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Grievance Mediation

The Impact of the Process and Outcomes on the Interests of the Parties

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Executive Summary

The revival of grievance mediation can be traced to an experiment in mediating workplace disputes in the coal industry of the United States in 1980, which resulted in a very high success rate of 80 to 90 percent. The decades that followed, researchers comparing the effectiveness of grievance mediation and arbitration concluded that grievance mediation is a faster process with lower costs that can produce a 'win-win' outcome and a positive long-term impact on the relationship between the parties. However, except in a very general way, the research has tended not to explore the long-term impact of the process and the outcomes of mediation. Using a hypothetical case of a discharge grievance, this study attempts to fill that gap by taking the grievance through both mediation and arbitration, and contrasting the impact of the two mechanisms on the interests of the parties.

- Mediation allows the parties to develop creative solutions to both the immediate crisis and its underlying causes in a way that best addresses the interests of both parties.
- The process of mediation does much less damage to the parties' feelings for each other, and thus to their long-term relationship, than does the arbitration process.
- Although mediation is intended to replace arbitration, the mediator should in fact be an experienced arbitrator with good mediation skills. The mediator will then be able to advise the parties on the strength of their positions and the likely outcome of the dispute at arbitration, which will encourage them to compromise, in order to avoid the 'win-lose' outcome typical of arbitration.
- By focusing on the parties' interests and allowing each side to tell its story in an informal setting, mediation promotes greater understanding in the workplace and fosters an atmosphere conducive to joint problem solving in other areas, since the two sides can identify the underlying problems, rather than just the symptoms.
- While mediation works well with some types of grievances—disciplinary grievances, for example—it is less appropriate for others—grievances related to seniority, for example.

Contents

Introduction / 1

Grievance Arbitration / 1

Grievance Mediation / 2

Bargaining and Negotiation / 4

The Case of Benchmark Insurance:
Mediation or Arbitration? / 7

Conclusions / 12

Appendix 1: Benchmark Insurance
Incorporated / 13

Appendix 2: The Electronic Mail
Policy at Benchmark / 16

Appendix 3: A Supervisor's
Electronic Mail / 17

References / 17

About the Author

Mitchell S. Birken graduated from Queen's University in 1999 with a master's degree in Industrial Relations. He obtained a Bachelor of Arts degree from McGill University with a major in political science and a minor in Economics. He currently lives in Toronto, Ontario working at North York General Hospital in their Human Resources/Labour Relations Department.

Arbitrators tend not to apply the same degree of scrutiny to management decisions relating to seniority as they do to disciplinary decisions. Since arbitrators are reluctant to interfere with management's ability to set qualifications for jobs, the employer may have little incentive to offer concessions.

- **In the case of the disciplinary grievance under scrutiny, the author finds that mediation would serve most of the interests of both parties far more effectively than arbitration. The financial and career interests of the employee who was disciplined would continue to be met. The supervisor who disciplined him would avoid having her professional competence questioned in an arbitration hearing, and the parties would develop a settlement that would promote open communication of their underlying interests and help redevelop a positive professional relationship for the long term.**

Introduction

Over the past two decades researchers have been examining the effectiveness of grievance mediation in resolving workplace disputes. Compared to arbitration, grievance mediation offers a quicker, less formal process with lower costs that may result in a 'win-win' outcome with a positive long-term impact on the relationship between the parties. The relatively high success rate of mediation makes it a worthwhile step in the grievance procedure before moving to arbitration.

While the research has focused primarily on the effectiveness that mediation has in reaching settlements, it has tended to ignore questions concerning the processes and outcomes of mediation. Using the example of Benchmark Insurance Incorporated,¹ this study attempts to fill that gap by examining the impact of both the *processes* and the *outcomes* of grievance mediation on the interests of the parties and by contrasting the results with those of arbitration. Therefore, this study focuses more closely on tactical questions. As will be seen, the optimal outcome of mediation is a negotiated settlement that meets the interests of both parties: the parties to a dispute want to address many interests during the process of resolving the conflict. While mediation can meet this goal and produce mutual gains for the disputants, arbitration, which tends to produce winners and losers, cannot.

Grievance Arbitration

The overall function of grievance arbitration is to resolve workplace disputes through a process that is fair to all parties. And while the decision rendered by the arbitrator will not prove favourable to both parties, arbitration can bring about a conclusion to the immediate dispute. However, binding decisions made by a third party do not always provide the best means of resolving disputes. The parties often find it unsettling to allow even a qualified decision-maker to decide a matter that has a direct impact on the working relationship. For this reason, arbitration is the final step in the grievance procedure, to be used once all other attempts at resolving the dispute have been exhausted.

Disadvantages of Arbitration

Arbitration has serious disadvantages related to the formal nature of the process: its cost, the time involved, and the long-term effect on the relationship between the parties.

Cost

With the average arbitrator's bill in excess of \$1,500 per case, each party could spend more than \$5,000 to arbitrate a standard dispute when attorney and stenographer fees are included (Goldberg 1989, 10), and many additional hidden costs would be borne by both management and the union while investigating the grievance and preparing positions and witnesses (Elliott and Goss 1994, 9)

Time

Because grievances arise out of an alleged violation of the collective agreement, it is often necessary to seek an immediate resolution. For example, if the union alleges that a dis-

¹ The example of Benchmark Insurance Incorporated is included with the permission of Professors Richard Jackson and Deborah Leighton, Queen's University.

*Binding decisions made by a third party do not always provide the **best** means of resolving disputes.*

charge of an employee was unjust, the union and the employee want the matter resolved as quickly as possible. But according to one estimate, the entire arbitration process from request to arbitration to receipt of an award, takes between six and nine months (Goldberg 1989,10). Another estimate based on research in Alberta, is that arbitration averages eleven and a half months (Elliott and Goss 1994, 10).

Formality

Because the procedures and rules of evidence associated with arbitration resemble those of a courtroom, they prevent grievors from simply telling their own stories (Silberman 1989, 45). Further, many workers are not accustomed to answering only direct questions, and they are uncomfortable with the pressure of cross-examination (Goldberg and Brett 1983, 24).

The Long-Term Relationship

Because the arbitration process produces 'win-lose' outcomes, it can easily damage the long-term labour-management relationship (Goldberg 1989, 10). During the proceedings over-zealous attorneys may stir up bad feelings (Elliott and Goss 1994, 13), and when one party wins at the expense of the other, dissatisfaction and hostility may subsequently prevail. The advantages of resolving the dispute must therefore be carefully weighed against the potential damage to the working relationship.

Expedited Arbitration

Since expedited arbitration is both faster and less expensive, it avoids problems that arise from conventional arbitration. (Goldberg 1989, 10). Proceedings are informal and rules of evidence do not apply; post-hearing briefs cannot be filed, and a stenographic transcript is not produced. Further, the arbitrator must give a decision either immediately or within a short period, and the decision is without precedential effect (Goldberg and Brett 1983, 23).

Nevertheless, this approach continues to produce a 'win-lose' outcome. Furthermore, since the arbitrator's decision is binding, the parties tend to be cautious about accepting a hasty decision. Thus expedited arbitration has tended to be limited to grievances that are of little significance (Goldberg and Brett 1983, 23).

Grievance Mediation

Grievance mediation is one way of avoiding disadvantages that arise from arbitration (Bowers 1980, 132). The role of the mediator is to help facilitate a negotiated settlement between the parties, not to make a binding decision. A skilled and impartial mediator can help them achieve a 'win-win' outcome.

The mediator discourages the parties from focusing exclusively on their respective positions and attempts to have them concentrate instead on interests. As well, mediators help reach a negotiated settlement that is based on their shared interests and that results in mutual gains.

Although mediation is intended to enable the parties to avoid arbitration, the mediator should in fact be an experienced arbitrator with mediation skills. The mediator will then be able to advise the parties about the likely outcomes of the dispute if it did go to arbitration (Goldberg 1989, 11). This opinion will then further the process of negotiation.

If the attempt at mediation fails, the parties can submit to arbitration in front of a different arbitrator, in which case, anything discussed during mediation is privileged. The parties will be comfortable with making concessions in mediation, if they know those concessions will not damage their case if mediation fails.

The role of the mediator is to help facilitate a negotiated settlement between the parties.

Advantages of Mediation

High Success Rate

The revival of grievance mediation can be traced to Goldberg and Brett's experiment in mediating workplace disputes in the coal industry in the United States in 1980. Of the 37 grievances submitted to mediation, 32 were resolved, a success rate of 86 percent (1983, 23). The Washington public schools were intrigued by these results and began to experiment with what appeared to be a faster and less expensive procedure. Between 1985 and 1988, 32 Washington public school grievances proceeded to mediation before arbitration and 30 of them were settled (Skratek 1990, 270). Similarly, research in Alberta based on a representative sample of 30 different trade unions and a cross-section of both minor and major employers, has revealed that between 1982 and February 1994 there were 498 grievance mediations, of which 85 percent were settled in mediation (Elliott and Goss 1994, 51).

Although it is claimed that parties often omit mediation for grievances which they believe are not appropriate for a negotiated settlement, thus biasing the results (Feuille 1992, 134), success rates are nevertheless clearly high enough to establish the value of mediation.

Lower Cost

Mediation is much less expensive than arbitration. Goldberg and Brett found that mediators charged an average of \$295 for each mediation, while arbitrators charged an average of \$1,034 for each arbitration (1990, 253). Costs are further reduced because lawyers and stenographers do not typically participate in the process.

Quicker Resolutions

According to one study, it takes on average about fifteen days to move from the request for mediation to the mediation conference where parties attempt to resolve the dispute (Goldberg 1989, 12), which is substantially less than the six to nine months that elapses from the request for arbitration to the receipt of the award. Further, while an arbitration hearing may last several days, grievances may be resolved in less than a day through mediation (Bowers, Seeber, and Stallworth 1982, 463).

Informal Proceedings

Participants generally appreciate the informality of grievance mediation. Goldberg and Brett found that 91 percent of mediation participants are satisfied with the degree of formality of the process compared to 71 percent of arbitration participants (1990, 251). Their study was quite representative and included grievors, district union representatives, local union representatives, company labour relations representatives, and local company operating personnel.

As mentioned, while in arbitration the rules of evidence and procedure limit grievors' ability to fully explain their view of the dispute, mediation helps to overcome this problem. Thus Goldberg and Brett found that 76 percent of mediation participants are satisfied with their ability to discuss all the important facts, as opposed to 63 percent of arbitration participants (1990, 251).

Benefiting the Long-Term Relationship

Perhaps the greatest advantage of grievance mediation is that it can achieve 'win-win' solutions that benefit the long-term relationship between the parties. Focusing on interests allows the parties to understand each other and promotes joint problem solving, since

Participants generally appreciate the informality of grievance mediation.

the two sides can identify underlying problems, rather than just their symptoms (Elliott and Goss 1994, 19). Formal attempts at achieving mutually acceptable settlements of grievances at mediation can then be an effective model for other forms of negotiation between the parties.

Bargaining and Negotiation

The next section uses a detailed case study to explore the advantages of grievance mediation, particularly in contrast to arbitration. To do so, it will be necessary to develop the tools for analyzing various types of bargaining and negotiations, which is the purpose of the first part of this section. Since the nature of the grievance and the issue in conflict help to determine the appropriate strategy, the second part this section analyzes in general terms the negotiation strategies that are appropriate for various types of grievances.

Distributive Bargaining

Distributive bargaining, which is used to resolve pure conflicts of interest, is the process of dividing limited resources among participants (Walton and McKersie 1991, 11). For our purposes, distributive bargaining is synonymous with positional bargaining: the parties make demands on a fixed sum of resources (that is, put out 'positions') in order to achieve the greatest possible value for themselves, at the expense of the other party.

Success comes from closely guarding information and intentions, developing one's relative power and convincing the other party of it, modifying the other party's expectations, and committing to a final position (Walton, Cutcher-Gershenfeld, and McKersie 1994, 44). Because it is believed that revealing intentions and expectations will result in a weaker bargaining position, the objectives are to mislead the opponent of one's needs and to make the opposing side believe the settlement is much closer to their own preferred settlement than their original proposal.

Shaping the Opponent's Perceptions

Shaping the opponent's perceptions of your needs can be accomplished in several ways:

- 1 By maintaining a low rate of interaction in the initial stages of the negotiation process and allowing the opponent to control the discussion, thereby limiting the flow of information.
- 2 By appearing uninformed about key issues, which enables one side to maintain a secretive position regarding its real needs.
- 3 By submitting several proposals in order to conceal the relative importance of the demands contained in the various offers. (Walton and McKersie 1991, 67, 69)

However, this strategy has several disadvantages. The parties who use it may lack credibility. If both parties use it, the increased volume of misinformation will lead to uncertainty and miscalculation, thereby hindering progress in the negotiations (Walton and McKersie 1991, 72). Finally, deliberate misrepresentation and other forms of dishonesty can severely damage the long-term relationship between the parties (Walton and McKersie 1991, 72). The same is true of attempts to use misinformation to shape the other side's perceptions of its own needs.

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Commitment Tactics

Since the parties aim to capture the greatest proportion of benefits in positional bargaining, they must choose when to appear flexible and when to remain firmly entrenched in a position. Remaining flexible—undertaking a minimal commitment strategy—can communicate a willingness to exchange concessions in order to reach a settlement. This tactic also enables a party to test the feasibility of various positions and choose the position that could yield the greatest benefit (Walton and McKersie 1991, 85). Since distributive bargaining is accompanied by misinformation about true intentions, testing the feasibility of different positions can help reveal the other party's hidden interests and help to determine the optimal position.

A maximal commitment tactic involves an attempt to convince the other side of the strength of your position and to propose that it should accept your settlement point or suffer the consequences of not reaching an agreement. While a party may indicate a determination to remain firm in choosing the position that will produce the greatest benefit for the individual party, subsequently abandoning that position becomes difficult, due to the embarrassment of retraction. Therefore, the optimal strategy is to lead the opponent to believe that a position is firmly entrenched, but also to create an avenue of retreat by subsequently indicating that an inflexible commitment was never intended (Walton and McKersie 1991, 84, 85).

Integrative Bargaining

In contrast to distributive bargaining, integrative bargaining looks for common or complementary interests between the parties, in order to achieve a 'win-win' outcome by creating opportunities for mutual gains. The solution may give both parties an absolute gain, without any loss, or other possible solutions may offer various sacrifices and benefits, and the parties must determine and implement the solution with the best combination of both (Walton and McKersie 1991, 128, 129).

In order to achieve an integrative solution, the parties must exchange accurate information, explore their underlying interests, and use structured problem-solving techniques (Walton, Cutcher-Gershenfeld, and McKersie 1994, 45). Full disclosure of information is necessary so that problems can be identified and defined (Walton and McKersie 1991, 137).

A second step is to create an exhaustive list of potential solutions and thus a wide range of options from which the best will ultimately be chosen. The third step involves ordering proposed solutions based on the preferences of the parties. Cooperation among the parties in creating possible options, in order to effectively resolve the problem, is a significant driving force for this method of negotiation.

Principled Negotiation

Principled negotiation focuses on basic interests, searching for mutual gains and using fair standard in situations where interests conflict (Fisher, Ury, and Patton 1991, 14). The fundamental premise is that people must be separated from the problem. While, as mentioned, maintaining a positive long-term relationship with the other party is often an important consideration in the negotiation process, the issues in question and the relationship between the parties must be addressed independently.

Focusing on Interests, not Positions

Focusing on the interests of the parties, rather than on their respective positions is the first of three steps in principled negotiation. One of the chief objectives is to avoid positional bargaining (taking an extreme position and then making concessions), which wastes time and threatens the long-term relationship between the parties. Instead, the goal is to

Integrative bargaining looks for common or complementary interests between the parties, in order to achieve a 'win-win' outcome.

attempt to reconcile interest: because there are often several 'positions' that can satisfy a given interest (Fisher, Ury, and Patton 1991, 42), it may be possible to reach a solution that is beneficial to both parties.

The other party's underlying interests may be uncovered through active listening, restatement, and paraphrasing of viewpoints. The negotiator thereby displays a genuine commitment to exploring the other party's concerns, and the process can help reframe the problem. Alternatively, a party may present a series of settlement options or proposals in order to gauge the other side's satisfaction with various options and better understand their needs (Moore 1986, 192).

Using Objective Criteria

It is important to recognize that at times the interests of parties will conflict, creating a distributive issue. When such situations arise, impartial criteria can provide a fair method of resolving the impasse.

The initial step is to agree on the objective criteria to be used, which might be industry standards, market values, the decision of a neutral party, or any other measure that the parties consider to be fair. Such criteria reduce the likelihood that feelings of contempt or resentment will surface as a result of what one party regards as an unfair settlement.

Determining the Appropriate Negotiation Strategy

As mentioned at the beginning of this section, the nature of the grievance and of the issue in conflict will help determine the appropriate negotiation strategy. Three distinct types of grievances can be filed when one party believes the collective agreement has been violated.

The Employee Grievance: Discipline and Discharge

Management may impose disciplinary action on an employee to correct undesirable behaviour. Although the Ontario *Labour Relations Act* has been amended to remove the requirement that the employer can discipline or discharge an employee only for just and reasonable cause, most collective agreements still have this provision. If the case goes to arbitration, the employer bears the onus of proving, that on a balance of probabilities, there was just cause and that the form of discipline was appropriate. The employee would respond that the employer lacked just cause and/or that the severity of discipline was inappropriate.

However, arbitration may not be the best approach. While, as mentioned, arbitration promotes an adversarial relationship and forces the parties into what amounts to positional bargaining, employee grievances often arise out of situations that have integrative potential. In those situations, grievance mediation provides parties with an opportunity to reach a negotiated settlement that is mutually satisfactory and avoids what is likely to be a 'win-lose' solution imposed by a third party in arbitration. The settlement may substitute a lesser penalty than the employer sought, perhaps with the inclusion of attached conditions.

The role of the mediator is crucial in privately informing the parties of the strength of the respective positions and outlining the likely outcomes of the dispute in arbitration. Precisely for this reason, it is necessary, as mentioned, for the mediator to have had experience as an arbitrator—or at least to be well-versed in arbitral jurisprudence.

The Employee Grievance: Seniority

Although disciplinary grievances have great integrative potential, seniority-related grievances tend to involve distributive issues with less room for compromise. Mediation can

*The role of the mediator is **crucial** in privately informing the parties of the strength of the respective positions and outlining the likely outcomes of the dispute in arbitration.*

create an environment of open dialogue between the parties, helping them to understand why the particular employee did not receive the promotion or transfer. Creative solutions to seniority-based grievances can be developed by, for example, providing the grievor with the inside track on the next suitable opening or providing the grievor with further training. However, the employer may have little incentive to offer concessions, since arbitrators tend not to apply the same degree of scrutiny to management decisions in this area as they do with discipline. Unless the grievor can establish that the employer acted in bad faith, arbitrators have been reluctant to interfere with management's ability to set qualifications for jobs (Arthurs et al. 1993, 342)

The Policy Grievance

Whereas an individual grievance relates to a single employee, a policy grievance has implications for many employees (Palmer and Palmer 1991, 180). Disputes arising out of company rules that dictate employee appearance or prohibit smoking are examples of policy grievances.

Negotiation of policy grievances tends to be positional, since management seeks to protect its right to manage the business and its workforce. Furthermore, if the grievance raises issues of interpretation with potential future ramifications, the parties tend to view the issue as distributive and are less eager to make concessions. To achieve a negotiated settlement of a policy grievance, the mediator must therefore uncover the underlying interests of the parties and ascertain their priorities. It may then be possible to develop a creative solution that is beneficial to both parties. Again, reminding the parties of the disadvantages of the arbitration process can encourage them to seek innovative solutions and reach a negotiated settlement.

Reminding the parties of the disadvantages of the arbitration process can encourage them to seek innovative solutions and reach a negotiated settlement.

The Case of Benchmark Insurance: Mediation or Arbitration?

The preceding sections have outlined the processes of grievance arbitration and mediation and have discussed the negotiation strategies that are appropriate to specific types of grievances. This section applies these concepts to Benchmark Insurance Incorporated, a hypothetical case developed by two faculty members at Queen's University, Rick Jackson from the School of Business and Deborah Leighton from the School of Industrial Relations, both of whom are mediators and arbitrators.

Burns vs. McSwain

Briefly, while Ron Burns, an employee of Benchmark Insurance, was on vacation, his supervisor, Diane McSwain, found it necessary to access his e-mail database in order to retrieve an important correspondence from a client. While legitimately looking for a file in Burns' database, McSwain noticed several messages to Bob Mason, a former employee of Benchmark who had moved to a competitor firm. McSwain found that one message was contemptuous of management and personally insulting to her, and that it contained confidential company information. Following Burns' return from vacation, an investigation took place that resulted in his termination, for three specific reasons: misuse of company e-mail, insubordination and contempt of management, and the violation of the duty to maintain confidentiality with respect to company matters. Burns subsequently grieved the employer's decision (for full details of the case, see appendix 1).

This section uses the Benchmark case to explore more closely the advantages of grievance mediation, particularly in contrast to arbitration.

While Burns and McSwain are the principal participants in this grievance, the interests of the company and the union are also involved in the dispute (table 1). Conclusions about the probable impact of arbitration and mediation on the parties and their relationships must be drawn with those interests in mind. Although all four participants would have liked to avoid arbitration, some of them had a stronger desire to do so, based largely on the likely outcome at arbitration.

Table 1
The Parties' Interests

Ron Burns	Diane McSwain	Benchmark Insurance	The Union (CUACE)
<ul style="list-style-type: none"> • Being reinstated to former position • Restoring personal financial security • Maintaining seniority • Re-establishing of positive professional relationships • Regaining trust of management • Avoiding arbitration 	<ul style="list-style-type: none"> • Having the respect of colleagues and subordinates • Maintaining positive professional relationships • Being able to trust subordinates • Being viewed as an effective leader/supervisor • Keeping the incident quiet • Having the support of management in this situation • Avoiding arbitration 	<ul style="list-style-type: none"> • Employing workers who respect and obey supervisors • Employing workers who can be trusted with confidential information • Having a clear policy regarding the use of e-mail • Avoiding arbitration 	<ul style="list-style-type: none"> • Ensuring that workers are treated fairly • Protecting the personal privacy of workers • Having a clear policy regarding the use of e-mail • Avoiding arbitration

What Would Happen in Arbitration?

Since this is a discharge grievance, the employer bears the onus of proving that there was just cause for discipline and that discharge was the appropriate remedy.

The Preliminary Objection

Counsel for the union would probably make a preliminary objection that the e-mail message written by Burns not be allowed into evidence because it was obtained in a way that completely disregarded the personal privacy of the grievor. While accessing the grievor's e-mail to search for a specific message from a client could be considered a legitimate business reason, the fact that McSwain continued to look through Burns' messages once the specific document she sought was found clearly indicated an invasion of privacy.

Counsel for the employer would respond that the grievor should have had no expectation of privacy, since both the computer and the electronic mail program were owned by the company. Further, since there was a clear policy that e-mail could be used only for business purposes, no private matters should have been in the computer database.

Counsel for the employer would also likely submit that McSwain had legitimate business reasons for reading the e-mail message in question, since she was legitimately concerned about a potential breach of confidential information when she saw many messages written to Mason, a known employee of a competitor company.

The arbitrator would likely rule that the evidence was admissible because the grievor did not have a legitimate claim to privacy on company-owned hardware and software and further, that it could be concluded that McSwain was properly concerned with messages to a competitor. Presenting the evidence and the arguments on this preliminary objection could last an entire day, which would add to the time and cost of the arbitration process.

Opening Statements

Since this is a discharge case, the employer would bear the onus of proof and proceed first with opening statements. Counsel for the employer would likely argue that there was just cause for imposing discipline and that discharge was appropriate: Burns had misused the company e-mail, had exhibited insubordination and showed contempt for management, and had failed to maintain confidentiality with regard to company information. The employment relationship between Burns and Benchmark Insurance had been irreparably damaged.

Counsel for the union would reply that the company did not have just cause for imposing discipline and that even if just cause had existed, discharge was too harsh a penalty. Counsel would state that the company did not have a clearly communicated e-mail policy, and that the grievor was not insubordinate, since he believed that his comments about management were in a secure form of private communication, and he was relieving work stresses to a friend. Further, there was no intent to breach the confidentiality of company information: the comments in the e-mail about a new product that Benchmark was planning were made within the context of a conversation with a friend. Counsel for the union would request that the termination of Burns be overturned and that he receive salary for his time since termination.

Presenting the Evidence

Since the employer bears the burden of proof in this case, counsel for the employer would proceed first in presenting its evidence.

The examination-in-chief of Diane McSwain would likely be designed to portray her as a conscientious supervisor. Testimony would likely be sought regarding a clear company e-mail policy and the manner in which the policy was communicated to employees. The questioning would be designed to allow McSwain to point out the breach of confidentiality as well as the insubordination and contempt for management, in order for her to state that the employment relationship had been irreparably damaged.

The questioning of McSwain in cross-examination, on the other hand, would attempt to portray her as an insecure person, and possibly an incompetent manager, who abused her powers as a supervisor to invade the privacy of her subordinates.

She might be depicted as vindictive in imposing the most severe form of discipline on Burns, to avenge the personal comments made about her. Counsel would also likely question McSwain about the apparent absence of any mention in statements of company e-mail policy of disciplinary action for violation of that policy. As well, counsel would introduce into evidence a personal e-mail message sent by Mark Edwards, a Benchmark supervisor (see appendix 3), and question McSwain about the inconsistency in the enforcement of this policy, thereby showing that the disciplinary action was an excessive personal response to Burns' e-mail, rather than sound business practice.

*In discharge cases, the employer bears the **ONUS** of proof.*

The examination-in-chief of Ron Burns would aim to highlight his lengthy career with the company and the absence of any prior disciplinary action. It would be designed to show that the grievor had no willful intent to disclose confidential information and that he was simply 'venting' his problems with his supervisor to a friend and not acting in an insubordinate fashion. Cross-examination, on the other hand, would attempt to depict Burns as untrustworthy, disloyal to the company, and bitter over the promotion of McSwain to the position of his supervisor.

Employer's Arguments

Based on the evidence presented, counsel for the employer would argue that there was just cause for discharging Burns because of violation of a clear company policy concerning e-mail, his insubordination and contempt for management, and his violation of the duty to maintain confidentiality with respect to company matters. The message sent by Edwards (appendix 3) was in fact related to company business and was intended to enhance the social interactions of employees, to improve morale.

Counsel would add that Burns' clear contempt for management threatened the productivity and efficiency of the department and undermined the supervisor's authority in the eyes of other employees. Because of what was said in the message, re-establishing a viable working relationship would be impossible. Moreover, by divulging critical information about the launch date of a new product to a member of a competitor firm, Burns had clearly violated his duty to maintain confidentiality; his actions could result in a substantial loss of profits for the company.

Union's Arguments

Counsel for the union would likely begin by arguing that breach of the e-mail policy could not be used as a basis for discharge, since the rule was not consistently enforced from the time of its introduction and since employees were not informed that discharge would result from a violation. Further, counsel would argue that in conventional practice employees used e-mail exactly like the telephone, with an expectation of privacy.

The union would argue further that the contents of the e-mail failed to meet the definition of insubordination, since there was no evidence whatsoever that the grievor had refused to obey the orders of his supervisor. The grievor's expectation of privacy made this situation not unlike an employee blowing off steam about work-related problems to a spouse.

As for the alleged violation of confidentiality, Mason was completely aware of the development of the new product, which was discussed while he was still employed at Benchmark, and there was clearly no intent by Burns to provide information to a competitor; rather, he was telling a friend about the sources of problems at work and his stresses about potentially being asked not to take his full allotted vacation.

Counsel for the union would therefore request that the termination be overturned. Further, counsel would likely submit that if the arbitrator did believe the company had just cause, the punishment should be reduced from discharge to a short suspension.

Probable Outcomes at Arbitration

Given the onus of proof, the standard of proof, and the arbitral tests, the probable result of this grievance, pursuant to arbitration, would be a reduction of disciplinary action to a two-to-five day suspension. Because the contemptuous remarks about McSwain were made in a setting that was believed to be private and were not publicly stated in an attempt to usurp her authority, the arbitrator would view them as less objectionable. As well, the context of the divulgence of confidential company information would seem to

Given the onus of proof, the standard of proof, and the arbitral tests, the probable result of this grievance would be a reduction of disciplinary action.

indicate that Burns did not intend to be disloyal. Nevertheless, a violation of that confidentiality did occur that warranted some disciplinary action.

Impact of the Outcome on the Parties' Interests

Many of Burns' interests would have been met with this arbitration decision: he would be reinstated with the ability to maintain his financial security and to regain the trust of management.

On the other hand, the decision would cast McSwain as 'the loser.' Colleagues and subordinates would see her actions as an abuse of power and the termination of Burns as a result of a personal vengeance. They would question her ability to act as an effective supervisor.

Further, one of McSwain's main interests would be to be able to trust her subordinates, but the arbitrator's decision would not address this issue. Burns could simply return to work, and McSwain would have to work with a subordinate she did not trust and did not like. Because McSwain would know how Burns felt about her abilities, there would now be a potential source of future conflict.

The Impact of the Process on Parties' Interests

The arbitration process could easily damage the interests of all the parties. Aside from the time involved in the whole process (probably eleven and a half months) and the costs (probably \$5,000), from the perspectives of both the company and the union, pursuing this employee grievance to arbitration would have serious disadvantages because it would fail to address one of the key underlying issues of this case: the inherent problem surrounding the application and the interpretation of the company's policy regarding the proper use of electronic mail.

What Would Happen in Mediation?

The mediation process would foster an open dialogue aimed at reaching a settlement that was acceptable to all parties, and the mediator would take an active role, with the ultimate objective of settling and healing, rather than adjudicating.

The Mediation Process

It would be useful to begin the mediation by allowing both Burns and McSwain to explain freely how the events affected them personally. The mediator should disallow interjections that could push the parties into firm positions or further escalate the conflict. It would probably be appropriate to adjourn to private caucus sessions, in order to allow the mediator to work around the parties' distrust and dislike of each other. While in private caucus sessions, the mediator would try to discover the interests of the parties that could help in developing a creative resolution to the dispute: McSwain's desire to be viewed as an effective leader and Burns' keen interest in regaining the trust of the company and being a productive and loyal employee.

Through private caucusing the mediator could also confront the parties with an appraisal of the relative strengths of their positions in arbitration. McSwain would be advised that it would likely be difficult to prove that the e-mail policy was consistently enforced, that Burns had the intent to show contempt for management, and that he intentionally breached the confidentiality of the company. Indicating that the arbitrator would most likely reduce the form of disciplinary action could encourage McSwain to make some concessions. Similarly, even though arbitration might favour a reduction of the disciplinary action, the mediator would indicate to Burns that it could still be severe. Burns could also be told

The mediation process would foster an open dialogue and the mediator would take an active role, with the ultimate objective of settling and healing.

that a 'win-lose' outcome would make his job very difficult and that he would be under severe scrutiny. Since Burns would want to restore his financial security, the mediator could push him towards making a compromise, such as accepting a less severe, while still burdensome, penalty, which could immediately alleviate those financial pressures.

A key ingredient of an effective settlement might be for Burns to sincerely apologize to McSwain for his insulting remarks. The mediator would then try to convince McSwain that the apology was sincere and that Burns' comments in the e-mail were without malicious intent.

Potential Outcomes of Mediation

Mediation can help the parties take steps to prevent future problems. A potential outcome, similar to the arbitrator's decision mentioned above, is for Burns to receive a suspension of two to seven days. First, Burns would agree to apologize privately to McSwain for his insulting comments, as well as for inadvertently communicating information to a competitor that could have severe economic ramifications. The parties would also agree to develop a policy of open communication in the workplace, in order better to address problems in a professional manner. Further McSwain would agree to clarify the e-mail policy, in an attempt to avoid unpleasant situations in the future. Finally, the parties would sign an agreement to keep the incident confidential, in order to avoid further embarrassment.

This settlement would serve most of the parties' interests far more effectively than arbitration. As mentioned, Burns' financial and career interests would be met. And McSwain would avoid having Burns ordered back by an arbitrator, which would undermine her reputation as an effective supervisor.

Unlike the decision at arbitration, the decision to introduce a policy of open communication could help redevelop a professional relationship between the parties. Rather than merely resuming work, the parties would also have developed a settlement that would attempt to smooth the transition to a positive professional relationship. The parties would have tackled some of the root causes of the dispute.

Conclusions

A comparison of the different outcomes of arbitration and mediation in the case of Benchmark Insurance has revealed a clear strategic advantage of mediation, in addition to advantage in the areas of cost, time and formality. Although arbitration can resolve the immediate problem, it often fails to address the underlying interests of the parties. If only the surface issues have been resolved, while the root problems persist, the working relationship will continue to suffer.

Although the case of Benchmark Insurance is only hypothetical, it does offer valuable insight into the impact of both the *processes* and the *outcomes* on the parties' interests. Because union and management are in a long-term relationship, the parties must attempt to avoid damaging that relationship when resolving grievances. By focusing on the interests of the parties, in an attempt to create an opportunity for mutual gains, grievance mediation seeks a negotiated settlement that will resolve both the immediate dispute and the underlying issues.

This is not to say that arbitration is of no value. Since arbitration can guarantee a resolution of the immediate conflict, it must be included as the possible final step in the grievance procedure. As we have seen, the possibility that the dispute may go to arbitration can be used by the mediator to induce the parties to agree to a negotiated settlement, with all its advantages over arbitration.

Although arbitration can resolve the immediate problem, it often fails to address the underlying interests of the parties.

Appendix 1

Benchmark Insurance Incorporated²

Ron Burns had an uneasy feeling after checking his voice-mail on Monday morning, August 25, 1997, his first day back to work after a three-week vacation in Europe. Among his many messages was one from his supervisor, Diane McSwain, telling him to report to her office at 10:00 that morning. The tone of the message, particularly when it was the first communication he received after being away for three weeks, was uncharacteristically cold.

Ron Burns was thirty-six years old and worked as a senior clerk in the head office marketing department of Benchmark Insurance Incorporated, located in Toronto. He had joined the company as a junior file clerk in 1978, directly out of high school. Since then, he had moved up slowly but steadily to his current position. Over the years, Ron had taken courses at a local community college and was now only a few credits short of his business diploma. Married, with two children, he was considered a responsible and reliable employee who had had no disciplinary problems.

The head office of Benchmark Insurance had recently been unionized by the Canadian Union of Administrative and Clerical Employees (CUACE), which had won representation rights for all non-managerial employees. Ron Burns' position was in the bargaining unit, but that of his direct supervisor, Diane McSwain, office manager for the marketing department, was excluded. Diane McSwain was thirty-one years old, had been with Benchmark for six years and, up to a year ago, had held a position on the same level as Ron Burns. When the office manager retired, Diane was promoted to take his place. One of the other candidates for the position had been Bob Mason, a friend and colleague of Ron's. Ron had expected Bob to get the position, as did most others in the department. Mason was both older and senior to Diane McSwain and generally well-regarded. Mason left the company in January, five months after being passed over for Diane in the promotion competition.

Ron Burns' sense that something was amiss was reinforced when he was kept waiting outside his manager's office for twenty minutes without an explanation, and then by her manner, which was, to put it mildly, cold and unwelcoming. She began the discussion immediately, by saying, 'Did you write this?'

'This' was a copy of an e-mail message, the text of which is set out below.

From: BurnsR@benchmark.com<Ron Burns>
To: masonr@reliable.com<Bob Mason>
Date 9 July 1997 14:33:10
Subject: Update

Greetings from the centre of the universe! How goes the battle?

Life here continues in its unpleasant, unproductive pattern. You certainly made the right move in getting out of here. Diane continues to prove that employment 'equity' (what a joke that term is!) is a bankrupt and futile policy. She's not competent to manage a piss-up in a brewery, much less a large office in a department like ours! It doesn't help that she's so screwed up as a person, never mind as a manager. I don't think I've ever met a person who was so sensitive when it comes to herself and at the same time so com-

² Copyright 1998 by Professor R. Jackson and Professor D. Leighton, Queen's University. Minor changes have been made for the purposes of this study.

pletely insensitive when it comes to anyone else. What a farce that she should get promoted. There were at least two other people—besides you—who were better qualified. You really should have gotten it; that's what almost everyone feels. I'm looking around for a new job, but you know how tight things are these days. Any advice?

Meanwhile, I'm at least getting out of here for three weeks this summer. Not long enough, but any rest from that woman is better than none. It's damned difficult to get away, and it's made things with Diane even more difficult because we're on a full court press for an early launch of our new product—the plan responding to the earlier conversion age for RRSPs. It's now supposed to be rolled out on September 1st, but the whole project is already behind schedule, mainly because Her Highness can't make up her mind and is terrified of making a mistake, but at the same time, she is so opinionated that nobody can suggest anything worthwhile, much less point out when she's wrong. From the looks of things, I won't be surprised if those of us working on it are 'asked' to limit our summer vacation to a week. If that happens, I'm going to insist on my three weeks: she's known about it long enough, and I'll be damned if I'll sacrifice that because she doesn't know how to manage a project.

All for now. Thanks for letting me blow off steam. Let me know how things are going with you at Reliable.

Best,

Ron

Not surprisingly, Ron was shocked ('stunned' would be a better word) to see this letter and to be handed a copy of it by Diane McSwain, its principal subject. Embarrassed and upset, he could only stammer, 'Where did you get this?' to which she replied, 'Never mind where I got it; is it yours?'

'Yes, but it was a personal correspondence. It was supposed to be completely confidential. I never dreamed anyone else would ever see it.'

'I'm sure you didn't. In any event, this is completely outrageous and unacceptable. It's insubordination and a personal attack on me, and shows complete contempt for management, and, if that wasn't enough, you've given away company secrets! You can consider yourself on suspension until further notice.'

Shaken, Ron left the office at that point, went to his desk, and called his union steward. The steward, Brent Peterson, advised that the two of them should go back to see McSwain immediately, in order to get some important questions cleared up. He then phoned Diane's office and was advised that she could see them both at 11:00. When they arrived, there was a fourth person at the meeting: Mary Fleming, from the human resources department.

Brent Peterson opened the discussion by saying, 'Thank you for seeing us. There are one or two questions which the union feels need to be resolved. First, is Mr. Burns being disciplined?'

Fleming responded, 'No, not at this moment. Now he certainly may be disciplined, but at this point we're still investigating. He'll be advised of the result when we've decided.'

'Then I take it that he's suspended with pay?'

'That's correct; with pay.'

'If you're only in the process of investigating, then why suspend him at all?'

'We just think it's better that way for now, in view of what was said in the e-mail.'

'Are you going to get his side of the story?'

Up to this point, the discussion had all been between Mary Fleming and Brent Peterson. However, Diane McSwain now said angrily, **'His side? Don't we already have his side of the story? This e-mail speaks for itself!'**

Peterson responded, **'It may or it may not. In any event, what the union wants to know is this: we all thought e-mail was confidential and secure, sort of like making a phone call. How did you get a copy of this letter?'**

Diane responded, **'Ron was away for three weeks on vacation in Europe and basically incommunicado. I needed a copy of an e-mail he had sent to a client in July and went to Ben Bradley [the head office computer systems administrator]. He gave me access to Ron's outgoing e-mailbox database. I simply called it upon my own PC. It was simple.'**

'That's absolutely shocking! But you couldn't have been looking for this letter since, as you say, it's personal.'

'No, I wasn't looking for this one. As I said, I was looking for one he had sent to a client. But in looking for it in the outgoing mailbox listing, I noticed that there were a large number of outgoing messages to masonr@reliable.com, and that made me suspicious. I knew Bob Mason had gone to Reliable Insurance when he left us. I knew he and Ron had been good friends. It was too much of a coincidence. Ron would have no business reason to be corresponding with Bob Mason, particularly now that he's working for a competitor, so I looked. And this is what I found.'

This time, it was Ron who spoke: **'That was meant as a personal communication to a friend and former colleague. You had no business going into my mailbox. That's an invasion of my privacy! How many others did you look at?'**

Mary Fleming responded, **'Number one: e-mail is a company system and is supposed to be used for company business, not personal gossip. Number two: since it's a company system, the company can review how it's used. After all, it's not as if employees haven't been warned not to use it for personal stuff. Number three: it looks as if you were discussing company business with an employee of a competitor—you revealed confidential information, for Heaven's sake!'**

'What confidential information?'

'Well, our new product for converting RRSPs, for one thing.'

'That's ridiculous! Bob knew all about the new product. We've been discussing it for almost eight months, and he didn't leave until January, for God's sake!'

Fleming, retreating slightly, said, **'Well, he may have known about it in general terms, but he certainly didn't know about the September first launch date because that was just decided in June. In any case, he now knows that a product infinitely superior to anything else his company can offer is going to be available almost immediately. Even you have to admit that that is a key piece of intelligence for a competitor. And there's no question that you misused e-mail, and for the purpose of being insubordinate and contemptuous of management and attacking Diane McSwain.'**

Brent Peterson said, **'I don't remember ever being warned about personal use of e-mail—I don't know anyone else who has been, either. Certainly, the union is unaware of any such warning. And I'm positive that the vast majority of employees in this company believe that their e-mail is private and secure. Everyone uses e-mail for personal messages, and management is well aware of that. I'll bet Ron's mailbox had umpteen personal messages from people in this company, including managers, if you hadn't just looked for incriminating stuff. Anyway, I can see that we've all been too trusting. We've underestimated just how far you'll go to catch people!'**

Fleming responded, **'We're not trying to catch people; we're trying to run a company in**

a tough, competitive environment. If only people didn't spend so much time trying to evade responsibilities for their actions, that would be a lot easier! Unfortunately, the union seems to be very good at helping them do that.'

The meeting went on for ten more minutes in this vein, but nothing more of substance came out. It was then adjourned. The next day, Ron Burns was invited back to human resources for a second interview on the matter. This meeting, which Diane McSwain and Brent Peterson also attended, was for the purpose of asking Ron for his side of the story. He was given a full and fair opportunity to tell his version of events. That version was, in all respects, similar to the foregoing account, but as Ron left the interview, he turned to Diane and blurted out, 'Look, I'm really sorry about all of this. I know this will sound like I'm just trying to save my own skin, but I want you to know that I had no idea my comments would ever get back to you. I thought sending an e-mail message was just as private as making a phone call. I may feel this way, but I tried to be professional about it when we were working, and I would never do anything deliberately to hurt your feelings. I really mean it when I say that I truly apologize.'

Diane just looked at him and nodded.

Two days later, he received a letter, informing him that he was being fired forthwith. The union grieved the discipline imposed on Mr. Burns.

It should be noted that during the grievance procedure, it was established and the parties agreed, that the company's written policy with respect to the use of e-mail consisted solely of the document in appendix 2. Further, while clearing out his desk, Ron also came across an e-mail message he'd received in May from a manager inviting him and several other colleagues to a barbecue, and which he had printed out for the details. This appears as appendix 3.

Appendix 2

The Electronic Mail Policy at Benchmark

(Copy of form given by the company to all new employees upon arrival to describe the e-mail system and advise them of their e-mail address. Such a document was distributed to all existing employees when e-mail was first introduced six years ago.)

BENCHMARK INSURANCE INCORPORATED **Information Systems Department**

Welcome to Benchmark Infosystems! The following information will help you make maximum use of your computer.

Your electronic mail address is : mcswaind@benchmark.com

Your password is: (Password is handwritten in this space)

Benchmark's website address is : <http://www.benchmark.com>

If you encounter any difficulty whatsoever, or have any questions about our systems, please do not hesitate to contact us at local 532.

Note: Please remember that electronic mail is to be used for business purposes only.

Appendix 3

A Supervisor's Electronic Mail

(Copy of an e-mail message sent to twelve other Benchmark employees by Mark Edwards, who is a supervisor and exempt from bargaining-unit membership.)

From edwardsm@benchmark.com
To: andersond@benchmark.com
bentleym@benchmark.com
burnsr@benchmark.com
dunnv@benchmark.com
gerhardtw@benchmark.com
harrism@benchmark.com
mcswaind@benchmark.com
portera@benchmark.com
pullend@benchmark.com
robertsb@benchmark.com
watermanf@benchmark.com

Date: 15 May 1997

I'm delighted to advise that my son, Chad, will be graduating with First Class Honours from the Commerce Program at Queen's University on May 22. You're all invited to help us celebrate at a special barbecue on Friday, May 23. Our house; 6:00 p.m. Hope to see you all there. No gifts; just bring yourselves.

Mark

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