Strategic pre-mediation advocacy: Maximizing client satisfaction

Andrew M. Pinto
Pinto Wray James LLP

The primary strategy in dealing with wrongful dismissal files in the early stages involves making judgment calls about which key issues will make a significant difference to a satisfactory settlement or litigation result in the case. While that may be true of any legal matter, wrongful dismissal advocacy is particularly amenable to early settlement or, failing that, adjudication based on a few choice issues. The reason is that wrongful dismissal litigation typically involves a small number of key documents (such as the employment contract, termination letter, performance evaluations or incident report) and is highly fact dependent. Many of the key facts, such as the data of the employee and employer are well known by both sides. Even in cases that depend on credibility, the issues themselves are not difficult to identify although their disposition may be uncertain.

In this article, I identify a few of the key issues in wrongful dismissal litigation that merit careful attention in the early stages of handling the file. I suggest that while substantive factual and legal issues are important, so too are the style and tone of communications between the parties, usually through counsel. Knowing that most wrongful dismissal cases settle means recognizing that the most important person that you have to convince is not the judge at the end of the case, but rather the opposite party from the very outset of communications.

The initial consultation stage

Plaintiff employee's perspective: The initial consultation with the employee client is obviously the occasion to obtain factual information and assess the merits of the wrongful dismissal case, at least in a preliminary fashion. Less obviously, it is also an occasion to assess a number of factors that are ancillary to the merits of the case but that may greatly affect the outcome. What are the client's communication skills? Are there events transpiring in the client's life that relegate the legal case to secondary status – such as a death in the family or a pressing health concern. Is the client or some other individual, possibly an influential family member, driving the case? Will the client make an effective witness? Does the client have the financial wherewithal to pursue the case for several months or possibly years? What is the client's ability to withstand criticism, whether warranted or not, since a contested case may end up adversely affecting the client's emotional well-being as the parties trade allegations? These contextual factors may determine how the case should proceed even before it has actually begun.

The checklist approach: Whether explicit or not, counsel should go through a checklist of key information about the termination issue that concern and affect the client. Important but non-obvious aspects of the checklist include the following:

- The financial viability of the employer. In recent harsh economic times, this may be more of a concern than before. Whether the employer is in financial hardship clearly casts a shadow over the wrongful dismissal negotiations and may discourage consideration of taking the case all the way to trial, at which time the employer may be bankrupt. If insolvency is a concern at this stage, ask the client about possible related employers that may be more solvent (see *Gray v. Standard Trustco (Trustee of)*, [1994] O.J. No. 3031 (QL), 8 C.C.E.L. (2d) 46 (Sup. Ct.) per Ground J.). Counter intuitively, if the entire industry is in peril (e.g. the automotive sector, pulp and paper), then it may present an opening for plaintiff counsel to argue that the employee's ability to mitigate his damages is diminished thereby warranting a greater reasonable notice period. It may also present an argument for why a lump-sum payment rather than salary continuance is appropriate

- Whether a written contract of employment or its termination provisions are enforceable. Don't *assume* enforceability as there may be an difficulties due to a past consideration problem, breach of the *Employment Standards Act* minimum notice provisions, breach of the *Employers and Employees Act* or other contractual enforcement problems. In *Dwyer v. Advanis Inc.*, 2009 CanLII 23869 (ON S.C.), the court declined to apply the relevant provision of the written employment contract because it was ambiguous

and the ambiguity was construed against the employer as drafter of the contract. A contract that provides a fixed notice period may be void from the outset if that fixed period would eventually fall short of the employee's *ESA* entitlement (see *Shore v. Ladner Downs* (1998), 160 D.L.R. (4th) 76, 107 B.C.A.C. 142 (C.A.))

- The employee's likelihood and timing of finding comparable employment. Most terminated employees, whether for cause or not, do not appreciate the significance of their duty to mitigate. Assuming that a plaintiff employee is likely to find comparable employment within a 6 month period – most employees do if engaging in a diligent search - this fact may strongly influence the client's expectations when they realize that the employer may simply opt to pay the statutory minimum and wait it out until the employee finds employment elsewhere.

- The realistic scope for a true *Wallace*-type or independent actionable wrong type of claim. Many employees wish to claim some type of pain and suffering for their loss of employment. The scope of arguing such causes of action has been significantly diminished in the last two years: (*Honda v. Keays*). Even when such damages are awarded, the quantum is relatively low, usually around 2-3 months' increase in the notice period (see, *Slepenkova v. Ivanov*, 2009 ONCA 526, 74 C.C.E.L. 163) and the

incremental legal fees and risks associated with aggressively pursuing such claims may be disproportionate.

- Whether there is a human rights aspect to the case and whether, in the circumstances, it may be advisable to plead section 46.1 of the Ontario *Human Rights Code* which allows damages for a human rights breach within the context of a civil action, such as wrongful dismissal. There must some connection between the cause of action at common law and the human rights allegation. In *Dwyer v. Advanis Inc.*, *supra*, the Court dismissed the human rights allegation since it was not satisfied that the plaintiff's heart attack had anything to do with the employer's decision to terminate his employment.

- Whether a demand or claim by the employee may elicit a counter-demand or counterclaim from the employer. Sometimes terminated employees may not be aware that the employer could seek to enforce its rights as well by seeking to recover an employee loan, training funds thrown away, or vacation paid but not earned (see *Booth v. Alliance Windsor Insurance Brokers Inc.*, [2006] O.J. No. 5694 (QL), 56 C.C.L.I. (4th) 208).

- Whether there are non-competition, non-solicitation and confidentiality provisions in place. Employees are sometimes unaware that these agreements, often signed at the commencement of employment, are still

enforceable beyond their termination. Sometimes employees assume, to their surprise and detriment, that the employer has no intention of enforcing these agreements. In practice, these agreements, particularly the non-compete variety, can be turned into opportunities to bump up the notice period via the theory that he employer cannot, on the one hand, seek to strictly enforce these provisions while at the same time effectively preventing the employee from mitigating their damages by making it more difficult to obtain employment in their accustomed line of work. Attention should also be paid as to whether these provisions are truly enforceable as the courts have frowned on such agreements if they are unreasonable or obtained without consideration: *Lyons v. Multari* (2000), 50 O.R. (3d) 526, 3 C.C.E.L. (3d) 34.

Formulating the employee client's demands

Is it better to merely advise, or directly represent the client?

Should legal counsel remain in the background or emerge at the very beginning of the case? I routinely have a discussion with my employee clients about the advantages and disadvantages of employee's legal counsel remaining in the background or directly conducting negotiations from the very beginning on their behalf. I suggest that if containing legal costs is an overarching factor, if they still have a decent relationship with their employer's representative, if they are more likely to get a sympathetic ear by approaching management without a lawyer,

then by all means, it may be better that they attempt or continue to attempt negotiations with their former employer and that I simply stay in the background and give them advice – at least in the early stages of negotiation.

I advise, however, that retaining a lawyer to negotiate directly with their former employer has significant advantages. The likelihood of their position simply being ignored is less; the company is more likely to forward the demand letter to their own legal counsel. You more quickly achieve the dynamic of having your client's version of the facts and settlement or litigation position reviewed by another lawyer who is hopefully well versed in employment law. You move more quickly to a dialogue between counsel where, even if you disagree on the merits, you at least have the same terms of reference. Other advantages of having negotiations conducted at the outset by a lawyer include the reduced likelihood of a disconnect between a client's position and the position put forward subsequently by their counsel. It is difficult to undo the damage caused by a client's naïve communication of unhelpful facts or settlement position.

Should you pick up the phone, email or write a formal demand letter? Each mode of communications has its own "culture" with its attendant set of advantages and disadvantages. A phone call is less formal and may lend itself more easily to without prejudice conversations, however, the recipient of the call will likely be reluctant to commit to discuss contentious points in a phone call. He or she may request that facts or settlement offers be repeated in writing. The

caller should probably send some advance written notice of an intended phone call in case the receiver of the call wishes to instead direct the caller to legal counsel or to advise that communications, at least initially, be conducted in writing. E-mail is a less formal mode of communication that may be well suited to routine communications; however emails lack heft and may not be appropriate for conveying important legal information between parties that hitherto do not even know each other. Finally, the formal letter, which may nevertheless be sent as an attachment via e-mail, is the standard mode of communication that carries a certain sense of gravitas befitting formal legal communications.

Who is the audience of your demand letter? The intended reader of the demand letter may not be who you think. Plaintiff counsel should be mindful that a great number of individuals both within and without the employer's organization may end up reading the demand letter. The human resources representative will likely pass it on to the former employee's line manager or supervisor, as well as in-house or external legal counsel. Members of senior management as well as the organization's owners or directors may also read the letter. Subsequently, the letter may eventually be read by mediators and pre-trial judges. Each reader will have a different vantage point and role to play in the potential resolution of the case. Each will definitely form a strong impression about the plaintiff employee's character and intentions, not to mention counsel. I've had situations where the letter I've directed to one counsel has found its way to another counsel who I consider to be a close professional colleague or friend. Had I written a letter that

was unprofessional, disorganized or scatterbrained, I would have embarrassed my client and myself.

Appreciating that the audience of a demand letter may vary, considerable thought must also be given to the tone and style of the letter. There is no single approach that is always appropriate. Counsel should reflect carefully on how much detail they wish to present about the client's version of events and settlement or litigation position. If the real audience of the letter is not the immediate human resources recipient but rather the employer's legal counsel who will likely be handling the negotiations, then the demand letter is the plaintiff employee's opportunity to present an outline of their version of events to that counsel in a way that is unlikely to be conveyed by the employer's representatives themselves.

I find that aiming for a reasonable degree of specificity conveys to the reader(s) of the demand letter that the plaintiff employee has an alternative but compelling narrative of events that they are confident in conveying and that the employer will have to contend with. Presumably this narrative will eventually be supported by documentary evidence and corroborated by witnesses but, at the demand letter stage, the objective is to convey the narrative and how the plaintiff employee's settlement or litigation position reasonably flows from that narrative. Keeping in mind that the demand letter may be the foundational document of subsequent negotiations or even the basis of an eventual mediation brief, counsel may wish

to include certain essential but non-contentious information that will be referred to over and over again such as the employee's age, length of service, position, and compensation structure in a fairly comprehensive manner. I do not hesitate, where appropriate, to indicate the basis of my detailed calculations of damages including compensation, bonus, profit-sharing, pension, benefits and other details. Assuming I have done so with reasonable accuracy, this elevates a demand letter into a resource document that will be repeatedly used by all the parties, mediator and pre-trial judge.

If the demand letter is in response to a termination for cause, depending on how comfortable and confident the plaintiff's counsel is in the plaintiff employee's version of events, the demand letter should probably rebut the just cause allegation in a head-on manner rather than dancing around whether the employer was justified in its actions. In other cases, however, where it may not really be clear what happened until well past the receipt of an affidavit of documents or oral discovery, the demand letter may need to remain deliberately vague about the underlying facts and simply reiterate that the plaintiff employee disputes the employer's version of events and that ultimately there is insufficient cause to justify summary dismissal. One of the practices I have developed, particularly in just cause cases, is to have my client provide a detailed account in writing of the underlying events. This may simply be for my internal reference purpose. The importance of a consistent narrative is emphasized to the client and reduces the likelihood of the client being able to change the narrative as the case wears on.

Or if the client does so, the change in narrative is evident. Inevitably, employer counsel will seize on discrepancies between different accounts provided by the employee as evidence of a lack of credibility and this may even be true under the umbrella of without prejudice communications since they would be admissible at mediation or in a settlement context.

The legal content of the demand letter is also a matter of judgment. If the demand letter is very legalistic referring, for instance, to case law or legal principles, it may be lost on the non-lawyer readers who may be dependent on legal counsel for interpretation. The all important intended persuasive or sympathetic effect on non-lawyer readers, which includes human resources staff and senior management, may be lost. At the same time there may be an important applicable legal principle encapsulated by a leading appellate decision that the employer may not know about. It may also not be clear that the employer will necessarily retain legal counsel and citing an appropriate legal decision may be a way of signaling to an employer that their decision around termination or compensation following termination was based on an erroneous principle. An example that comes to mind is citing the *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, [2001] S.C.J. No. 40 (QL), decision for the proposition that a sanction less serious than termination is warranted for less serious types of misconduct. That is the type of legal issues that less sophisticated employers may not necessarily be aware of.

To copy or not to copy? As employment counsel, we have often encountered self-represented individuals who have written demand letters and directed them not only to the appropriate supervisor or human resources representative, but also to other individuals inside or outside the organization such as senior management, members of the board of directors or directors of related corporations. While an attempt to "shame" an employer by copying others on the demand letter may harm rather than help a client, there may be a legitimate reason to do so where there is a strong concern that the immediate recipient of the demand letter may attempt to bury the information or keep the former employee's perspective hidden from other, more fair minded individuals in the organization. The example of an executive director who has been dismissed by a disgruntled chair of the board of directors comes to mind. By copying other members of the board on the demand letter, counsel may be ensuring that these other members come to know precisely what has taken place in the hope that greater accountability will reign. This strategy of copying others should be exercised with caution as it may signal a level of distrust with the main recipient of the letter that may set negotiations off on the wrong footing.

Does asking for the moon still make sense? The tendency by some plaintiff counsel is to greatly overreach in their demand letters in order to leave negotiating room for the inevitable compromise with the employer. It may also be that such counsel considers the demand letter a mere prelude to the equally over-the-top statement of claim that they intend to file on their client's behalf.

The most charitable way of looking at this strategy is the legitimate hope that the employer's response, while still falling short of the employee's excessive demands, will end up within striking range of what the employee may have wanted in the first place. The problem, however, is that reaching for the moon is precisely that – it is unreasonable - and will be seen as such not only by the employer's counsel but also by all the subsequent readers of the demand letter including, quite possibly, the mediator and/or pre-trial judge in the matter. The letter may backfire in the sense of inviting an equally extreme response from the employer based on the theory that a totally unreasonable demand warrants a totally unreasonable response. Even employers or their counsel who are enured to receiving outrageous demands may simply find it unproductive for the parties to trade unrealistic demands rather than focus on the real issues in dispute within a realistic settlement framework.

The employer defendant's perspective

Contrary to what the employer had hoped for, the terminated employee has decided to challenge the employer's position on termination, either with or without cause. Hopefully in both situations, but particularly with a for cause termination, the employer has carefully documented the rationale for its actions. The employer counsel's first contact with the employer is when the demand letter is received and forwarded on.

Many of the considerations about tone and content discussed above apply in a mirror-image context for employers and their counsel. Ratcheting up the case through insult and invective is unlikely to result in the employee or their counsel backing down. However, a factual account of the employer's rationale is likely to be carefully examined by the other side. Picking up the phone to have an off-the-record "what's this really about" conversation is another option. In my experience, I've also had senior employment counsel suggest, albeit rarely, that an early in-person meeting between counsel may be appropriate rather than a formal response to my demand letter. It provided the opportunity for counsel to gauge each other's negotiating style, competency, the putative merits of the case in a more efficient and interactive fashion than trading letters several weeks apart. Personal meetings may be productive where relations between counsel will remain professional and may, in fact, enhance settlement due to previous professional dealings. Personal meetings without clients may also permit counsel to frankly discuss creative solutions to settling the matter on the understanding that the client hasn't necessarily agreed to the proposal(s) or solutions that counsel identify.

When acting for employer clients in the early stages of a wrongful dismissal action, some of the key strategies involve the following:

- Emphasize the relatively disproportionate onus on the employer to justify its actions due to the inequality in bargaining power. In for cause cases,

the bar is set very high. If counsel conclude that the employer will likely be unable to justify its decision to terminate for cause, due to a weakness in documentation, witnesses, or unequal enforcement of employment policies (see *Bhasin v. Best Buy Canada Ltd.*, 2005 CanLII 45965 (ON S.C.), *Laszczewski v. Aluminart Products Ltd.*, [2007] O.J. No. 4991 (QL), 62 C.C.E.L. (3d) 305 (Sup. Ct.) per Echlin J.), then the wiser course of action may be to recommend an early and full settlement. Caselaw has now established that an employer is not necessarily going to be penalized for asserting a good-faith for cause allegation that doesn't prove to be sound: (*Mulvihill v. Ottawa (City)*, 2008 ONCA 201 (CanLII))

- The employer's narrative must align with documentary discovery. The employer will undoubtedly have more documents than the employee to produce at the documentary discovery stage. It's important to emphasize that the employer will have difficulty at mediation, pre-trial, and at trial if its narrative is inconsistent with the information in those documents. Unsophisticated employers or those that have not engaged in litigation previously may be surprised by the requirement to identify and produce not only arguably relevant documentation that is helpful to their case but also documentation that is *helpful to the other side*. Counsel should also explain and carefully examine whether "anticipation of litigation" privilege and solicitor-client privilege would apply to certain relevant documentation.

- *Is litigating the case nevertheless going to expose the employer to unanticipated risks?* Advise employer clients to focus on the wider implications of the case. Litigation is risky even in the most straightforward of cases. Witnesses don't perform on the stand as you expect. Personnel change over the lifetime of the litigation and the legal costs of full-blown litigation can easily outweigh the costs of settling with a plaintiff employee. If a win at trial may nevertheless expose a different aspect of the employer to public or regulatory scrutiny, because of the negative reputational or business consequences, then settlement must be considered even in a very strong case.

- Conversely, even if the employer's case is not strong, but *settlement* will have wider negative consequences to the employer – due to bad precedent being set or a concern about the plaintiff's breach of settlement confidentiality – then it may be that settlement is *not* an option, at least not in the early stages of the litigation. An example is a case where I represented a mid-sized employer who summarily terminated an employee for abandonment of her position following a purported unauthorized vacation. The case for my client was never very strong since the employee had long service and there was mixed evidence about whether she was authorized by management to take an extended vacation. Nevertheless, the strategy in the early going of the case was *not to settle* because the plaintiff had very publicly thumbed her nose at the

employer by her conduct. The negative precedent that would be set in regards to the employer's large workforce would far outweigh the costs of losing at trial. Ultimately, the case was settled following a pre-trial about 2 years after the litigation had begun. By that time, the notoriety of the employee had diminished and the employer's message to its workforce had been sent loud and clear about the importance of following its vacation and other policies.

Conclusion

In one way or another strategic pre-mediation advocacy on either side of the employment bar includes the following:

1. Assessing the larger landscape of the case.
2. Taking care with the tone and content of all communications, particularly the demand letter and first substantial employer response.
3. Determining the likelihood and timing of settlement. Is it a case amenable to *early* or *late* settlement, or is it necessary to go all the way to trial given the client's objectives?

Thinking through the end of the case at the beginning is a counterintuitive exercise but one that is more likely to maximize client satisfaction.

Andrew Pinto
Pinto Wray James LLP
Barristers & Solicitors
393 University Avenue
Suite 2000
Toronto, Ontario
M5G 1E6

Tel.: (416) 703-2067
Fax: (416) 593-4923
E-mail: apinto@pintowrayjames.com
Website: www.pintowrayjames.com