

IN THE MATTER OF THE INQUIRIES ACT 2005
AND IN THE MATTER OF THE INQUIRY RULES 2006

THE POST OFFICE HORIZON IT INQUIRY

**WRITTEN SUBMISSIONS ON COMPENSATION
ON BEHALF OF
THE DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**

Introduction

1. On 9 May 2022 the Inquiry published the Chair’s provisional view on compensation for prosecuted subpostmasters, subpostmistresses, managers and assistants (“SPMs”) and announced that there would be hearings on compensation issues in July. The following day, 10 May, the Chair invited Core Participants to provide written submissions addressing twelve specific matters by 31 May 2022.
2. The Department for Business, Energy and Industrial Strategy (“the Department”) is grateful for this opportunity and hopes that these submissions are of assistance in addressing this extremely important issue.
3. The Department begins by setting out some general comments and observations, which it is hoped provide some useful context, before responding to each of the twelve issues identified by the Chair. The Department stands ready to assist the Inquiry in whatever ways it can.

General Comments and Observations

The Department’s objectives and the balance between fair compensation and speed

4. The Department’s objective, as set out in the ministerial announcements of 21 July 2021, 14 December 2021 and 22 March 2022, is that all affected SPMs should quickly receive full and fair compensation.

5. Departmental officials have been working hard to achieve this, in consultation and cooperation with representatives of SPMs, Post Office Limited (“POL”) and UKGI. They continue to do so. However, the Department is well aware that despite these efforts there have been delays in the process, particularly in the early stages of the Historical Shortfall Scheme (“HSS”), and recognises the impact that this has had on those affected. This is a matter of serious regret. The Department is doing all it can to avoid any further periods of delay.
6. The Department remains of the view that its objective of ensuring that all affected SPMs should quickly receive full and fair compensation is undoubtedly the right one. At the same time, it is clear that in practice there is a potential for tension between on the one hand ensuring that compensation is full and fair, and on the other hand providing it at speed.
7. There has been an attempt to balance these competing factors, and achieve both fairness and speed wherever possible. However, the Department has taken the view that the most important thing is that compensation should be full and fair, even if this means that in some cases that compensation is not paid as quickly as everyone would wish. It considers this to be the right approach.
8. For this reason, whilst the Department agrees that the HSS is a ‘remediation scheme’ which has tried to incorporate some elements of a general principles or criteria approach (see paragraph 11 of the Chair’s provisional view), it also necessarily incorporates a large degree of individualised case-specific consideration, particularly in more complex cases, in order to achieve full and fair compensation.

Compensation for SPMs whose convictions have been or will be overturned

9. At paragraphs 13-14 of his provisional view the Chair raised an issue as to why no formal remediation scheme has been constituted for SPMs whose convictions have been or will be overturned. The approach taken by POL to this set of SPMs, with the support of the Department and UKGI, is one of case-by-case negotiation in order to ensure proper compensation. Whilst this does inevitably result in a less streamlined process, it is –

importantly – in line with the preference the Department understands Hudgells, who represent the vast majority of current claimants, to have expressed to POL’s solicitors. It also reflects the widespread recognition that the group litigation claimants received an unsatisfactory level of compensation as a result of their third-party legal funding arrangements, which means it is especially important to get the amounts of compensation right for these SPMs and resolve any disputes as fairly as possible.

10. A formal remediation scheme for SPMs with overturned criminal convictions was not pursued because of the preferences expressed together with the fact that there is not a single time limit on when claims might arise, given that the timing of claims coming forward will depend on when convictions are overturned by various courts. It would be difficult and potentially unfair to operate a time-limited scheme like the HSS, even if the application window were made very generous. This is another reason the Department decided to ensure funding was available to enable POL to make interim payments and then full compensation payments to SPMs whose convictions are overturned, as and when this happens and claims are made.

Interim compensation arrangements

11. Interim compensation payments are intended to be made quickly, with offers being made within 28 days of claim being received after a conviction is overturned, and then full compensation can be individually negotiated with the benefit of independent legal advice. Further detail is set out in the Government response¹ to the most recent report of the BEIS Select Committee of the House of Commons dealing with the Post Office and Horizon, dated 14 April 2022 (see the answer to Recommendation 3). At the date of these submissions, 73 cases had been overturned. There had been 69 applications, 3 of which had been rejected and 66 interim payments had been made. All 66 of the interim payment offers were made within 28 days of an application being received by POL. A few payments against these offers had, however, been delayed in complex cases where a postmaster had died or was made bankrupt; these have all now been resolved. To date only 8 claims have been received, of which only 2 are fully quantified, 2 partly quantified and 4 unquantified.

¹ <https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1267/report.html>

The scope of the 14 December 2021 ministerial announcement

12. At paragraphs 19-21 of his provisional view the Chair raises a question about whether claimants within Category 1 (SPMs who were acquitted at trial) who were not part of the group litigation are eligible to make claims for malicious prosecution in reliance on the ministerial announcement of 14 December 2021. As set out in its letter to the Inquiry of 4 April 2022, the Department is clear that any individuals in the Category 1 situation are entitled to claim compensation in the same way as the group of SPMs whose convictions were overturned (Category 3).
13. The Department anticipates that there will be relatively few people in this situation who have not already made claims through the HSS. For that reason, and in the interests of simplicity and brevity, the ministerial announcement of 14 December 2021 referred only to SPMs whose convictions had been overturned. However, to be clear the Department's position is (as set out in its letter to the Inquiry) that any person in Category 1 who was not part of the group litigation is eligible to make claims in the same way.

The twelve issues identified by the Chair

14. The Department sets out below its submissions on the twelve specific issues identified by the Chair.

A. The Historical Shortfall Scheme

- 1) The heads of loss which are recoverable under the HSS and the reason(s) for any exclusions**

15. The recoverable heads of loss were published on the HSS website². Section 5 of the Consequential Loss Principles and Guidance³ sets out a non-exhaustive list of examples:

- a. Loss of earnings

² <https://www.onepostoffice.co.uk/scheme>

³

https://www.onepostoffice.co.uk/media/47793/historicalshortfallscheme_consequentiallossprinciplesandguidance.pdf

- b. Loss of profits
- c. Loss of property
- d. Loss of opportunity/loss of a chance
- e. Penalties/increased costs of financing
- f. Bankruptcy/insolvency
- g. Legal and professional fees
- h. Stigma/damage to reputation
- i. Personal injury/harassment

16. Other heads of loss are considered where appropriate. There are no specific exclusions in respect of eligible claims, and other heads of loss are considered where an explanation and/or evidence is provided. The Government response⁴ to the BEIS Select Committee sets out in detail how consequential losses are assessed within the HSS in the answer to Recommendation 10.

17. As noted in the Government response to Recommendations 14 and 15 from the Committee, it is recognised that SPMs may face challenges in evidencing their claims due to the absence of records and amount of time that has passed since some losses have occurred. The HSS was therefore designed so that a lack of supporting information or documentation was not a barrier to entry and claims would not be rejected solely on that basis.

2) Whether there has been delay and, if so, the cause(s) of delay in processing applications under the HSS

18. The Department accepts that there were delays to the intended timetable for processing applications in the first few months following initial closure of the scheme in August 2020 and then final closure of the scheme on 27 November 2020. This was because the resourcing of the HSS was planned on the assumption that several hundred applications would be made, whereas in fact over 2,500 were received. As a result, the scheme did not have sufficient capacity at the beginning. The Department was alerted to a shortfall in funding by POL in autumn 2020. The Department engaged in discussions with POL and

⁴ <https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1267/report.html>

UKGI between then and February 2021 about how to address the issue and what precisely was needed. Additional funding approval was secured from HM Treasury to increase the funding available to the HSS and this was announced in March 2021. The Inquiry has already been provided with the relevant documents setting out this sequence of events, by way of the Department's response (dated 27 April 2021) to the Inquiry's fourth request for information dated 30 March 2021.

19. Thereafter offers in response to HSS applications began to be approved, although for the remainder of 2021 still more slowly than initially intended and anticipated. This was because:
- a. An initial round of test claims was used to create a set of case assessment principles, which set out the underlying legal principles to be applied in order to ensure consistency and fairness of approach. These were approved by the Independent Advisory Panel⁵ (a group of legal experts, forensic accountants and retail experts who assess the claims). While this was critical to establishing a robust, consistent and fair approach to processing applications, establishing the case assessment principles took longer than initially envisaged.
 - b. The Independent Advisory Panel as originally constituted did not have sufficient capacity to process the number of applications received (because, as above, the resourcing was initially planned on the assumption of several hundred cases, not over 2,500). Further members had to be appointed and meeting frequency increased to improve capacity;
 - c. A decision was made to deal with simpler, and smaller, cases first; work on the more complex cases had to wait until the principles, processes and resourcing of the HSS was fully established.
20. These steps were an attempt to achieve a fair balance between the potentially competing interests of full compensation and speed, and between a fully individualised assessment and some form of generally applicable criteria, as set out above. It was a pragmatic approach which has enabled POL and the Independent Advisory Panel to establish clear and consistent principles and processes, and apply continuous improvement to the HSS's planning, resourcing and administration. However, it did take time.

⁵ https://www.onepostoffice.co.uk/media/108595/independentadvisorypanelor_feb2022.pdf

21. Regular progress update on the HSS are published online⁶. As at 27 May 2022, 60% of eligible applicants have received offers, up from 33% by the end of December 2021. POL are reporting progress each month on their website and are on track to issue at least 95% by the end of 2022. The Minister for Postal Affairs has publicly stated that the Department wants to ensure 100% of applicants have been issued offers by the end of this year and it is working closely with POL towards that aim.

3) The provision which has been made for applicants to obtain independent legal advice in respect of their claims under the HSS and whether it is adequate

22. The Government response⁷ to the BEIS Select Committee report also addressed this issue (see Recommendation 16). The HSS was deliberately designed by POL to be relatively straightforward and user-friendly with the expectation that applications could be made without the need for legal advice. Recommendations on how much compensation should be paid for an individual claim are made by the Independent Advisory Panel rather than POL employees. The Panel includes legal experts. To date POL has never paid less than the amount recommended by the Independent Panels in any claim; there is a small number of cases where POL has chosen to increase the Panel's offer.

23. The focus has therefore been on providing funding for independent legal advice to SPMs once offers are made, if they need assistance in considering the terms of the offer and deciding whether or not to accept it. POL contributes up to £400 towards this where the offer covers the claim in full (or largely in full) or £1,200 where any significant part of the claim has not been included in the offer. Claimants are informed of this in the offer letters and information about where to find a solicitor is provided.

24. The matter of legal support for SPMs who have applied to the HSS has been kept under review. So far only a small number of claimants have submitted invoices for the reimbursement of legal fees for post-offer legal support. This is probably because very few claims up until now have been escalated to the dispute resolution procedure of the HSS.

⁶ <https://www.onepostoffice.co.uk/scheme>

⁷ <https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1267/report.html>

However, as the more complex cases are now being progressed it is expected that the take-up will increase and the Department is monitoring whether the current support is sufficient through its regular meetings with POL.

4) The provision which has been made for interim payments pending completion of dispute resolution procedures under the HSS

25. HSS cases are prioritised into three levels (Critical, High or Medium) based on circumstances such as severe financial hardship, terminal illness, risk of personal hardship or old age. This prioritisation was carried out when applications were first submitted but can also be reviewed at a later stage if a claimant contacts POL to alert them to a change of circumstances. As of 31 May 2022, 25 interim hardship payments had been made where a concern has been raised about the impact of the speed of progress on the claimant (see Government response⁸ to BEIS Select Committee report, Recommendation 9).

26. Aside from interim payments to HSS applicants facing hardship or difficult personal circumstances there is no broader, automatic provision for interim payments under the HSS. At the time the scheme was introduced the intention was to deliver the compensation quickly and it was not felt necessary to make general provision for interim payments. POL is not currently planning to introduce interim payments to the HSS, because doing so would risk further delay to progress on final offers, which is the priority, particularly in light of the delays in the initial period of the scheme's operation. However, cases can be (and have been) expedited if a claimant's personal situation requires it and interim payments may be made in similar instances.

B. Final Compensation for SPMs with Quashed Convictions

5) The principles which are applied to the calculation of final compensation payments and

6) The mechanism(s) by which final compensation payments are being calculated

⁸ <https://publications.parliament.uk/pa/cm5802/cmselect/cmbeis/1267/report.html>

27. Final compensation payments for SPMs with overturned convictions are being determined through individual negotiations between the claimants' legal representatives and POL. As set out above, the Department understands that this was the preference expressed by Hudgells solicitors who represent a majority of current claimants with overturned convictions and indicated they did not want a more general remediation scheme.
28. How long this process takes depends on how long it takes each claimant's advisers to submit a claim and thereafter for negotiations to conclude successfully. The Department, with support from UKGI, is monitoring the process and has confidence that POL is committed to moving these negotiations forward as quickly as possible.
29. It is concerning to hear (as set out by the Chair at paragraph 14 of his provisional view) reports that SPMs who have had convictions overturned are considering bringing civil proceedings against POL because they are unhappy about the lack of progress in assessing final compensation or because of a wide gulf between the parties' valuation of their claims. As at the time of these submissions being drafted the Department is only aware of two SPMs having submitted a fully quantified claim to POL, both represented by Hudgells, and understood that constructive negotiations continue on these. The Department has encouraged, and would continue to encourage, other relevant SPMs to make a fully quantified claim as soon as possible, and expects that issuing further civil proceedings should not be necessary.
30. In responding to claims, POL is using legal principles based on current case law, which will be updated as necessary. The aim is to have a consistent approach to determining SPMs' settlements whilst allowing each individual's particular circumstances to be taken into account.
31. All compensation is assessed on a case-by-case basis. Payments will be made in response to any claim for direct and consequential pecuniary losses, including loss of past and future earnings, alleged shortfalls and other costs incurred. Payments will also be made for non-pecuniary losses such as mental distress, personal injury, damage to reputation and loss of liberty. Finally interest and tax liabilities will be taken into account.

7) The provision (if any) which is being made for applicants to obtain independent legal advice in relation to their claims

32. POL will pay claims for reasonable legal costs incurred as part of any final settlements reached.

33. One reason for the Department providing funding to POL to enable claimants to receive an interim payment of up to £100,000 was to ensure they could secure independent legal advice to assist them in making full claims. The aim was that a payment at that level would allow claimants not only to deal with any immediate financial hardship but also to directly engage legal representatives rather than having to resort to third party funding.

34. The Department was concerned to avoid a situation where SPMs were forced to engage expensive litigation funders and end up with their compensation reduced as a result, as happened with the group litigation.

8) The procedure(s) which are being adopted to resolve disputes about the value of final compensation payments

35. Each settlement requires an individual negotiation between the SPM (or their appointed representative) and POL. Where it is not possible for the parties to reach agreement between themselves, they may, subject to agreement between the parties, opt for mediation, arbitration or any other form of alternative dispute resolution (“ADR”).

36. The Department understands that in the two full claims which have been submitted to date a measure of agreement on some heads of loss has been achieved and the intention is that payments will be made on these as soon as possible. The Department understands that POL is taking all necessary steps to progress the negotiations in the remaining areas, but if dispute remains the parties can agree ADR mechanisms, including potentially a form of external and independent input.

37. It is important to note that POL will not be the final arbiter of what compensation should be paid. The Department fully agrees with the Chair’s provisional view (at paragraph 28) that this would not be appropriate. The intention is for compensation to be agreed via

negotiations between the parties. If a negotiated agreement cannot be reached, then the parties can together decide to adopt ADR mechanisms to help reach agreement. If this is not successful then there will ultimately need to be resolution by the courts.

C. Fair Compensation for the Group Litigation Claimants

- 9) The principles which will be applied to the calculation of further compensation payments;**
 - 10) The mechanism(s) by which further compensation payments will be calculated;**
 - 11) The provision (if any) which will be made for applicants to obtain independent legal advice in relation to their claims;**
- and**
- 12) The procedure(s) which will be adopted to resolve disputes about the value of further compensation payments**

38. As set out in the ministerial announcement on 22 March 2022 the Department's intention is that members of the group litigation will receive equivalent compensation to that available to those SPMs who were not part of the group litigation. At a meeting on 30 March 2022 between the Minister for Postal Affairs, the Justice for Subpostmasters Alliance ("JFSA") and Freeths LLP, it was agreed that there would be collaboration on developing compensation arrangements through weekly meetings of a working group comprising Departmental officials, JFSA representatives and solicitors from Freeths.

39. Those meetings began on 7 April 2022 and all four of the issues raised by the Chair in relation to compensation for the group litigation claimants are under discussion. The Minister will write soon to all members of the group litigation order to consult them informally on the shape of proposals emerging from the working group. Whilst no decisions have been made as at the date of these submissions being written, both sides share a strong desire to put in place arrangements and begin payments as soon as possible. The Department hopes to be able to provide a further update to the Inquiry at the hearing in July.

Conclusion

40. The issue of compensation is an exceptionally important one. It is hoped that these submissions will assist the Inquiry by setting out the current position in some detail. The Department will continue to update the Inquiry before or at the hearing in July with any further relevant information as it becomes available.
41. The Department is also open to any suggestions or proposals for how to ensure full and fair compensation is made as speedily as possible, and looks forward to hearing the contributions of other Core Participants to that end.

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