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Judicial Review and Mediation: Do They Go Together?

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Judicial Review Pre-action Protocol (PAP)

Alternative Dispute Resolution

9. The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution ('ADR') or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt. Both the claimant and defendant may be required by the court to provide evidence that alternative means of resolving their dispute were considered. Parties are warned that if the protocol is not followed (including this paragraph) then the court must have regard to such conduct when determining costs. However, parties should also note that a claim for judicial review should comply with the time limits set out in the Introduction above. Exploring ADR may not excuse failure to comply with the time limits. If it is appropriate to issue a claim to ensure compliance with a time limit, but the parties agree there should be a stay of proceedings to explore settlement or narrowing the issues in dispute, a joint application for appropriate directions can be made to the court.

Advantages of Mediation in Judicial Review

- Compliance with Pre-Action Protocol
- Final Resolution of Dispute
- Cost-Saving
- Avoids Stress of Court Appearance
- Avoids risk of loss/costs
- Avoids adverse findings on a matter of law

Disadvantages of Mediation in Judicial Review

- Delay
- Extra Cost
- Concession of Error of law (?)
- Dispute of Law not determined

The Practical Steps

- Agreement to mediate
- Agree the Mediator
- Agree the date/location
- Prepare Mediation Bundle
- Prepare Position Statement
- Decide who will attend
- Attend with Authority to Settle

Conclusion

I suggest:

(1) Start any introduction of mediation into the court system by considering what sort of cases are suitable for mediation. Do not start by assuming mediation is suitable for all types of cases or that it is there to solve particular problems affecting the courts.

(2) Ensure that the mediation procedure adopted is one that will enable agreement i.e., sufficient time, mediators of experience and available advice for the parties.

(3) Ensure that the judiciary and the court staff are aware of the availability of mediation, the procedure adopted and the pros and cons of its use.

GARDEN COURT MEDIATION

Mediation and judicial review: do they go together?

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What do we know from research?

Some headline findings:

- Most potential JRs are resolved as a result of pre-action letter (settled, withdrawn or resolved in some other way).
- Another sizeable number of JRs are resolved between pre-action and before permission.
- The majority of those that gain permission settle before hearing.
- Most settlements in JR favour the claimant.

Therefore…

…opportunities for mediation may be limited because:

- JR is a remedy of last resort – many options will have been tried before.
- JR has a tight deadline for action – it might not be possible to mediate before seeking permission.
- JR is relatively quick and straightforward compared to other litigation.
- JR has a high rate of settlement.
- However, these might only be concessions, where defendant agrees to reconsider.

Settlements in JR

Settlements happen in a number of ways:

- negotiated settlements (directly between lawyers)
- settlements achieved at roundtable meetings (clients sometimes attend)
- mediated settlements (clients always attend)

Research shows that in JR, mediation is not necessarily cheaper or faster than settlement by negotiation, settlement by roundtable, or judicial determination.

So does mediation have a role, and can it add value?

Limited remedies

'...the nature of the remedies in judicial review enables defendants to avert many challenges simply by agreeing to reconsider and come to fresh decisions. In such circumstances, claimants often have no choice but to accept the defendant's concession and withdraw proceedings. Such 'pragmatic' concessions on the part of defendants offer the short-term advantage of disposing of troublesome challenges quickly and cheaply, but often produce the same outcomes for claimants without addressing underlying issues or providing substantive remedies for them.'

Mediation and Judicial Review: An empirical research study (2009)

Reasons for rejecting mediation in JR

- Urgency/time limits
- A question of law/policy/liberty
- No room for compromise/strong case
- Costs implications/expense
- Regulatory limitations on decision-making
- Power imbalance

Yet the vast majority of JR claims are settled, and lawyers rarely raise these as objections to negotiated settlement.

Cost

- In the research, no evidence was found that mediation is cheaper or quicker than judicial review.

- This is partly due to characteristics of the JR process that make it likely that, unless the case was mediated very early in the case, most claims would be cheaper to litigate than to mediate.

- But this depends on when mediation takes place, how much the mediator charges, costs of legal representation at mediation, etc

- Also, lawyers identified cost benefits that are not easily quantifiable – such mediation saving on human resources.

What does mediation bring to the JR party?

The research found that mediation offers added value in some JRs, including:

- A guided structure – overseen by an independent person with no personal interest in the dispute or its outcome.
- Client-centred – active participation and decision-making can contribute to more sustainable solutions
- Interest-based – a focus on interests creates more common ground and more opportunities than a sole focus on legal positions does
- Better outcomes – agreements can include actions to be taken, apologies, explanations, compensation, changes to policy and procedure

Guided structure

‘If you have a really messy case or just don’t have that trust, and you need lots of bodies there to consult and give instructions or you have more than two parties, then really mediation would greatly improve the prospect of success.’

Barrister / mediator

‘In roundtable discussion there [are][always arguments about what’s agreed, is it binding, is it in full and final settlement….there is always a danger that in fact each person will think they’ve agreed different things from what the other person is agreeing.’

Barrister / mediator

Client-centred

‘Roundtable conferences . . . are lawyer-centric; they are dominated usually by the senior lawyer present on that team. I do not believe that the parties. . . are involved other than peripherally in the large majority of them. Very frequently they’re in a side room, and the effective debate goes on unmoderated, on a bilateral, probably positional basis, as between lawyers on either side.’

Mediator with judicial review experience

Interests based

‘If you look at who participates in a court case, it’s the judge and barristers, and it’s not the client….[A]t a mediation, the interests take centre-stage, and you have the ability for the decision-maker and the party to…have a direct dialogue that takes place in a structured way…’.

Barrister / mediator

Better outcomes

‘Judicial review is a blunt instrument. If mediation could get a client e.g. a change of a social worker they’re not getting on with or an apology, that would be added value.’

Solicitor

‘For me, the point of mediation . . . is that it allows the substantive issues in contention to be discussed as opposed to the fairly bold ‘you can or you can’t’ type decisions that will come out of court.’

Solicitor

Case study 2: The best of both worlds?

- Dispute with NHS Primary Care Trust on package of support for disabled young adult.
- Parties couldn't agree on a home-based package or a care plan centred on a residential facility.
- Family wanted to establish independent user trust for arranging support.
- The Trust said it was a novel request, not done before – determination needed of power to establish trust.
- Mediation held one week before final hearing.
- Mediator met with young woman at home before mediation.
- Not settled at mediation, but arrangements agreed should it be determined that the Trust did have the power.

The judge ruled the Trust did have the power to set up a trust and that the detailed arrangements worked out at mediation could be implemented. The judge commented that 'Judicial Review is an unsatisfactory means of dealing with cases such as this.'

An example of parties needing the formality of a judicial determination and the flexibility of the mediation process.

Case study 3: A multi-party intractable dispute

‘I think without mediation, it probably wouldn’t have reached a resolution because the dispute between the parents were so deep-rooted and intractable and hostile really, they could never have sat down and had a sensible discussion and just sorted it out as you would expect most disputes could be sorted out . . .

Where you’ve got that level of hostility or distrust, as you had from the parents towards the local authority in terms of distrust and then from the local authority’s perspective, they were utterly fed up with the parents and feeling that nothing they ever did would ever be good enough, you’re never going to get them round a table to sort things out in the absence of some formalised structure.’

Defendant barrister

Mediation as complement to Admin Court

Both are examples of cases ‘in which a combination of the two processes, litigation and mediation, was needed to provide the necessary range of solutions to a complex situation. Neither forum alone could have provided a satisfactory outcome’.

Rather than always being an either/or situation, what the research shows is that the value mediation can bring is often as a qualitatively different but complementary process to litigation. That difference can manifest itself in the degree to which lay parties are engaged and participate and in the potential range of outcomes that address needs and interests.

Public interest

However, there are valid concerns about the wider public interest. These might be about setting legal precedent or about the impact on others who might be affected.

In one case study, ‘although other service users in similar circumstances in the same borough would have benefited indirectly from the mediated agreement to train more female care staff, the terms of the agreement would not have been publicised and the case would have had no wider radiating effect’.

Mediation risks preventing the dissemination of lessons learned and benefit to others affected by the decision. There is a risk that defendant public bodies could regard mediation as offering them the advantage of confidentiality, thereby avoiding publicity and public scrutiny.

Consider whether confidentiality of outcome has a place in mediation in JR context??

Research reports

V Bondy, M Doyle, V Reid, 'Mediation and Judicial Review – Mind the Research Gap', *Judicial Review*, Vol 10, Issue 3 (Sept 2005), p.220-226 https://domarmediation.files.wordpress.com/2012/03/mind-the-research-gap-jr.pdf

V Bondy and M Sunkin, 'The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing', Nuffield Foundation/Public Law Project (2009) https://publiclawproject.org.uk/resources/the-dynamics-of-judicial-review-litigation/

'The effective use of mediation by local authorities in judicial review', Nabarro LLP, 39 Essex Street, and ADR Group (2009) https://www.lexology.com/library/detail.aspx?g=3d481f81-435f-40e3-95b3-0c13a617a23c

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GARDEN COURT MEDIATION

Mediation and judicial review:

Do they go together?

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18 July 2023

Money

- Judicial review mediations are rarely about money
- But a money claim could be attached e.g. unlawful detention
- Is it cheaper to mediate than litigate?
- Need to work out whether to (a) pay a mediator and (b) pay a lawyer to help advise at the mediation as to whether to compromise the claim on the terms of the settlement being discussed
- The government has a Guide to civil mediation published in July 2021 which lists disputes which can be mediated but does not include reference to judicial review. It does not include any reference to legal aid

Money and the Legal Aid Agency (LAA)

- If parties are privately paying, each pays the fee for the mediator, usually in advance and split equally
- If there is a civil legal aid certificate in place for the claim, then the mediator's fee can be claimed as a disbursement under that certificate at the rate of £100.80 per hour
- Civil mediation is not established within LAA compared to family mediation
- Mediator would then charge an hourly rate instead of the day rate
- Prior authority is not needed to claim the mediator's fee as a disbursement

Money and the Legal Aid Agency (2)

- If mediation takes place pre-permission and settles, then the cost of the work done is potentially payable at the LAA's discretion. Anecdotally, this has rarely been claimed although there are no formal stats available.

- The attendance of solicitor and/or counsel at a mediation can be claimed and could be covered under the applicable rate for 'attendance and preparation' rather than 'advocacy'. The LAA has said this would be an issue of reasonableness in terms of the cost assessment around whether it was reasonable to attend the mediation.

- This suggests there needs to be an assessment as to the prospects of settlement prior to the mediation which could be relied on to justify the cost associated with the mediation.

Costs

- Mediation reaches settlement, what happens about the accumulated costs?
- Legally aided party may seek to recover their costs from the other party at the mediation rather than risk their associated costs not being covered by the LAA
- If asked, do supply – in advance of the mediation – a costs budget or costs incurred to date with a projection of costs if the matter is contested in court
- Be aware of the potential sanction of costs not being awarded to the successful party if it unreasonably refused an invitation to mediate

The future?

- The Civil Legal Aid Review is due out in 2024
- Its terms of reference include ‘access to legal advice, assistance, representation and **mediation** for those who meet certain statutory criteria including means and merits testing’
- One question posed is, ‘what changes will drive earlier resolution of issues and reduce incidences of problems?’
- The Review says options should focus on outcomes that will ‘encourage, where appropriate, the early resolution of disputes providing swift access to justice through early legal advice and **mediation**’

Thank you

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