

Doing the 'rights' thing: a debate on mediating in the shadow of the law

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Consider the following situations: you're a wheelchair user and you have no way to get into most of the shops on the high street; you have Parkinson's and occasionally have tremors, and a pub refuses to serve you because the bartender thinks you've had enough; you're a student with dyslexia and your college lecturers refuse to allow you to use a computer for your written exams, and as a result your marks suffer. Perhaps you are blind and do not feel safe keying in your PIN number when you make a purchase, and a shop refuses to allow you to sign for your purchase even though you have the appropriate 'chip and signature' card from your bank. Or you are deaf and communicate using British Sign Language, and your local housing benefit office fails to provide a BSL interpreter for your appointments with a benefits adviser. As a result of any of these situations, you could be inconvenienced, embarrassed, harassed or at serious risk of losing out on a social life, a degree, even your home.

These are examples of everyday obstacles that disabled people face when trying to access goods and services. They are also examples of discrimination, and you could take those service providers to court for breaches of the Disability Discrimination Act 1995 (DDA). Alternatively, you could try to settle those claims of discrimination using conciliation, which is free, voluntary and independent and sits outside the legal system.

The following exchange about disability discrimination conciliation is between Margaret Doyle, an independent mediator and a conciliator with the Disability Conciliation Service, and Val Reid, ADR Policy Officer at the Advice Services Alliance (ASA), the umbrella group for the not-for-profit advice sector in the UK. Margaret Doyle's views are her own and do not necessarily represent the views of the Disability Conciliation Service. The views expressed by Val Reid reflect those of ASA. Although this exchange focuses on disability discrimination, it has relevance to other 'rights-informed' mediation context, including other discrimination issues, health-care complaints conciliation and workplace disputes.

Dear Val,

The Disability Rights Commission (DRC) has pioneered the use of mediation techniques in resolving complaints about discrimination. Currently the DRC funds an independent conciliation service that can be used in cases involving an alleged breach of the law

relating to goods and services and to education, Parts III and IV of the Disability Discrimination Act 1995 (DDA).

I think, given the impending establishment of the new Commission for Equalities and Human Rights (CEHR) – which will eventually bring together the work of all the separate equalities commissions including the DRC – it's a good time to consider whether the innovative model of conciliation used in DDA cases should be used in a wider range of anti-discrimination cases. I think it should be.

Under the DDA, it is illegal to treat someone less favourably because of their disability, or to fail to make reasonable adjustments so they can access a service, or to fail to deal with barriers to someone's physical access to premises, without justification. These are cases that could go to court to be resolved, but conciliation is offered as a free, voluntary and independent way of resolving the claim. These are serious allegations, and it is important that conciliation does not replace or remove the right to take legal action. If a claimant wants to try conciliation, the legal deadline for taking the claim to court (six months) is extended by an additional two months. That means that if the conciliation does not resolve the claim to the claimant's satisfaction, the claimant can still go to court.

Some of the advantages of using conciliation include having the meeting held in a convenient and accessible venue at a time convenient to the parties; discussing the issues fully in light of the rights of disabled people and the responsibilities of service providers; and exploring options for redress and future changes.

The conciliation of claims under DDA Parts III and IV is provided by an independent organisation, the Disability Conciliation Service (DCS), which is managed by the national community mediation charity, Mediation UK. The model of mediation¹ used has evolved from rights-based mediation, in which the mediator has primary responsibility to ensure that settlements reached are in the spirit of the rights legislation as well as to both parties' satisfaction.

What the DCS has developed is known as 'rights-informed conciliation'. The model requires conciliators to be well-informed about the DDA and to remind the parties of the rights and responsibilities it confers, and this has been an interesting practice issue for many of the conciliators, as it represents a departure from the purely facilitative mediation model most have worked within.

As I mentioned earlier, the DDA conciliation enables people to exercise the same rights as they would in court but with a more flexible approach that has potential for a wider range of remedies to be achieved than can be obtained in court. In fact, I would argue that it has larger potential. Although the complainant must meet the legal definition of "disabled" (under the very restrictive, but expanding, definition of the DDA) in order to use the conciliation service, there is no requirement that the parties accept that there

¹ I use the term 'mediation', although the legislation refers to 'conciliation', because it is a mediation process and because the term 'conciliation' is often used to refer to very different types of processes. For more on the debate about differences between 'conciliation' and 'mediation', see ASA's website www.adrnow.org.uk/go/SubSection_2.html

has been a breach of the Act. Indeed, in many of the cases I have handled there is a vast grey area of unknowns in this respect – and the beauty of mediation is that it allows the parties to move away from the strict legal interpretation of events into a discussion of how what happened affected those involved.

There is more to say on this, of course, but I want to hear your views of using mediation in this context. I'm sure you have important points to raise!

With best wishes,

Margaret

Dear Margaret,

I agree with you that mediation can offer a very constructive way forward for some disputes. I would say that it's particularly helpful where the parties concerned have an ongoing relationship. You've mentioned a pub that refuses to serve a customer with epilepsy, a shop that has no means of access for a wheelchair user, or a college that does not make adequate provision for a student with dyslexia. In these cases, it's probably in the interest of both the service provider and the person complaining to try to reach an agreement without exacerbating the problem, so that they can go on drinking, shopping or studying in a relatively positive atmosphere. This is where mediation has a lot to offer.

Mediation does also offer a much wider range of remedies than the courts, as you mention. Case studies from the DCS show that it's not just compensation that people want; they want an explanation of what went wrong, and someone who will look them in the eye and say sorry. They want practical adjustments to make their lives easier. They're also looking for better staff training or clearer company policies, so that other people don't have to face the same problem.

However, I think there are some arguments against over-reliance on mediation as a way to resolve rights-based disputes. Here are three of them:

- *It's important to establish some principles in the courts, so that other people can rely on them. Agreements made confidentially in mediation may benefit the individual concerned, but won't provide legal precedents for future disputes.*
- *Publicly naming and shaming organisations that repeatedly break the letter and spirit of the DDA means that there is more likely to be a change of attitude and approach by other organisations.*
- *Publicity for cases where individuals fight and win against poorly-performing organisations gives an important, positive message about respecting the rights of people with disabilities, and the responsibilities of service providers.*

I would argue that the decision about whether a case should be taken to court, or whether it is suitable for mediation, is a vital one. Of course the complainant should be involved in making an informed decision about how to proceed, but that needs professional, knowledgeable, independent advice from an adviser who is aware of all the issues, and can help the individual assess both the personal factors involved, and the public interest concerns.

I do also have some concerns about the DCS process itself, specifically about what happens on the day of the conciliation appointment. I understand that the complainant is encouraged to get some independent legal advice before s/he goes to the meeting with the mediator and the service provider, but s/he is not allowed to take a legal adviser along to the meeting. If an agreement is reached during the course of the conciliation appointment, it is only binding on the service provider if the complainant accepts it as a full and final settlement of his/her claim there and then. However, in making this decision, s/he has no access to an advisor to discuss what has been offered, and no cooling-off period to go and think about it, or take further advice: a decision needs to be made on the day. This seems to me to put undue pressure on the individual, and to deprive them of support, advice and information just when they need it most. Complainants are not likely to be repeat players in such cases, so may well not be very familiar with their rights and their legal position. They may be tempted to agree to something which is far less than they deserve.

I'd like to find a way to ensure that the best possible process is chosen in each case, and that the individual has enough time and enough independent advice to make the right decision at the end of it. Any suggestions?

All the best

Val

Dear Val,

I agree with your concerns about mediation in rights-based cases and about the need for parties to be well informed before settling. There is certainly a degree of pressure on the complainant to make a decision about the disposal of their legal claim at the end of the meeting, and this is often done without ready access to independent advice. But both parties are given a great deal of information beforehand by the conciliation caseworker at the DCS – not legal advice but guidance on types of outcomes achieved in court and in conciliation, information on what the DDA requires, etc. – which they can use to consult others, and the mediator also has the responsibility to ensure that any settlement is in keeping with the rights enshrined within the DDA.

Also, parties can have access to an adviser by phone during the meeting. I have had that happen in two cases – in one the complainant was being offered very little by the respondent and her belief that it had not been settled to her satisfaction was merely confirmed by her solicitor, who spoke to her on the phone and said he was prepared to issue court proceedings immediately. In the other, the complainant's adviser was in fact

his mother, who also spoke to me on the phone about whether her son should accept the settlement. I couldn't advise her but I could reassure her that her son had been able to express himself fully at the meeting. That is a case I would like to return to, because it touches on another point that you made.

My view is that we need to trust individuals to know what they want to achieve, and give them the space and time and supporting information to explore this. I agree that reflection time would be helpful in some cases, but I also wonder whether this can also be counterproductive. I would worry that both sides might go away from the conciliation and be given advice from others – colleagues, family members, friends are more likely than legal advisers – that reflects their own view of the world and of 'justice' without their having had the benefit of the discussion that took place in conciliation. These discussions focus on a particular incident and how it affected the disabled complainant, but they also involve exploring how discrimination happens, however inadvertently; about the everyday obstacles and humiliations that many disabled people face; and about examples of good and bad practice. They have an important educational aspect. That is why I believe if parties want to have legal advisers attend, and both sides agree to that, there is no reason to exclude these and in fact it can be quite helpful when they are involved.

I also believe the problem may be more of a perceived, theoretical one than a real one. In only one case did I feel that the complainant was unsure about whether to sign a full and final legal settlement – and my view is that if someone is in doubt, the only safe response is to not sign the full and final settlement box on the outcome form. Usually the complainant has been very clear about the decision not to dispose of the legal claim, often because there has been no acceptance on the part of the respondent that a discriminatory act took place, and the complainant is keen to pursue the claim in a way that will provide some vindication and acknowledgement of the injury they have suffered.

I would like to respond on two of the points you make:

1) The 'name and shame' aspect of court decisions is bit misleading. Although court judgments are public record, whether or not they are publicised widely is pretty much at the discretion of the press – is it a juicy case? And to believe there is always a deterrent effect is perhaps idealistic. Service providers who have no interest in engaging with the issues around disability discrimination are unlikely to be deterred from further discriminatory behaviour, and other organisations of a similar mindset will simply take a commercial decision as to whether discriminatory behaviour is a financial risk or not.

2) The need to establish legal principles is another point made often by the legal profession. In an emerging area of law, like disability discrimination, it is important to be able to set precedent and test the legal boundaries. One way this happens is by the Disability Rights Commission establishing its priority areas and backing legal cases in those areas in order to get a test case decision². Once a few court decisions are available in a particular area of dispute, these can be used as a benchmark to help

² Note that according to its website (www.drc-gb.org/the-law), the DRC has provided legal backing to 92 DDA Part III cases and 8 Part IV post-16 cases since 2000, but many of these appear to have settled either pre-issue or pre-hearing, thus not serving the purpose of a test case.

future litigants measure what they might be able to achieve at court. But once that happens, the appetite to back legal claims dries up.

More fundamentally, to me, is the question of who decides what's the right outcome of a case? Who decides what the complainant 'deserves'? Society might need legal precedents and might need for 'justice to be seen to be done'. But does that mean that individual complainants should determine how to proceed based on what society needs or wants?

That brings me back to the case of the young man and his mother. In this case there was a settlement that met his individual needs and that he felt was quite a good deal – it involved purchase of a new laptop and expensive software, and it was a creative settlement that addressed his need to access a particular service. But I had reservations about this because it was so individualised. The terms of the agreement did not require any systemic changes by the service provider, so there was no wider benefit to the public and to future disabled service users. That service provider could simply continue as it had, with the not unreasonable assumption that few disabled customers would pursue a complaint about lack of access. I was not at all sure this was a good outcome in DDA terms.

Yet I had to ask myself – whose dispute was it? Who was I to say that the only just outcome would be one with a wider impact? This is really my main concern about rights-based mediation: how to reconcile on the one hand the individual's need to resolve the dispute and get a remedy; and on the other hand, the needs of potential complainants or society in general. I wonder – if we had a requirement that any settlements are made public, not as legal precedents but to enhance public scrutiny and awareness, would this be an adequate answer to the question? And on a practical level, how to make that acceptable to service providers so they would continue to engage with mediation?

What do you think?

All the best,

Margaret

Dear Margaret,

Well, you certainly have some valid and some challenging arguments. I don't want to dispute your contention that for many people mediation is an accessible and low-cost way to get a personal remedy, when taking a case to court could be too expensive, or too stressful, or too difficult because of the shortage of expert advice and representation.

It seems to me that there are two possible arguments to be made here.

- *On the one hand, if the only realistic alternative to using the DCS is to do nothing about the problem, to just lump it for all the reasons given above, then there is a strong case for promoting the DCS as the most effective procedure for resolving DDA claims.*

- *On the other hand, if there is a genuine choice between mediating a claim and taking it to court, then the arguments about the public accountability and precedent-setting which are intrinsic to the court system are all valid and important.*

Unfortunately, it is impossible to produce accurate figures for the number of DDA claims taken to County Courts in any given period, because judicial statistics are not recorded in a way that identifies the subject of each case. That means it's hard to compare numbers of cases taken to court with cases resolved through the DCS. And even if, as the DRC claims, the numbers of DDA court cases are small, then perhaps the arguments should be about better funding for advice and support for small claims, so that getting access to the judicial system is not so hard. Or perhaps there should be a simpler, cheaper, more user-friendly tribunal system for resolving DDA complaints, as there is for employment disputes.

You also argue that publicity for a judicial decision is dependent on the media deciding to feature a 'juicy case'. I agree that our society is too dependent on media priorities, but I don't think that is an argument for not ensuring that justice is done, and seen to be done.

I think there is a danger of romanticising mediation as a feel-good, one-size-fits-all solution. Of course it has a role in resolving individual disputes. But you ask 'Whose dispute is it?' My reply would be that disputes of this sort do belong to everybody, in a sense. Imagine a world in which all disputes were resolved, privately and confidentially, to the satisfaction of the individual, but no public information about the outcomes was available. Would this constitute justice?

And there are two other linked points I'd like to make:

- *How would an individual ever gauge whether or not to be satisfied with an outcome, unless they had a publicly understood context within which to assess whether the agreement is fair or not?*
- *Would businesses be prepared to go to conciliation to resolve such disputes, if they were not motivated by the desire to avoid legitimate, expensive court action and its attendant publicity?*

I'd also like to come back to our discussion about the role of independent advice and support in mediation. Although it must be helpful for complainants to have information about the DDA and about expected outcomes from the mediators, that is not really a substitute for independent advice from a knowledgeable person who has their interests at heart. There is a risk that lack of advice will exaggerate the inevitable imbalance of power between large organisation and inexperienced individual. You talk about complainants having access to telephone advice during a meeting, and about your own opinion that having an adviser or supporter present if both sides agree can be very helpful. I agree with you. Is there any chance that this could become official DCS policy?

However, you also express reservations about having a cooling-off period before the agreement is signed, on the grounds that the complainant might be wrongly influenced by friends and family who haven't heard the arguments and discussions which took place. I'm not sure that I agree with your concerns. Surely, if we 'need to trust individuals to know what they want to achieve, and give them the space and time and

supporting information to explore this' as you claim, then we should be able to trust them to evaluate the range of advice and opinions they are given and make their own decision. Putting pressure on people to decide something so important in a hurry is unlikely to produce satisfaction for either party.

My criteria for the best possible system would include:

- *Independent and knowledgeable advice when a complaint is first raised, so that the individual and the adviser can make an informed decision about how best to resolve this dispute – both for the person concerned, and for society*
- *Funding for advice and support to take key cases to court, so that public judgements and reliable precedents can be established*
- *A quality-assured, user-friendly conciliation process, so that appropriate cases have the time and space to explore issues, apologies, changes in practice and personal remedies*
- *Access to independent advice during conciliation, and time at the end to think about things before signing a final agreement*
- *Published information about mediated cases and outcomes, anonymised if necessary, so that individuals and service providers can learn from what has been discussed and agreed, and society can see that justice is being done*
- *Some procedure for referring organisations which appear to be regular offenders back to the DRC, or to the new CEHR, so that some public action can be taken to educate staff and improve services, and, if necessary, to penalise bad practice*

As I look at this list, I don't think we are that far apart in our views!

Best wishes,

Val

Acronyms

ASA	Advice Services Alliance
CEHR	Commission on Equalities and Human Rights
DCS	Disability Conciliation Service
DDA	Disability Discrimination Act 1995
DRC	Disability Rights Commission