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Mr Patrick Bourke
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Friday 31st July 2015

Dear Mr Bourke

POST Office Mediation Complaint Review Scheme – Review 2

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 second review of the process having first conducted a review in late February 2015. At the outset of our involvement in the Scheme we, along with the other stakeholders, felt that it was important to monitor and record the ongoing scheme so I have prepared this second review and we are content for Post Office to distribute copies of this review to other interested parties.

CEDR's role has not changed throughout the mediation phase of the Scheme, it remains to provide a panel of independent mediators who can mediate cases brought by applicants to the Scheme. We have not and do not review the applications nor do we take a view on the eligibility or otherwise of individual applications.

I have set out below some updated information to reflect all the mediations that have been undertaken by CEDR since the mediation phase began in July 2014; a brief explanation of mediation as a process (for readers unfamiliar with this form of Alternative Dispute Resolution); and some specific observations of our experience of the Scheme as reported by our case handlers and mediation panel members. I have also provided some anonymous feedback that has been taken from the confidential post mediation reports that the CEDR mediators' have submitted to CEDR. Finally, to provide some context I have also reviewed and restated some feedback on how our experience with this Scheme compares with the wider commercial and employment related mediation's that CEDR conducts.



Mediation Statistics

Since July 2014, CEDR has been referred 81 cases for mediation under the scheme. So far 20 mediations, using eight different mediators, have taken place with a further 3 mediations expected to take place in the next 8-weeks and another 34 awaiting confirmation of the mediation date.

Outcomes

Focusing on the 20 cases that have been mediated the outcomes are as follows:

Resolved:	8	40%
Progressed:	5	25%
Unresolved:	7	35%

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 mediator's reports on the mediations 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 number of mediations is still a relatively small sample of cases on which to make any firm conclusions 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 around 40% is somewhat lower than the average settlement rate that we see across all the mediations that CEDR conducts. In an average year our settlement rate tends to range between 65% and 75% with a further 10% to 15% of cases resulting in some progression towards final resolution.

Process Observations

It may be helpful in the context of a scheme review like this, to explain briefly how the mediation process works, its purpose and outcomes. Mediation is a process generally conducted by parties in dispute with assistance of an independent skilled neutral, with the aim of reaching a negotiated binding resolution of a dispute, if terms of settlement can be found that are acceptable to the parties to the dispute. Acceptability will turn on what each party thinks are their interests, and in the context of a potential legal case will also turn on parties' perceptions of their rights, as well as their sense of the other process and outcome options available if no settlement can be reached. Entry to the process can be on an ad hoc individual basis, by court direction, by contract, or under the terms of an industry or group scheme as in this Scheme. Most mediations take place within a day, after summaries of the case have been submitted in advance to the independent mediator. CEDR's general caseload covers a wide range of civil and



commercial disputes from commercial contractual claims through to administering the Court of Appeal mediation scheme. On average, some 65% to 75% of such mediations settle on the day, in any given year, even when the parties have been deadlocked before entering the process.

Mediation differs from arbitration or adjudication in that the mediator works with parties to help them find an acceptable agreement. The neutral does not make an award based on the arguments and evidence provided. Mediation can be more flexible than binding determination methods, both in how the process is run, and in terms of the remedies that may be available by agreement as against awards made under principles of law or evidence. (It is important here to note, that in situations of contested evidence such as exists in relation to the Scheme, adjudication or arbitration of individual cases may not be particularly consistent across cases nor satisfactory to at least one of the parties.)

The Scheme

I have given some thought as to what may be of some assistance in reporting on experience with this particular Scheme, 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 and they have also been influenced by the wider campaign asserting the failings of the Horizon system. They have, therefore, sometimes 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, explanation and evidential validation. It would appear that some applicants and/or their representatives consider the approval for mediation has indicated an acceptance of liability by the Post Office, but this is not the case.

It has been noted that where a continuing contractual relationship is still in place between subpostmasters and the Post Office, 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'*
- *'Mr ... had highly unrealistic expectations of compensation ... this was largely created by his adviser'*
- *'The Post Office should make clear that there is no guarantee that negotiations will arise or an offer will be made at the Mediation'*

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 and lack of evidence available. It is, of course, understood that this Scheme has been set up to address specific commercial 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 is that the parties have usually established the scope of their differences and their legal risks before the mediation day is fixed; both parties have clearly set out the issues between them; and both parties have been prepared for what to expect at the mediation. In our experience new or previously unarticulated claims or positions aired at the mediation for the first time invariably lead to a more difficult mediation, and less likelihood of success. Mediator reports in this Scheme suggest that subpostmaster expectations of entering a compensation dialogue are frequently at variance with the Post Office representatives' approach of seeking credible evidence to justify claims before seeing a need to make negotiation offers. In cases where this applies, the Scheme still leaves open the opportunity to use the process for airing of grievances, for explanation of procedures, and for non-monetary proposals of apology or acknowledgment of difficulties. However the mismatch of expectations in some cases can lead to some degree of disappointment amongst subpostmasters



entering the scheme which may ultimately influence negatively perceptions of the effectiveness of the Scheme.

Pre-mediation

In our first review we recommended that more information be provided to the subpostmaster prior to the mediation day in order assist them with understanding the nature of the mediation stage, and to set out the understanding that the Post Office will be only likely to respond to substantive evidence of claims or special personal circumstances. Since that report CEDR has updated the mediation procedure document that is provided to applicants.

Representation

In the early stages of the Scheme, one subpostmaster was not represented at mediation and several 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, nor are able to deal so well with some key legal principles being argued.

Mediator report extracts:

- *'The claimants had [non-lawyers] 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'*

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 that is not always the case.

We feel that the experience of unrepresented subpostmasters may have implications for the reputation of the process should they choose to feedback their experience to others. It is a formidable experience to face without support. Equally it is important for applicants to be aware in advance of the requirements being set by the Post Office for applicants to come with substantive evidence of issues faced by use of the Horizon system or in other respects where problems under the subpostmaster contracts have arisen.

Recommendation: We recommend that all applicants are strongly urged to seek/take legal advice and if at all possible legal representation at the mediations. Where subpostmasters choose not to have representation a cooling off period could be implemented for them to determine if they wished to confirm a provisional resolution. 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.

CEDR's experience is that 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, however, have experienced delays of note and for a variety of reasons. Considering the limited pool of individuals concerned this 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 and we have no complaints. In terms of the mediations themselves it is clear from the reports that the Post Office has a willingness to explore the options, express empathy and have constructive dialogue with the subpostmasters. However, the Post Office have also made clear that their approach to mediation requires applicants to bring 'credible' specific claims or information of special personal circumstances justifying a negotiated resolution, rather than negotiations premised on alleged general problems of the Horizon system or of the Post Office contractual arrangement as such.



Overall Conclusions

Mediation remains a useful process within which individuals can engage with the Post Office in confidential discussions concerning a sensitive and controversial set of circumstances, and it has led to practical agreed outcomes in almost half of the cases so far conducted. I have noted the importance of managing expectations of subpostmasters entering the scheme. It is clear that more should be done to assist subpostmasters to understand the nature of the process in this regard before proceeding to mediate. It is especially important to make applicants aware that mediated negotiations under the scheme are focused on claims around specific personal circumstances and not set up to offer compensation for general allegations of perceived Post Office failures. Equally, our mediator reports suggest that it does appear likely that legal representation does greatly assist the subpostmaster in individual cases, and we support this element of the Scheme.

I remain willing and able to discuss any of these issues in greater depth as appropriate, and as greater experience arises from further case referrals.

Yours sincerely

GRO

John Munton

Director of Dispute Resolution Services