

Kluwer Mediation Blog

When mediation isn't mediation at all...

Sabine Walsh (Sabine Walsh Mediation) · Sunday, July 6th, 2014

At the risk of being accused of being too much of a purist, I just have to have a little grumble about the latest misappropriation of the term mediation. All involved in promoting and encouraging the use of mediation know how one of the largest barriers to people availing of this process is the lack of understanding of its key principles and how it really works. The fallout from Garth Brooks' plans to rock Dublin over five consecutive nights this month has, very publicly, confused the issue once again.

Mr. Brooks, in fairness, was not at fault here, merely deciding to bow to the begging of his fans and put on five shows in a row. These shows are (were) to be held in Dublin's largest stadium, Croke Park, a venue that can hold 80,000 people in the North inner city of Dublin. Croke Park is the home of, and run by Ireland's largest sporting institution, the Gaelic Athletic Association (GAA). As soon as these dates were announced, the local residents announced they would be objecting to the application to Dublin City Council for the licence for the event. This row has been brewing for some time, with residents of the areas around Croke Park complaining bitterly about the disruption, noise, antisocial behaviour and general upset that concerts cause, all of which is not helped by the fact that the locals were not consulted by the GAA about these shows in particular. It is worth noting that as a condition for the granting of planning permission for the stadium, an agreement from 2009 provided for the holding of a maximum of three such events per annum. So far this year there have been three One Direction concerts and an American Football match is also set to follow the Garth Brooks dates.

In response to this, in March of this year, the GAA called in Kieran Mulvey of the Labour Relations Commission, billed by the newspapers as "a top mediator" (even such a descriptions sits uneasily with me), and terms of reference for a "mediation" process were drawn up. Problem number one, from my perspective, emerged straight away, with the resident's association saying they had not been consulted (this is even noted in the mediator's report!) about the engagement of Mr. Mulvey and expressing concerns that "it is again a cosmetic exercise on the behalf of the GAA to win some sort of public relations campaign". The groups also complained about the terms of reference, stating that they "miss the point completely." The GAA, on the other hand, expressed complete confidence in Mr Mulvey and the process he would chair. So much for free and voluntary engagement in a mediation process...

The next issue goes straight to the heart of what we think the role of the mediator should be. As set out in the terms of reference, Mr. Mulvey was to prepare and publish a report on the mediation. This report however, was not a statement of terms of agreement or the outcome of mediation but in fact a series of recommendations, made by Mr. Mulvey based on the talks, including a cap on the number of concerts, a fund to be set up for residents and similar. While not binding, this quite detailed report was the outcome of the mediation process. What is telling though, is what happened

next. The GAA issued a statement emphasising its “wholehearted” engagement in the process and accepted the recommendations of the report, despite its financial implications. The residents’ comments on the report, on the other hand, confined themselves to expressing their disappointment with the report and confirming that if Dublin City Council granted the licence for the five concerts, the next move would be to apply for an injunction to top the concerts. In addition to this, a complaint was made to the police about the legality of the planning permission for the concerts.

The substantive issue is not what concerns me here, though having been to some fantastic concerts in Croke Park, and having seen the aftermath, I can empathise with both sides. My problem is that a process in which one party has engaged only reluctantly, where the person in charge has assessed the issue and recommendations, and reported on both those and the process itself, and those recommendations leave one side disappointed and turning to legal action has been called mediation. I should also say that at the time of posting this, Mr. Mulvey is being interviewed on the national radio station expressing opinions on everything from the engagement of the various parties, the role of Dublin City Council and the likelihood of “his” success, and also suggesting another solution. Confidential process?

Ireland’s draft Mediation Bill (still flying around government offices in a holding pattern but due before parliament later this year) defines mediation as “a facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute.” I can’t see the Croke Park process coming within that definition. I do of course acknowledge that there are many forms of mediation including directive and evaluative mediation, but this is not how mediation is generally defined and, more importantly, practised in Ireland. The hallmarks of “real” mediation, which make it what it is, namely for all sides to feel equally enfranchised, for them to be able to speak and agree in confidence, and for them to be the authors of their own agreement are what we say to potential users is what makes mediation work. By all means hold process like this, but call it non binding arbitration, or a facilitation, or a conciliation perhaps, but leave the term mediation for what is really mediation so people can be clear about what is involved.

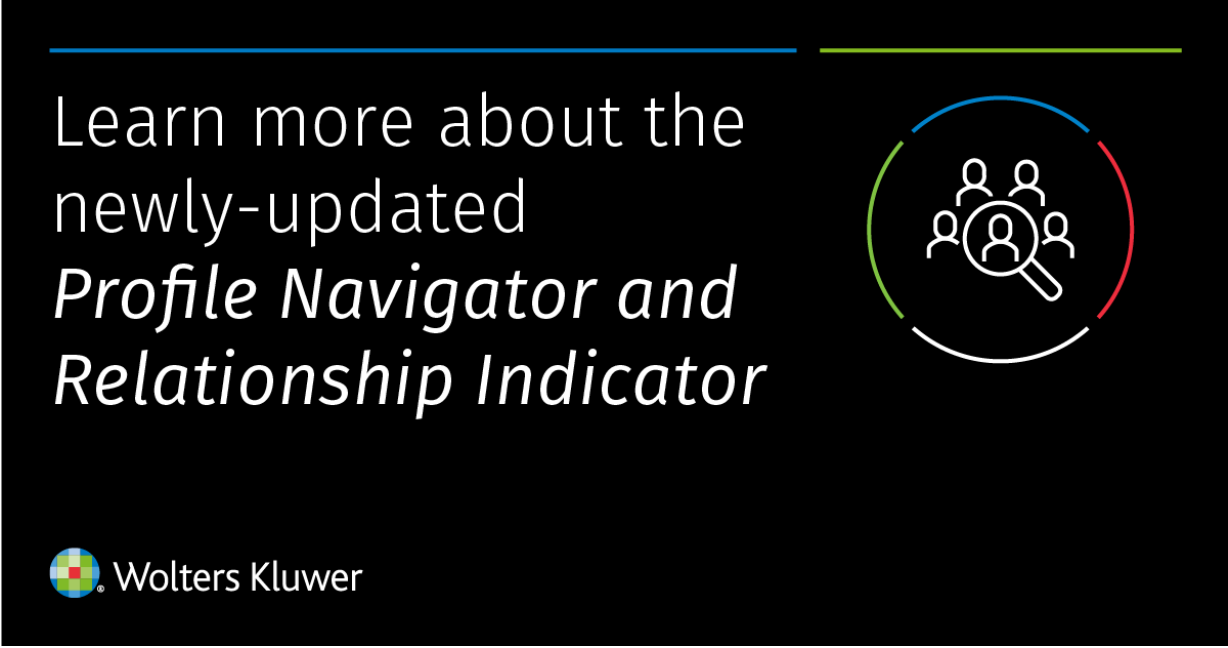
What happened next, you might ask? Was it successful despite it all? I’m not sure anyone, especially Garth’s fans would consider it so. Two days ago, Dublin City Council granted a licence for only three of the five concerts, meaning the other two have been cancelled unless an alternative venue can be found and licenced. The man himself, and his promoters have said they will either play all five dates on none at all. Dublin City Council said it based its decision to a large extent on the 373 submissions received from residents. The GAA has said the matter is “now out of its hands”. Ireland’s international reputation gets another knock and hoteliers and other people involved in the tourism industry express their frustration. And around the country and further afield Garth Brooks fans are crying into their Stetsons. A good outcome? I think not. I wonder what would have happened if they had gone to mediation?

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