

## **Initial Complaint Review and Mediation Scheme**

### **Test for mediation - Post Office submission**

The Working Group chair has invited Post Office to make a submission, by reference to relevant documentation, on the test to be applied to decide whether an application in the Scheme is recommended for mediation.

#### **Current test**

*"On the assumption that both parties will approach mediation in a genuine attempt to reconcile their differences, is it reasonably likely that mediation will lead to an agreed resolution of the issues."*

#### **Proposed new test**

JFSA has proposed that cases should proceed to mediation where mediation would allow the Applicant an opportunity to express their concerns to Post Office.

#### **Submission**

This submission sets out extracts from documents that are relevant to determining whether the proposed new test should be adopted in place of the current test. For ease of reference, the extracts are grouped by reference to the reasons advanced by Post Office in favour of maintaining the current test.

Although there is no historic document explicitly setting out the test which will be applied in determining which cases should be recommended for mediation, the documents referenced in this submission support the proposition that the current test is the correct one.

This submission does not address the separate but closely related question of who should apply the test: the Working Group or Second Sight. It is understood that JFSA will shortly be submitting a separate paper on the question of the Working Group's role in

deciding which cases proceed to mediation. Post Office will respond to that issue once it has had sight of JFSA's paper.<sup>1</sup>

## 1. The test should filter cases

The Scheme envisaged that some cases would not proceed to mediation and therefore it is acceptable to design a test that filters out some cases. It also envisaged that some degree of judgment would be exercised over the progress of individual cases through the Scheme.

On the assumption that there would be some filtering of cases at the mediation stage, Post Office and the Working Group have not objected to any case entering the Scheme (save where the case clearly did not meet the eligibility criteria eg. the applicant was an employee of a subpostmaster rather than a subpostmaster or crown employee).

The proposed new test would result in all cases proceeding to mediation, with the effect that cases would proceed through the Scheme without any exercise of judgment or control by anyone.

The following extracts support the proposition that the test for mediation may result in some cases not proceeding to mediation.

### Case Review Mediation Pack<sup>2</sup> - Page 2, The Scheme - paragraph 5

*"The Working Group's role is to ensure the Scheme is run in a fair and efficient manner. It will also be involved in making decisions on how particular cases should be managed through the Scheme."*<sup>3</sup>

*"As a result of this investigation, Second Sight will produce a Case Review summarising its findings and a recommendation on whether the case is suitable for mediation."*

---

<sup>1</sup> JFSA's submission also highlights extracts from documents and makes comments that are not related to the question of whether a case should proceed to mediation (eg. it refers to the scope of Second Sight's reports). As those issues are outside the scope of this submission, they are not commented on below.

<sup>2</sup> The Case Review Mediation Pack was and remains publicly available to download from the JFSA website and was the initial documentation sent to potential applicants about the Scheme.

<sup>3</sup> In its submission, JFSA has commented that the phrase "*particular cases*" means that only some cases should be managed through the Scheme. This phrase is in fact a reference to the notion that all cases will be managed on case by case basis depending on their individual circumstances.

Case Review Mediation Pack – Page 8 – FAQs

*"Will my case definitely be referred to mediation?"*

*[...] the Working Group may consider that some cases are not suitable for mediation. For example, if there is insufficient information about a case or the case is not one requiring resolution."*

Working Group Terms of Reference<sup>4</sup>

Role of the Working Group

*"4.4 To review at each stage Applicants' cases that may not be suitable for the Scheme and to decide whether and/or how those cases may proceed."*

JFSA letter to the Minister for Postal Affairs dated 16 April 2014 – 5<sup>th</sup> bullet

*"You will probably be aware that the way the Scheme was meant to work was as follows:-*

*[...]*

*The completed 2<sup>nd</sup> Sight Case Review Report, together with their conclusion and recommendation about the case would then be returned to the WG for either approval of the case being sent to CEDR, the Case Resolution and Dispute Resolution [sic] organisation appointed to run the Mediation process, or for its outcome to be discussed further by the WG"*

**2. The objective of mediation is to seek resolution**

Mediation is a process of finding solutions. It is therefore not appropriate for cases where the possibility of a resolution is unlikely. The proposed new test does not reflect the nature and intention of mediation.

The following extracts support the proposition that the test for mediation should have the objective of delivering resolutions where possible rather than being just a forum for discussion.

---

<sup>4</sup> The Working Group Terms of Reference have been approved by all members of the Working Group.

Case Review Mediation Pack - Page 8 - FAQs

"What is mediation?

*In essence, mediation is a face-to-face discussion between two parties. The discussion is chaired by a neutral and independent mediator.*

*The purpose of mediation is to give each side the opportunity to explain their position. The mediator will then discuss matters with both parties, sometimes together in the same room, sometimes privately with each party.*

*The mediator's role is to help the parties find common ground. Where common ground cannot be reached, **the mediator will help the parties identify their differences and then try to find a resolution to those differences.*** [emphasis added].

Working Group Terms of Reference

*"3.1 The Scheme's overall objective is to try to achieve the mutual and final resolution of an Applicant's concerns about Horizon and any associated issues (including any related monetary claims)."*

### **3. Efficient use of resources**

The Scheme funding arrangements are split into two phases so to reflect the fact that some cases would not proceed to mediation. The Working Group is also charged with managing scarce Scheme resources given that the Scheme is funded from the public purse. It is therefore appropriate that the test for mediation reflects the need to avoid incurring costs for little / no benefit. Any departure from this principle would need to be escalated through the appropriate governance channels at Post Office.

The following extracts support the proposition that the test for mediation should take into account the cost of mediating cases:

Working Group Terms of Reference

Objectives of the Scheme



*"3.7 The Scheme will be funded predominantly by Post Office and must therefore ensure value for money for taxpayers."*

Role of the Working Group

*"4.6 To manage the administration of the Scheme so as to ensure that the Scheme's processes and procedures are offering value for money for taxpayers..."*

Case Review Mediation Pack - Page 4 - Support for subpostmasters

*"Post Office will provide a financial contribution of:*

- up to £1,500 + VAT towards the reasonable costs of a professional advisor assisting a Subpostmaster during Second Sight's investigation (ie. gathering information, completing the Case Questionnaire, responding to Second Sight's questions, etc.)*
- up to £750 + VAT towards costs of a professional advisor in preparing for and attending a half-day mediation or up to £1,250 + VAT for a full day mediation."*

#### **4. Merits of the case**

The Scheme envisaged that some cases would lack sufficient merit or information to proceed to mediation. The current test reflects these factors whereas as the proposed new test does not.

The following extracts support the proposition that the test for mediation should consider the merit of particular cases.

Case Review Mediation Pack - Page 5 - FAQs

*"My case is very old. Can I still mediate it?"*

*Post Office's records only date back seven years and therefore it may be more difficult to investigate very old cases unless you are able to provide information and documents.*

*If your case is very old, you may still submit it to Second Sight for consideration. **However it may be decided by the Working Group that your case is not suitable for investigation or mediation.*** [emphasis added]

Case Review Mediation Pack - Page 7 - FAQs

*"Will my case definitely get investigated by Second Sight?*

*[...]*

*If there is insufficient information for Second Sight to investigate a case, the case may not be investigated or may not proceed to mediation."*

Working Group Terms of Reference

Role of the Working Group

*"4.9 It is not the role of the Working Group to collectively render any opinion on the merits and/or settlement of any Applicant's complaint. However, **the Working Group may consider the merits of any Applicant's complaint** in order to administer the progress of that complaint through the Scheme."* [emphasis added]

## **5. Alternatives to mediation**

It was envisaged that some cases could be considered through more appropriate alternative routes, such as direct contact between an Applicant and Post Office. Although the current test may result in a case not proceeding to mediation, this does not leave the Applicant with no route to resolution.

The following extracts support the proposition that the test for mediation should promote alternative options other than mediation where appropriate.

Case Review Mediation Pack - Page 2, The Scheme - paragraph 6

*"...Post Office may contact a Subpostmaster directly to discuss the Case Review and to seek closure of any outstanding issues. If a solution cannot be reached directly between Post Office and the Subpostmaster, both parties **may** then be invited to attend mediation..."* [emphasis added]

Case Review Mediation Pack - Page 8 - FAQs

*"Will my case definitely be referred to mediation?*

*[...]once Second Sight has submitted its findings, Post Office may contact you to discuss your case and to seek a resolution without needing to attend mediation.*

*If your case is not referred to mediation, then you may still pursue other methods of resolution such as by bringing a claim through the Courts."*

#### Working Group Terms of Reference

##### Objectives of the Scheme

*"3.3 Where appropriate, the Scheme must offer a reasonable forum, by way of mediation **or through direct discussions**, for an Applicant and Post Office to seek a resolution of that Applicant's legitimate concerns." [emphasis added]*

#### **6. Hearing an Applicant's complaint**

JFSA has advocated all cases going to mediation on the grounds that Applicants should have an opportunity to present their complaint to Post Office. However, the investigation phase of the Scheme already provides this opportunity to Applicants without the need for all cases to go to mediation.

The following extract supports the proposition that the need for Applicants to be heard has already been satisfied by the investigation phase of the Scheme.

#### Case Review Mediation Pack - Page 2, The Scheme

*"The starting point for the Scheme is for Subpostmasters to submit details of their case to Second Sight as part of an initial application process. Second Sight, in collaboration with the Working Group, will recommend whether the case should be investigated.*

*Second Sight will then work with each Subpostmaster and Post Office to gather information about and investigate that case. The Subpostmaster will be sent a Case Questionnaire setting out requests for more detailed information. Post Office will also provide additional information from its own records."*

#### **7. Distress to Applicants**

The Scheme recognises that mediation will be unfamiliar for Applicants. Indeed, some Applicants have suggested that interacting with Post Office can be emotionally difficult.

It would be unconscionable for a case to be put forward for mediation knowing that the prospects of a resolution are minimal. It may cause greater emotional distress for Applicants to be sat in a room with Post Office, with an expectation that comes with mediation that their case is to be resolved, when in fact that will not happen.

The following extracts support the proposition that the test for mediation should take into account that a futile mediation may cause more harm than good to Applicants.

Case Review Mediation Pack - Page 4

*"Post Office recognises that mediation will be unfamiliar to many Subpostmasters. It is therefore prepared to make a financial contribution towards the reasonable costs of a professional advisor (such as a lawyer or an accountant) supporting a Subpostmaster through the Scheme."*

WG Minutes of Meeting on 30 January 2014

*"Alan bates raised an issue with the Working Group correspondence issuing on Post Office headed paper. Alan explained that this was causing applicants distress and he asked if it would be possible to send on a plain Working Group header in future. This was agreed."*

**8. The proposed new test is inappropriate for criminal cases**

Adopting the proposed new test would result in cases where an Applicant has pleaded guilty or been found guilty of a criminal offence proceeding to mediation. Where there is no evidence to suggest that that conviction is unsafe, it would be inappropriate to put those cases through mediation being a process premised on the assumption that there are genuine points to be disputed and resolved.

Simply putting such cases through mediation raises the question of whether there are questions to resolve, which in turn risks the safety of what otherwise would be valid convictions.

By contrast, the Scheme envisaged that such cases would be most appropriately dealt with through the criminal courts.

The following extracts support the proposition that the test for mediation should take into account whether an Applicant has been convicted.

Parliamentary Debate on Horizon - Hansard - 9 July 2013 :  
Column 200

*"Parliamentary Under-Secretary of State for Business,  
Innovation and Skills (Jo Swinson):*

*[...]*

*On convictions, it is up to individuals to go through the usual judicial processes if they are concerned about the safety of a conviction, and that can be done through the Court of Appeal. Clearly, if any evidence were to come to light that had an impact on the safety of convictions—I stress that that has not happened as a result of this interim report—Post Office Ltd would have a duty to look further at those issues as a prosecuting authority to ensure that convictions remain safe."*

Case Review Mediation Pack - Page 2, The Scheme

*"What if my case involves a completed criminal prosecution or conviction?*

*You may put your case through the Scheme even if you have already received a Police caution or have been subject to a criminal prosecution or conviction.*

*However, Post Office does not have the power to reverse or overturn any criminal conviction - only the Criminal Courts have this power.*

*If at any stage during the Scheme, new information comes to light that might reasonably be considered capable of undermining the case for a prosecution or of assisting the case for the defence, Post Office has a duty to notify you and your defence lawyers. You may then choose whether to use that new information to appeal your conviction or sentence."*



#### **9. No public commitment to the proposed new test**

Neither Post Office nor the Working Group have ever committed to the new test proposed by JFSA (or any similar such test). In particular, there is nothing supporting the new proposed test in any of the following documents:

- Mediation Scheme Briefing Pack
- Working Group Terms of Reference
- Letters to Applicants
- Parliamentary debates on Horizon
- Post Office press releases

#### **10. The current test is already approved and proven to be workable**

The current test was debated at the Working Group meeting on 16 June 2014 at which time members of the Working Group unanimously agreed to the current test. That test was then implemented in the case of M054 and proven to be workable.

##### WG Minutes of Meeting on 16 June 2014

"3.2 *It being apparent that the matter of whether the Working Group should recommend M054 for mediation might proceed to a vote, the Working Group agreed the test the Chair should consider if called upon to use his casting vote as:*

- *'On the assumption that both parties approach mediation in a genuine attempt to reconcile their differences. Is it reasonably likely that the parties will reach an agreed resolution of their issues.'*

3.3 *The Working Group then moved to a vote on whether case M054 should be recommended for mediation."*

## Appendix

Below are extracts from *Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576*. This is the leading case on when it is reasonable to refuse to mediate a civil dispute. Although this judgment is not directly applicable to the Scheme, the points below provide a useful insight to the factors considered by the Courts when deciding whether a case should or should not be mediated. A number of these factors are analogous with issues currently faced in the Scheme.

Dyson LJ:

- "10. *If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR<sup>5</sup>, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.*"
- "18. *The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR. If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful.*"
- "21. *[Cost] is a factor of particular importance where, on a realistic assessment, the sums at stake in the litigation are comparatively small. A mediation can sometimes be at least as expensive as a day in court. The parties will often have legal representation before the mediator, and the mediator's fees will usually be borne equally by the parties regardless of the outcome (although the costs of*

---

<sup>5</sup> ADR - Alternative Dispute Resolution the leading form of which is mediation.

*a mediation may be the subject of a costs order by the court after a trial). Since the prospects of a successful mediation cannot be predicted with confidence (see further para 27 below), the possibility of the ultimately successful party being required to incur the costs of an abortive mediation is a relevant factor that may be taken into account in deciding whether the successful party acted unreasonably in refusing to agree to ADR."*

*"28. [...]The question whether there was a reasonable prospect that a mediation would have been successful is but one of a number of potentially relevant factors which may need to be considered in determining [whether it is reasonable to mediate]. [...]"*