

JUDGMENT : MR JUSTICE MITTING: Commercial Court. 15th January 2008

1. The Vibrations White Finger Scheme has now entered its run off phase. The aspirational end date, originally October last year, has been extended to the end of March this year. It may have to be modestly extended again but on any view we are nearing the end date of this Scheme.
2. As long anticipated there remain a number, as yet not finally ascertained, of individual cases which have not been dealt with to the satisfaction of individual claimants under the Scheme. The discussion which has taken place this morning and this afternoon has focused upon how those individual cases should be dealt with under the terms of the Scheme and pursuant to my powers under the CPR.
3. The basic question which underlies the discussion is whether or not an individual claimant, dissatisfied with the decision of Capita in respect of whom no other avenue is open under the scheme, can bring his claim for determination before me or before a judge nominated by me to have it determined on its merits.
4. The issue before me concerns, in particular, services costs claims, awards to individuals on a standard basis who, as a result of their exposure to Vibration White Finger, find themselves unable to perform routine domestic and similar tasks. I anticipate that most if not all of the remaining individual disputes fall under that category.
5. Paragraph 7.3 of the Agreement makes provision for damages for services costs which are to be paid as provided in Schedule 7.1. 7.1 provides a detailed and, subject to disputes resolution procedures, self-contained scheme for dealing with services costs claims.
6. If not resolved to the satisfaction of the claimant the disputes procedure provided for in Schedule 13.1 applies. It is necessary for me to set out the terms of the relevant paragraphs .
 - "1. *The parties anticipate that the majority of the minor disputes that arise in individual claims, whether of evidence or of interpretation of this arrangement, will be resolved between the claimant's representative (now Capita) ... via the agreed escalation process at Schedule 13.1(1). The parties also recognise that some disputes may include issues that relate to all or a number of claims. In such circumstances the parties will formally identify those issues as requiring resolution between the (CSG) and (DBERR) ... and thereupon the provisions provides for the resolution of disputes in individual cases will be suspended save that any party may give notice to the others that the issue or issues so identified should proceed as individual disputes.*
 - "3. *Initially, issues arising in relation to matters other than medical evidence should be addressed as follows:*
 - "3.1 *Where the matter in issue relates to an individual claim then the matter in the first instance should be referred to a senior (Capita) employee ... who will try to resolve the dispute directly with a partner or other fee-earner ... nominated by the claimant's representative. In the event of the matter remaining unresolved within 28 days of the reference, unless otherwise agreed, the claim may be referred to the disputes procedure by either party by service of a notice of dispute in the form of a notice at Schedule 13.2."*
7. The disputes procedure is set out in paragraph 4, which provides:

"Following service of notice of dispute, the dispute will be addressed in accordance with the following procedure.

 - "4.1 *any notice of dispute shall be addressed to the technical claims manager at Capita or the nominated representative of the claimant's representative or the nominated representative of other defendants where relevant.*
 - "4.2. *Other than provided for by paragraphs 4.3 and 5 should any dispute remain unresolved 28 days after receipt of the notice of dispute unless otherwise agreed, the claim may be treated as rejected, leaving the claimant free to pursue proceedings outside this Agreement.*
 - "4.3. *Following receipt of a notice of dispute the receiving party shall confirm whether or not there is scope for resolution of the matter in issue within 14 days and if so the parties will by any means they agree to seek to resolve the issue within a further 14 days. In the receiving party either (a) gives notice that there is no issue for resolution, or (b) fails to respond within 14 days, or (c) if Agreement is not achieved within the 14-day period or such long a period as may be agreed following the giving of the notice, then the claim shall be deemed rejected, leaving the claimants free to pursue court proceedings outside this arrangement if so advised."*
8. Paragraph 5 provides:

"Any dispute falling to be dealt with under paragraph 3.1, individual cases not resolved between (Capita) and the claimant's representative ... may with the consent of the (DEBRR) and the (CSG) be submitted to mediation by an accredited mediator nominated by the agreed mediation service provider."
9. The paragraph as drafted contains in brackets the words "not to be unreasonably withheld", after consent. Although never formally accepted by the Department, Mr Walker states the Department's position, which is that it accepts that its consent must not be unreasonably withheld and will submit to an interpretation of the Agreement that treats that as a contractual provision.
10. Thus, in relation to individual disputes there is a self-contained and complete disputes resolution procedure. I have already dealt with this in a judgment which I gave on 2nd May 2007 and I need not repeat what I said there. In the event that the invocation of the disputes procedure does not produce an outcome acceptable to the parties and to an individual claimant, the claimant, or for that matter the Department, have the right to refer the dispute to mediation. That right applies in the case of individual disputes. One of the issues which I have to determine today is what are the circumstances in which the Department's withholding of consent to mediation in an individual dispute might be considered unreasonable.

11. Paragraph 3.2 of Schedule 13.1 contains a separate and free-standing disputes resolution procedure. It provides:
"Where disputes arise raising issues that effect or may affect a group of claims, the (DEBRR) and the (CSG) ... will, as provided for in paragraph 1, seek to resolve those issues directly outwith this disputes procedure and may refer the matter or matters either for mediation in accordance with paragraph 5 or to the High Court judge nominated to oversee the litigation. Individual cases that are in dispute can also be resolved in this way if such a dispute arises. The claimant's representative and (Capita) ... shall respectively notify the (CSG) and the (DEBRR) ... forthwith."
12. Mr Allan for the CSG, in this respect advancing arguments for the benefit of individual claimants, contends first, that in a number of cases the Department has unreasonably withheld its consent to mediation; and secondly, that in the final analysis, provided the dispute is referred by the CSG, an individual's claim under this Agreement can be referred to me as the supervising judge to be resolved, not merely as to whether or not procedures have been properly followed in his case but also as to whether or not he is under the terms of the Agreement entitled to the specific head of claim, in particular service costs damages, which he seeks.
13. Mr Walker submits that paragraph 3.2 of schedule 13(1) applies only to generic disputes and that, if Mr Allan is right in his construction of paragraph 3.2, the elaborate and detailed provision that had been made over the years by me and my predecessor for cut-off dates for the resolution of individual disputes by very many claimants will be simply overridden and in effect replaced by a new and inconvenient procedure. He raises the prospect of hundreds or even thousands of claims being dealt with on their individual merits by me or by judges nominated by me, a prospect which, self-evidently, would defeat one of the purposes of the agreement.
14. As I construe the agreement, I think that Mr Walker's argument is essentially correct. Very detailed provisions are made for dealing with individual claims. A disputes procedure is provided for dealing with individual disputes, which includes, expressly, mediation.
15. Paragraph 4 provides that in the event that an individual dispute is not resolved, then the individual claimant's remedy is to pursue court proceedings outside the arrangement. Those provisions in my view provide a self-contained and complete code for dealing with individual disputes, which raise no question outside their own terms. I will turn later on in this judgment to the effect that that has on the approach the Department should take to requests for mediation in individual disputes.
16. If that interpretation is not right, then I accept Mr Walker's argument that paragraph 3.2 could be used in effect to override the detailed provisions of the agreement in relation to individual claimants, and the many and detailed orders that have been made to ensure the orderly management of this arrangement in the past.
17. I reach that view both as a matter of construction, of paragraph 3.2, and in the exercise of the broader powers of case management which I have under the CPR. First, as a matter of construction, paragraph 3.2 deals only with disputes "outwith" the disputes procedure, which may be referred to me by the Department or the CSG. In the nature of things, such disputes are, as they have been historically, only likely to be those which potentially affect a significant number of individual claimants. In the past they have all been of that kind; none have required me or my predecessor to enquire into the merits of an individual claim.
18. Although it is theoretically open to the CSG to refer an individual claim to me, it would be doing so not as the culmination of, let alone as part of, a disputes procedure applicable to an individual case, but entirely separate from it. So much is clear from the concluding words of paragraph 1 of schedule 13(1), which provide for disputes in individual cases, which affect a large number, to be referred to me, subject to the right of any party to give notice that the issue should proceed as an individual dispute. No such notice could be given when the individual disputes procedure had already been exhausted. That provision, like the words of paragraph 3.2 other than the sentence beginning "individual cases", demonstrate the purpose of paragraph 3.2: to permit me as supervising judge to resolve generic issues.
19. The parties who have subscribed to this immensely detailed agreement cannot be taken as a matter of construction to have agreed that their provisions can be dispensed with in individual cases and replaced by individual determination by me or by a judge nominated by me. The remedy for a disappointed claimant is that which is provided for in paragraph 4 of schedule 13(1), the pursuit of his common law claim.
20. I go on to consider whether, in the exercise of my powers under the CPR, I should nonetheless determine individual claims on their individual merits. Mr Allan submits that I should, and there is every advantage to an individual claimant that I should. It is common ground that it would be easier for an individual claimant to establish an entitlement to a significant sum by way of compensation for services costs under the agreement than at common law. Under the agreement, compensation is standardised and depends upon a number of standard assumptions. The burden of proving that those assumptions do not apply in routine circumstances shifts to the Department. At common law, an individual claimant must prove an individual loss and prove that it arises as a result of a breach of duty by those for whose actions the Department is responsible.
21. I am, however, concerned not only with the advantage which an individual claimant may have under the arrangement, but also with the orderly winding down of the scheme, and ultimately with taxpayers' money. Further, I have to have regard to the resources that would have to be devoted by the court to the resolution of individual claims. In principle, there is little difference in terms of cost and absorption of court time in requiring an individual claimant to prove his entitlement under the handling arrangement and requiring him to prove his claim

at common law. The outcome might be different for reasons that I have just indicated, but in terms of the cost of the exercise and the number of individual cases that might have to be pursued, there is little difference. Accordingly, from that point of view, there is no great advantage in resolving whatever number of individual claims remain within the agreement rather than by ordinary litigation in the County Court.

22. Accordingly, both as a matter of construction and reflecting upon my broader powers, I am unpersuaded that I or a judge nominated by me can or should determine individual claims on their individual merits.
23. What impact does that have on the provision for mediation? It places, on any view, a greater burden upon mediation as a means of resolving individual disputes. It is the last step which can be taken within the agreement to resolve individual disputes arising under it. If there had been some other means of resolving disputes, for example by a litigation type hearing, then the attitude of the Department of refusing to agree to mediation when its view is that the claim is suspect and requires to be tested by cross-examination, would be entirely understandable. There would be no purpose in having what would amount to two sets of procedures to resolve one issue. But now that mediation remains the only method of resolving individual disputes under the agreement once the other parts of the disputes procedure have been exhausted, then in my view the Department must adopt a far more liberal attitude to the reference of individual disputes to mediation.
24. I take as a paradigm case the case of Nicholson, first because it seems to me to contain elements from which lessons can be drawn, and secondly because it is the only one which I have studied in detail. I do not propose to set out the whole history of the matter. In the broadest of detail, he made a claim for services costs in January 2001, following upon a diagnosis that he qualified, subject to factors which subsequently led Capita to reject his claim. He worked after leaving the mining industry in jobs which, when first referred to, suggested that he may for a time have used small tools, a claim arguably inconsistent with his services costs claim, of which the premise was that he could not use such tools. He worked for three different employers. One of the employers, for whom he worked for approximately ten years after 1993, was Premdor. Documentary evidence obtained from Premdor suggested that he had, for about a year, worked on a production line which required him to make repeated use of tools. That assertion was made by a Mr Burke in a letter. There was no suggestion that it was made in anything other than good faith.
25. Mr Nicholson disputed it, saying that Mr Burke did not in fact work for Premdor at the time that he did. Mr Burke has subsequently acknowledged that the assertion that he worked with tools was mistaken. Nevertheless, Capita, who had rejected Mr Nicholson's claim primarily on that ground, continued to maintain its rejection on the ground of other inconsistencies in the statements made by him or on his behalf over the years.
26. This is not a claim which is capable of being fairly resolved just by looking at documents. Some sort of discussion, of debate, of mediated negotiation, is in my view required fairly to deal with it. The Department has maintained its refusal based on Capita's findings: that, because of the inconsistencies in the claim, they can only be properly resolved by cross-examination. In other words, Mr Nicholson's claim must, if it is to be pursued, be pursued outside the agreement by common law litigation.
27. That stance requires him to abandon the advantages, which I have already identified, to him of bringing his claim under the agreement. It is in my view unreasonable for the Department to deprive him of the only means by which he can pursue that aim, mediation, by continuing to withhold consent to it.
28. One should not make too much of personal experience in dealing with these issues but, for what it is worth, I have personal knowledge of a claim in which the good faith of the parties was in issue; it was nevertheless resolved to their satisfaction by mediation. Mediation is a flexible dispute resolution tool. It is capable of resolving even those claims, like Mr Nicholson's, where the consistency of the claimant's account is in issue. Accordingly, in his case and, for that matter, in cases such as his, the Department would, in my opinion, not be acting reasonably if it were to withhold consent to mediation.
29. In his case, no question arises but that his request for mediation was made within time. By paragraph 6 of an order of 8th July 2006, time limits were imposed upon the reference of individual disputes to mediation: within six months of the decision finally rejecting a claim, or by 28th February 2006, whichever the later.
30. The next issue which arises is whether or not that cut-off provision should be amended. Mr Allan submits that it should be, so as to permit those claimants who have not made requests for mediation within the time limit provided to do so within a short time limit imposed today. I do not accept that. The time limit was perfectly clear; it expressly provided for mediation. If individuals or their representatives were not alert to the possibility of pursuing an individual dispute by mediation, they should have been. The terms of paragraph 5 of schedule 13(1), which must be known to all of those who undertake claims of this nature, are unambiguous. There is no good reason why those claims which have been allowed to lapse by effluxion of time should be revived within the agreement. Those who have allowed them to lapse have the perhaps unenviable choice of leaving things as they are or bringing a claim at common law in the courts.

Mr D Allan QC and Mr C Carling (instructed by Irwin Mitchell) appeared on behalf of the Claimant.
Mr R Walker QC and Miss C Foster (instructed by Nabarro) appeared on behalf of the Defendant.