

Mediator “Fairness”?

Kluwer Mediation Blog

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We finished module 2 of our flagship training course last week. One of our participants emailed me the next day:

“I was driving up the road yesterday and mulling over one aspect of the mediation exercise we did. I get that we are facilitating adults to make fully informed autonomous decisions and that they need to make that decision based on their priorities, circumstances and judgement – that is not the mediators job. Ensuring they can consider all options and think about consequences etc, as well as making them aware they have the opportunity to seek professional advice helps.

However, it was the aspect of “needs” that concerned me. When Paula said she would accept a figure which was more than her immediate need (her debt that needed repaid soon) there was a request for her to consider if that was actually her need or would another figure (probably lower) be acceptable. That would clearly help the mediator get towards an agreement. But would it be fair? Does a mediator need to worry about “fair”?

I like the idea of mediation because it opens up a process that is more accessible than courts. It takes out the size of the wallet as being one of the deciding factors of an outcome as is often the case in court battles. But if we don’t consider fairness it does feel that, if you are needing the money, you are more likely to settle for a very small bird in the hand. If Paula didn’t have debt she wouldn’t feel so pressured to reduce her “wants”.

I think I am arguing myself to the position that it is the fully informed autonomous decision that is important and that mediator fairness (or at least the

mediator's view of fairness) should probably not be the concern. But I am not sure how comfortable I feel about that. Is it just a fact of life that the more "needy you are" the more likely you are settle for less? Can someone be a mediator when their instinct is to fight for the underdog?"

I replied:

"A great question and one with which many have wrestled over the years, not least those concerned with "justice". And those whose instinct is to fight for "underdogs".

Perhaps, if one's instinct is to fight for the "underdog", then one should be an advocate, not a mediator. That is unless one can somehow set that bias (for that is what it is) aside.

"Fairness" is an elusive concept. What seems "fair" to one may not seem "fair" to another. How do you decide? By making a judgment based on what you know. But what do you know?

Paula may have a "sugar daddy" in his Merc outside. She will not tell you. The organisation may have no money or may go out of business before the Tribunal hearing on Paula's claim. You may not be told.

In any decision, people take account of so many factors, conscious and unconscious. Apparent needs is one. If you test that out and, in particular, test out the BATNAS and WATNAS, what else can you do? Who are you to superimpose your judgement on that of Paula if she is fully capable of making a decision and as well informed as she can be? How would you feel if you said "that's not fair" and a deal wasn't done, and Paula was then assaulted by the drugs guy to whom she owes 10k and who won't be waiting till the Tribunal in x months time? It's not easy.

If handled well, mediation offers an opportunity for people to decide what they want to do in their own particular circumstances. And, yes, the more needy may actually get less in money terms on an objective view. But what is it worth to them? The widow's mite comes to mind. Paula's being "pressurised" is not because of mediation. It's because of her circumstances. Countless people in the court system win and lose because the judge is incompetent or their lawyer

didn't prepare well. How fair is that?

So, how can a mediator ever have a "view of fairness" that is anything other than subjective or at least largely irrelevant to the matter in hand?"

This is a provocation. Now, over to you all. Thoughts? Responses?