settlement, it is not reasonable that large, well-resourced companies should avoid the risk of charges or penalties associated with miscalculating such taxes owing, usually including both income tax and CPP and EI contributions. Employers should take responsibility for their own calculations and risk-taking. Sometimes this language will be so broad that it includes errors made in the past by the employer's payroll department. Be firm about any parts of these requests that are unreasonable.

8. Penalties or Fixed Damages

Some releases contain a clause whose purpose is to attach a fixed consequence to complainants for breaching the release in any way—for example, a requirement that the settlement funds be repaid, or some other pre-estimate of damages. These clauses are also exceptional, and should be treated as such.

Releases are contracts. Breach of contract is covered by contract law. Obtaining damages for a breach depends on proving the breach occurred, and then proving the loss claimed. It is impossible to determine in advance the consequences to the respondents of any particular breach. A breach could be inadvertent and negligible in its effect. If possible, do not accept these clauses, which treat every breach the same, as they are simply a burden and a risk for the complainant. The complainant is having to sign a release in the first place because of a wrong done to them. They should not have to do so under dire threats if the release is somehow imperfectly observed in future.

J. Settlement Implementation

Implementation of the settlement requires co-ordination of each side's actions. Complainants must take particular care over withdrawing from any processes underway since this action often cannot be undone.

Generally, counsel will get the complainant to sign the settlement agreement (if there is an agreement separate from the offer and acceptance correspondence), release, and any formal withdrawal forms or consent dismissal orders. These documents can then

be held by counsel on their undertaking to provide/file them once the settlement proceeds have been advanced and have cleared counsel's trust account and other elements of the settlement have been completed. Alternatively, these documents can be provided to the other side on their undertaking not to file or rely upon them until advised that the settlement funds have cleared counsel's trust account, or a fixed time period has passed (usually 10 days).

Pay careful attention when negotiating a settlement implementation if payments will be made in installments, or other parts of the settlement need to be implemented over time. Both parties need to fully understand when the release and withdrawals will be provided/filed.

The principal problems that can occur with a settlement implementation are that the respondents are unable or unwilling to pay, or the complainant decides they are not satisfied with the settlement.

If the respondents decide to renege on the settlement payment or other terms, the complainant has to decide between treating the decision as a breach of contract and enforcing the settlement in court and arguing that the legal action the settlement was meant to end is underway again. The viability of the latter may depend on whether the complaint or other legal action has been formally ended. It is often appealing because what the complainant was compromising to obtain—that is, certainty—has been lost and therefore they have not received value for whatever compromises they made.

The *Human Rights Code* contains limitations to which components of a human rights settlement can be enforced in court. Section 30 limits the enforcement of settlement terms to terms the Tribunal could have ordered. Certain terms will then not be enforceable, including apologies.

If the complainant decides the settlement is inadequate, counsel may have to withdraw as there is likely then a conflict between what the complainant understands or is saying happened in the negotiation and what counsel understands happened, and has likely communicated to the other side if counsel was handling that task. This can be a very tricky and contentious situation—ideally, consult a bencher—and can happen if the complainant is not ready to give up a battle or dispute that they may have been engaged in for a long time.