Judicial Review and Mediation

Private Law for Public Law Practitioners

The Public Law Project

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Varda Bondy & Helen Curtis
Research in public law

• Judicial Review research
• Examples
• What does research tell us about mediation in public law?
• Why more research is needed
The Terminology Salad

- Mediation
- Round table
- ADR
- Informal Resolution
- Does it matter?
Settlement and Mediation

• To understand how mediation can feature in the context of judicial review, it is necessary to understand the dynamics of judicial review and settlements
• Types of settlement
• The limitation of judicial review remedies
• Who is afraid of mediation?
Cheaper, quicker, better…

• Or is it?
• Mediation in judicial review claims are rare; why? (most cases settle anyway)
• Reasons given by practitioners for not considering mediation

• The ambivalence of mediation in public law – is it justified?
Process, Policy, Practice

- Ombudsman
- Place for wider public interest if confidential process
- Policy (e.g., abolish PCT)
- Almost 20% of final hearings involved issues of policy and practice
- How can lawyers extend beneficial outcome to one individual
- What can broaden the appeal of mediation?
Influencing Factors

- Will judicial review deliver what the claimant needs?
- What ADR is available?
- Mediation may not produce an offer, likely to bring clarity/transparency
- Using the process effectively
- Managing expectations
- Avoiding costs sanctions (see PGF)
- How could each party benefit from using mediation?
Hallmarks of Mediation

• Voluntary agreement by parties to mediate
• Neutrality of mediator
• Confidentiality
• Parties decide the outcome
• Creative solutions

• Ground rules
• Cost-effective
• Neutral venue, agreeable to all parties
• Authority to settle (right people there)
• Opportunity to be heard
What makes mediation work?

- Confidential; Agreement to Mediate will contain confidentiality clause
- Options explored without prejudice
- Voluntary
- Impartial, neutral facilitators
- The parties create the outcome
- Focus on the needs of the parties
- Being aware of strategic games
What are the benefits?

- Decision reached by the parties, not imposed
- Availability of outcomes which court cannot order eg apology/explanation
- Limits possible reputational damage
- Cost-effective if outcome secured
- Avoids stress of litigation
- Can influence future policy decisions
- Certainty and speed of settlement
Timing – when to mediate

• Pre-action protocol
• Internal procedures
• Too soon
• Too late
• Proposal and refusal
• Letter before claim
• Protect client’s position
• Parallel processes
The Mediation Process

- Welcome introduction – ground rules
- Joint session
- Opening statements
- Private (caucus) sessions
- Exploring options
- Encouraging momentum
- Keeping it confidential
- Working towards resolution
Contents of the Mediation Bundle

• Opening or position statement
• Pleadings if litigation has begun – the most recent version
• Expert reports
• Selection of documents in support
• History of any offers made/rejected including any Part 36 offers
• Costs budgets for litigation begun after 1st April 2013
• [For Mediator’s Eyes Only]
Purpose of the Position Statement

- To ensure the Mediator and other party understand the case from the your client’s perspective
- Demonstrate an openness to settle
- Identify strengths, weaknesses and areas of agreement
- Briefly summarise facts and issues
- Indicate the type or range of what would be an acceptable settlement
What happens at the Joint Session

- The Mediator will ensure the Agreement to Mediate is signed by all present
- Each party speaks for 10-15 minutes. If the client is going to speak, prepare what will be said beforehand
- If position statements have been exchanged, more information/clarification can be given
- Initial new query/information gap filled
- A positive response to any proposals
Confidentiality

• Provide for future disclosure or confidentiality of the settlement
• Expect publicity? Agree press release
• Establish clear understanding of parameters between the parties
• Understand confidentiality applies to the mediator too (but see AB v CD Ltd [2013] EWHC 1376)
• Manage client’s expectations
Funding & Costs

• Mediation paid for in advance
• Costs to date – have a schedule
• Know the impact of the funding arrangement on the outcome for the client
• Legal Help pre-permission
• Legal aid rates versus inter partes rates
• Keep in mind the progress that’s been made on agreeing central areas of dispute – some mediations falter on costs
• Be prepared to be proportionate!
Outcomes

• Creative solutions can be legally binding if written down and signed
• Confidential and Enforceable
• Apologies can be given without an admission of liability
• Be clear on who is doing what, when and consequences of non-compliance
• Costs and cost efficiencies
• Form of the settlement agreement
• Follow-up – more examples – tell us!