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**The Secretariat
Post Office Mediation
Complaint Review Working Group**



Private & confidential

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Dear Secretariat

POST Office Mediation Complaint Review Scheme

In accordance with the requirements of the contract to provide the mediation service element of the Post Office Mediation Complaint Review Scheme I have conducted my first review of the process. The agreement was to undertake the first report after 15 cases had been mediated but considering the recent public interest in the scheme I thought it might be of assistance to provide the Working Group with an initial report at this time.

As the Working Group is not a party to the mediation agreement I cannot share with you specific information about each case. However, I have provided some anonymous feedback in this letter that has been taken from the mediator's reports submitted to CEDR. I have also given some feedback on how our experience with this scheme compares with the wider commercial and employment related mediation that CEDR conducts to provide some context.

Mediation Statistics

Since July 2014 CEDR has been referred 27 cases for mediation under the scheme. So far 11 mediations, using six different mediators, have taken place with a further two mediations booked to take place later this month. Five of the cases referred to CEDR have been withdrawn and 10 are currently being scheduled for mediation in March/April 2015.

Outcomes

Focusing on the 11 cases that have been mediated the outcomes are as follows:

Resolved:	5	Progressed:	1
Unresolved:	4	Active:	1



By way of explanation the term progressed refers to a mediation where the parties have not reached a resolution but progress has been made in crystallising the position of the respective parties. Having looked at the Mediators report on the mediation classified as progressed (by the mediator) it would appear that both sides left the mediation with a much better understanding of each other's position but it is also fair to say that resolution was not reached.

The active mediation relates to a recently held mediation where the parties are still engaged with the mediator in an on-going discussion at time of writing.

Obviously this is a very small sample of cases to go on so one can only speculate on how the outcomes will measure up once a larger number of cases have been undertaken. However, based on the cases so far the settlement rate of 45% is somewhat lower than the average settlement rate that we see across all the mediations that CEDR conducts. In an average year the settlement rate tends to range between was 65% and 75% with a further 10% to 15% of cases resulting in some progression.

Process Observations

Obviously there have been some expressions of dissatisfaction widely reported in the media about the wider Scheme so I have given some thought as to what I can tell the Working Group that may be of some assistance without breaking the confidential nature of the mediation process for individual matters.

There are a number of observations I can share as follows:

Subpostmasters' Expectations

On a number of the mediations that have taken place so far the subpostmaster has not fully comprehended the nature of mediation as a process. They have attended with the expectation that they are going into a compensation process rather than a facilitated dialogue with the Post Office in which claims made by either party do require some prior notification and explanation. It would appear that some applicants and/or their representatives consider the approval for mediation given by the Working Group does in some way indicate an acceptance of liability by the Post Office, which is not the case.

It has been noted that where a contractual relationship is still in effect, and where both parties would like it to continue, the mediation process has been more effective.

Mediator report extracts:

- *'I felt the claimants came thinking they were in a compensation scheme (i.e. a no fault scheme) whereas the POL on both cases took a legalistic stance, as they were entitled to, to say they will only pay compensation if they think there is a legal right to it.'*
- *'POL at considerable effort and expense attended a full day's mediation and made a reasonable settlement offer in the circumstances. [The subpostmasters] requests were not realistic and [the*



applicant] continued to believe was not guilty of false accounting, despite the weight of evidence'

- *[The subpostmasters] expectations set by the mediation scheme steering committee were that the mediation scheme was a compensation scheme'*

Clarity of Issues

Mediator reports have indicated that on at least two occasions the subpostmaster and/or their representatives raised claims that had not been disclosed before the mediation. Having spoken to all of the mediators used so far there is a consensus that perhaps some of the cases referred to mediation under the Scheme would not have made it to that stage within a litigation process given the uncertainty over the issues. It is, of course, understood that this Scheme has been set up to address specific circumstances.

Mediator report extracts:

- *Claim appeared to relate to alleged losses but on the day the termination of an agency agreement was apparently the key issue and this did not appear to have been articulated before.*
- *The basis and amount of ... claim was not clear. ... had not adduced any evidence in support of ... claim.'*

CEDR's experience

In more 'routine' mediation work we see the parties have established the scope of their differences well before the mediation day is fixed and both parties know exactly what they are in dispute about. In our experience new or previously unarticulated claims aired at the mediation for the first time invariably lead to an unsuccessful mediation or at best a much more difficult process.

Recommendations

1. More information provided to the subpostmaster prior to the mediation day in order assist them with understanding the nature of the mediation stage. CEDR can draft a one page crib sheet of key facts that can be added the information already provided if that is considered helpful.
2. I suggest that it is also likely that it would assist the Working Group in the assessment of cases for mediation, and indeed the mediator in resolving them, if the applicant has clearly set out their claim before the assessment of eligibility is undertaken.

Representation

So far, of the 11 cases mediated, one subpostmaster was not represented and five others elected to have a non-lawyer as representation. There are some indications that legal representation provides better support. On a number of mediations it would appear that the professionals engaged to represent the subpostmaster



who are not themselves legally qualified have not fully understood the mediation process and were not able to argue legal principles well.

The subpostmaster who elected not to seek representation was unable to represent their own interests at the mediation effectively in my opinion although it was reported that the Post Office representatives did adopt a very skilled and professional approach and did not seek to take advantage of the lack of representation which is typical of their collaborative approach on all cases mediated to date.

Mediator report extracts:

- *'The claimants had accountants assisting them. It would have been massively helpful if they had had expert legal advice instead to have set expectations and advised them on strengths and weaknesses.'*
- *'Part of the [non-legal] advisors presentation involved... voicing opinions on POL's business practices. It was not clear if POL was meant to respond to this'*
- *'The inability of the [non-legal representation] to argue legal principle meant the POL would not change their view regarding compensation.'*
- *'The mediation was characterised throughout by a good working relationship between the Parties and the Legal Representatives.'*
- *'... was very well represented by solicitor.'*
- *'The key turning point [making the lawyers] realise that compensation would not be payable and that [The subpostmaster's claim] had too many legal hurdles.'*
- *'from the outset the Parties [both legal represented] each sought to cooperate towards a mutually acceptable outcome'*

CEDR's experience

In the vast majority of mediations that CEDR administer both parties have legal representation and the ground work for setting the clients expectations has already been done before the mediation occurs. It is true that there are cases where individuals represent themselves, or are represented by people from outside the legal profession, who conduct themselves in mediation effectively but in most instances that is not the case.

We feel that the experience of unrepresented subpostmasters (there are more to come) may have implications for the reputation of the process should they chose to feedback their experience to others. It is a formidable experience to face without support.

Recommendation: We recommend that all applicants are strongly urged to seek legal advice and if at all possible legal representation at the mediations. Where subpostmasters chose not to have representation a



cooling off period could be implemented for them to determine if they wished to confirm a provisional settlement. This should assist the applicant in understanding the reality of the legal position, crystallise realistic expectations and give them the opportunity to consider any offer without the pressure of a mediation day timeline which can be very stressful.

Speed of Response

The Client Advisors who handle the cases at CEDR have reported that there have been some issues in terms of the time required by one or more participants to respond to requests for dates to mediate from time to time. This was a concern for me during the set up phase of the scheme as Post Office, not unreasonably, have a finite resource to deal with these cases. However, I believe it is the right course of action to keep the Post Office representation team limited to small number of people in order deal with the mediations most effectively. The cases tend to be released to CEDR in clusters which make it more difficult to find dates quickly.

Recommendation: Stagger the release of cases for mediation in order to avoid backlogs.

Case by Case Response Review

We have reviewed the timelines on all 27 cases referred to CEDR so far and have identified six cases that took longer to deal with than others.

Case 1: Applicant requested a hold on the mediation process pending correspondence with the Working Group. Further delays occurred after the case was reinstated when the applicant objected to holding the mediation at POL's Solicitors offices.

Case 2: Administrative error at CEDR resulted in a delay in passing on POL's availability to the applicant of 3-weeks by which time POL's availability had changed.

Case 3: POL was unable to provide dates for 3-weeks due to availability issues with the POL team.

Case 4: Applicant did not respond to suggested dates for 2-weeks. Once a date was identified it became apparent that none of the Scheme Mediators were available and further dates were proposed but it took 6-weeks from point of referral to fix a date that all parties could attend.

Case 5: Both POL and the applicant were unable to provide matching dates resulting in 2, 3 and a final 2 week timeframe to agree the date.

Case 6: POL was unable to provide dates for 3-weeks due to availability issues with the POL team.



Observations

Case 2 was an operational issue at CEDR which I would not expect to be repeated as it related to an increase in our general case numbers and two new members of staff have since joined the team. I do not believe that the other cases represent anything more than the anticipated difficulties in scheduling mediations when a limited number of individuals are involved on multiple cases at POL, the law firms representing multiple applicants and indeed the intentionally small mediator panel.

CEDR's experience

We often find that identifying a date that all concerned (including the mediator) can do is the most time consuming part of the mediation process so it is no surprise that some cases have taken a while to arrange. Only six cases have experienced delays which considering the limited pool of individuals concerned is not a cause for concern in my opinion.

Co-operation with Post Office

In my opinion the Post Office has been consistently responsive to CEDR's requests for dates and access to the case material via the Huddle platform, we have no complaints. In terms of the mediations themselves it is clear from the reports that the Post Office has approached each one with a willingness to explore the options, express empathy and have constructive dialogue with the subpostmasters.

Overall Conclusions

In terms of actual mediations it is risky to arrive at any definitive conclusions after such a small number has been conducted but it does appear likely that legal representation does greatly assist the subpostmaster. It is also clear that some subpostmasters have not fully understood the nature of the process and more should be done to assist them in this regard before proceeding to mediate.

It is my intention to submit another report updating the Working Group after 20 cases have been mediated which I expect will be in April or May 2015 and I remain willing and able to discuss the CEDR element of the scheme as required. CEDR's CEO, Dr Karl Mackie, has said to me that if the Working Group would find it useful to meet to discuss our observations he would be more than happy to attend.

Yours sincerely

GRO

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