



Historical Shortfall Scheme

Consequential Loss Principles and Guidance

1. Scope and Background

- 1.1. Post Office launched the Historical Shortfall Scheme (the “**Scheme**”) on 1 May 2020 with the objective of resolving past issues for current and former postmasters who believe they have experienced shortfalls related to previous versions of Horizon.
- 1.2. The application form for the Scheme asks postmasters to identify any alleged Shortfall Losses as well as any other losses that are caused by a Horizon Shortfall, namely Consequential Losses. This document sets out the underlying principles that will govern the assessment of any claims for Consequential Loss under the Scheme.
- 1.3. A claim for Consequential Loss will only be considered for Eligible Claims where the shortfall underlying the Consequential Loss is found by the Scheme to be a Horizon Shortfall. Where several shortfalls are alleged and not all of these are found to be Horizon Shortfalls, claims for Consequential Loss will only be considered if they are caused by a Horizon Shortfall.
- 1.4. In the interests of ensuring that the process operates as swiftly as possible and is accessible for all postmasters, the Scheme process will be of a summary nature. This means that, while the process will involve the consideration of documentary evidence held by Post Office and provided by the postmaster, there will be no requirement for detailed written arguments from postmasters or oral evidence.

2. Definitions

- 2.1. **Consequential Loss** means financial or non-financial loss that is not a Shortfall Loss.
- 2.2. **Eligible Claim** means an application that has been determined to be eligible for the Scheme in line with the Scheme’s eligibility criteria¹ and is identified to the postmaster as such in an eligibility letter.
- 2.3. **Horizon Shortfall** means a shortfall in stock or cash at a postmaster’s branch compared with the amount of stock or cash indicated on Horizon for that branch, where the shortfall may have been caused by previous versions of Horizon or a breach of duty related to such a shortfall by Post Office.
- 2.4. **Shortfall Loss** means the amount of a Horizon Shortfall that the postmaster has repaid or is regarded by Post Office as still owing.
- 2.5. **Common Issues Judgment** means the judgment handed down by Fraser J in *Bates v Post Office Ltd* (No.3: Common Issues) [2019] EWHC 606 (QB).
- 2.6. **Horizon Issues Judgment** means the judgment handed down by Fraser J in *Bates v Post Office Ltd* (No.6: Horizon Issues) [2019] EWHC 3408 (QB).

3. Key Principles

3.1. Burden of proof in relation to proof of Consequential Loss

- 3.1.1. The burden of proof is on the postmaster to provide sufficient evidence in support of their claim to demonstrate that on the balance of probabilities (i.e. a greater than 50% likelihood) (a) such losses have been suffered and (b) as a consequence of a Horizon Shortfall (as such are found in the Common Issues

¹ http://www.onepostoffice.co.uk/media/47296/historicalshortfallscheme_eligibilitycriteria.pdf

Judgment or the Horizon Issues Judgment). This means evidencing the fact that a loss was incurred, the amount of that loss and that the cause of the loss was due to a Horizon Shortfall.

- 3.1.2. Where the postmaster is unable to satisfy the burden of proof in relation to their claim, their claim may nonetheless be accepted in whole or in part if the Scheme considers it to be fair in all the circumstances.

3.2. Evidence

- 3.2.1. Claims which are supported by evidence are more likely to be successful. Guidance on how best to evidence any potential claims for Consequential Loss is set out further below.
- 3.2.2. Greater weight will be attached to;
- a) contemporaneous evidence; and
 - b) factual evidence that is undisputed and/or verifiable.
- 3.2.3. The need to provide evidence is particularly important where a postmaster's claim relates to matters which are known only to the postmaster. While the burden is on postmasters to provide sufficient evidence to demonstrate their claim for Consequential Loss, the Scheme will also consider any relevant evidence Post Office holds when assessing the claim. Any key supporting documentation relied upon will be shared with postmasters when they receive the outcome of their claims to enable them to consider whether they wish to accept the offers made to them.

3.3. Established legal principles

- 3.3.1. In considering a claim for Consequential Loss, the Scheme will apply the findings in the Common Issues Judgment and the Horizon Issues Judgment relevant to the claim and any relevant legal and accounting principles applicable to the assessment of damages for breach of a legal duty when determining whether, on a balance of probabilities, the loss claimed is attributable to a Horizon Shortfall. In making that assessment the Scheme will consider:

a) Causation

The Horizon Shortfall must have caused the Consequential Loss (i.e. the Consequential Loss would not have happened but for the Horizon Shortfall).

If the postmaster would have found themselves in the same position in any event, irrespective of the Horizon Shortfall, the Scheme will not be able to conclude that the Horizon Shortfall caused the Consequential Losses the postmaster may have suffered.

b) Remoteness

The Consequential Loss must not be too remote (i.e. the Consequential Loss must have been reasonably foreseeable at the time of the Horizon Shortfall).

c) Mitigation

Assuming that causation is established (and the Consequential Loss is not too remote), the Scheme will consider the extent to which the Consequential Loss was or could reasonably have been mitigated by the postmaster, or conversely was aggravated by reasonable attempts by the postmaster to avoid or reduce the Consequential Loss.

d) Quantum

The object of the assessment will be, so far as the award of a sum of money can do so, to put the postmaster into the position that the postmaster would have been in but for the Horizon Shortfall.

- 3.3.2. Please note that the above is intended as a guide only; it is not an exhaustive list of the legal principles that may be applicable to any particular claim for Consequential Loss. The application of the above principles will be fact-specific and will depend on the circumstances of the postmaster bringing the Consequential Loss claim.

3.4. Limitation

- 3.4.1. Many Eligible Claims will relate to Shortfall Losses and Consequential Losses suffered a significant number of years ago. In order to draw a line under the issues caused by previous versions of Horizon and treat postmasters who have been affected fairly, the Scheme will not apply the laws of limitation or time bar in its assessment of the Shortfall Losses or Consequential Losses.

3.4.2. Post Office's rights to rely on the laws of limitation or time bar outside the Scheme (including in any subsequent court or arbitration proceedings under the Scheme's Dispute Resolution Process) are, however, strictly reserved.

3.4.3. Given the large number of applicants to the Scheme, claims may take some time to investigate and assess. Post Office is therefore willing to agree, in respect of each applicant, that time will not run for limitation purposes from the date the applicant joined the Scheme to the date on which the applicant receives their offer letter.

3.5. Presentation of the Consequential Loss outcome

3.5.1. The Scheme will present its Consequential Loss outcome to the postmaster in a clear, succinct manner, setting out information sufficient to allow the postmaster to understand the basis for the conclusion reached by the Scheme in respect of each type of loss comprising the Consequential Loss claim. It will also provide copies of the key supporting documentation relied upon.

4. The High Level Process

4.1. Submission of a Consequential Loss claim

4.1.1. It is for the postmaster to present any Consequential Loss claim, which involves sending all relevant information and evidence to the Scheme either at the same time as submitting their application form or following a request from Post Office setting out in detail, the evidence required for each head of loss.

4.1.2. What is capable of being claimed as a Consequential Loss, along with the level of evidence required to meet the applicable legal tests, will depend on the facts of each case. The postmaster should explain in as much detail as possible:

- a) the particular loss being claimed;
- b) the specific amount of loss being claimed;
- c) how this loss was caused by a Horizon Shortfall; and
- d) the reasonable steps the postmaster took to reduce this loss, and the impact these steps had.

4.2. Assessment of a Consequential Loss claim

4.2.1. Consequential Loss claims will be assessed against the established legal principles set out at paragraph 3.3.

4.2.2. In addition to the application of these principles the Panel will also consider what is fair in all the circumstances.

4.2.3. If the Scheme considers that information may be available to the postmaster which would help the assessment of their claim for Consequential Loss, the Scheme will proactively contact the postmaster and request that this information be provided within 28 days.

4.2.4. Where new documentation relevant to a claim cannot be obtained without a fee, for example where current property valuations or forensic accountancy analysis is required, the postmaster may request that Post Office reimburse the reasonable costs of the postmaster obtaining that new documentation. Post Office will not reimburse costs that are not pre-approved.

4.2.5. Where the Panel considers that it requires expert assistance in order to make a recommendation, the Panel may recommend to Post Office that an expert be appointed as contemplated by the Panel Terms of Reference.

4.3. Dispute Resolution Process

4.3.1. If postmasters are dissatisfied with the outcome of their claims following the assessment process, the Scheme's Dispute Resolution Process shall apply, as set out in the Scheme's Terms of Reference².

5. Types of Loss

5.1. There is no exhaustive list of the types of loss that can be claimed as Consequential Loss (assuming they meet the applicable legal tests and noting that additional losses claimed must be clearly linked back to a Horizon Shortfall); however, certain examples are detailed below along with examples of the types of evidence that postmasters should provide to support their claims for Consequential Loss.

² http://www.onepostoffice.co.uk/media/47295/historicalshortfallscheme_termsofreference.pdf

5.2. Loss of earnings

- 5.2.1. This may relate to loss of earnings during a period when the postmaster was suspended or where the postmaster's contract with Post Office was wrongfully terminated because of a Horizon Shortfall.
- 5.2.2. This will require evidence, preferably contemporaneous, that the postmaster was suspended or had their contract terminated without sufficient notice because of a Horizon Shortfall. Post Office will take reasonable steps to identify any relevant information from its own records but the postmaster should provide any documentation they hold evidencing their suspension or termination related losses, for example:
- a) suspension letter;
 - b) reinstatement letter;
 - c) termination letter;
 - d) remuneration information for the period of suspension and the period before/after the suspension;
 - e) contemporaneous correspondence between the postmaster and Post Office;
 - f) an explanation or other evidence as to why the postmaster's contract was wrongfully terminated and that otherwise they would have continued as a postmaster;
 - g) in respect of termination, an explanation as to why the notice given to the postmaster by Post Office was insufficient;
 - h) average monthly expenses in running the Post Office branch for the period before the suspension or termination; and
 - i) if the postmaster was subsequently re-engaged or obtained employment or otherwise earned an income following their suspension and/or termination, confirmation of the date on which the postmaster was so re-engaged or obtained employment and details of the remuneration received or income earned thereafter.

5.3. Loss of profits

- 5.3.1. This may relate to loss of profits from the Post Office branch or any retail shop owned by the postmaster associated with the Post Office branch.
- 5.3.2. This will require evidence, preferably contemporaneous, to show how the profits of the business were impacted by the Horizon Shortfall. The postmaster should provide all documentation they hold demonstrating the profits made by the business prior to and following the Horizon Shortfall, taking into account the cost of any additional measures that had to be put in place because of the Horizon Shortfall, for example:
- a) bank statements;
 - b) accounts;
 - c) tax returns;
 - d) cash flows (historical and forecast);
 - e) business plans (historical and forecast);
 - f) management information (historical and forecast); and
 - g) relevant correspondence.
- 5.3.3. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.4. Loss of property

- 5.4.1. If, as the result of a Horizon Shortfall, the postmaster is forced to dispose of an asset (e.g. a property) at a loss which they otherwise would have retained, a claim for Consequential Loss may be available.
- 5.4.2. In order for such a claim to be successful, the postmaster will need to provide evidence, preferably contemporaneous, that the Horizon Shortfall (as opposed to other factors) caused the disposal, as well as evidence of the value of the loss suffered as a result, for example:
- a) an explanation as to why the asset was sold;
 - b) relevant correspondence and documents relating to the purchase and sale of the asset;

- c) evidence of the value of the asset (historic and current); and
- d) any relevant accounting documentation.

5.4.3. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.5. Loss of opportunity/loss of chance

5.5.1. The loss of an opportunity to pursue a course of action that could have resulted in financial gain, such as expanding the business, which the postmaster would have pursued if not for the Horizon Shortfall may be claimed as a Consequential Loss.

5.5.2. For these claims, it will be necessary to submit evidence to demonstrate a specific opportunity or course of action that the postmaster was aware of at the time and had intended to pursue but was prevented from doing so due to the Horizon Shortfall.

5.5.3. This will require evidence, preferably contemporaneous, that the postmaster was aware of the opportunity at the time it arose, and intended to pursue it. Claims that speculate (without supporting evidence) how money put towards repaying a Horizon Shortfall could have been invested or what may have been done but for the Horizon Shortfall are unlikely to succeed. Any claims should therefore be accompanied by evidence such as the following:

- a) evidence that an opportunity to invest existed;
- b) evidence that the investment opportunity was being actively considered and was likely to be pursued;
- c) evidence demonstrating that the inability to invest was caused by the Horizon Shortfall (rather than by other intervening events or the fact that they would not have had the funds to avail themselves of the opportunity);
- d) evidence of what the postmaster's financial position would have been but for the Horizon Shortfall;
- e) expected costs and timeframe for investment; and
- f) evidence of progress (if any) on the investment.

5.5.4. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.6. Penalties/general or increased costs of financing

5.6.1. Penalties or general/increased costs of financing, as a result of the Horizon Shortfall, may be recoverable (e.g. additional interest or loan arrangement fees) if the postmaster can provide evidence to show that the Horizon Shortfall caused the penalty or increased cost of financing.

5.6.2. This will require evidence, preferably contemporaneous, of the purpose of the financing and what the postmaster's financial position would have been but for the Horizon Shortfall. If the postmaster alleges that the finance was taken out at less advantageous rates than it would otherwise have been as a result of the Horizon Shortfall they will need to provide evidence of when the finance was taken out and that they had been turned down for other products at more favourable rates.

5.6.3. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.7. Bankruptcy/insolvency

5.7.1. Losses suffered if the postmaster underwent bankruptcy or insolvency proceedings as a result of a Horizon Shortfall may be claimed as a Consequential Loss.

5.7.2. For such a claim to be successful the postmaster will have to provide evidence, preferably contemporaneous, that they were bankrupted/declared insolvent (as appropriate), the value of the loss claimed and that the bankruptcy/insolvency was due to the Horizon Shortfall (rather than other intervening events/general financial hardship/other factors).

5.7.3. The types of document that the postmaster should provide with their claim is as follows:

- a) copy of bankruptcy order or IVA documentation;
- b) copy of notice of bankruptcy in appropriate newspaper;
- c) financial/accounting evidence to demonstrate that the Horizon Shortfall was the reason for the bankruptcy/insolvency e.g.:
 - i. bank statements;

- ii. accounts;
- iii. cash flows (historical and forecast);
- iv. business plans (historical and forecast);
- v. management information (historical and forecast); and
- vi. details of all creditors at the time of bankruptcy/insolvency; and
- d) if the bankruptcy/insolvency process has concluded, details of payments made to creditors.

5.7.4. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.8. Legal and professional fees

- 5.8.1. Fees incurred in relation to dealing with a Horizon Shortfall at the time (e.g. the cost of defending legal proceedings or professional advice about restructuring the postmaster's business) may be recoverable. Please note that this is separate to any legal and professional fees incurred by a postmaster in bringing an application to the Scheme.
- 5.8.2. In order to claim these fees postmasters should provide evidence, preferably contemporaneous, of the following:
 - a) why and when the professional was engaged (noting that postmasters should avoid providing any legal advice they have received unless they confirm they are happy to waive privilege over that legal advice);
 - b) details of the engagement (including whether the engagement was by the postmaster or a third party); and
 - c) the professional's fees being incurred and paid by the postmaster (e.g. invoice/receipt).

5.8.3. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.9. Stigma/damage to reputation

- 5.9.1. Where a postmaster has incurred a financial loss as a result of damage to their reputation as a result of a Horizon Shortfall, they may be able to claim Consequential Loss.
- 5.9.2. The postmaster would need to explain what action taken by Post Office in light of the Horizon Shortfall damaged their reputation, how those matters became known to others and why the damage to the postmaster's reputation caused financial loss.
- 5.9.3. The types of financial loss caused by damage to reputation could include:
 - a) evidence that prospective employers would not hire the postmaster as a result of the Horizon Shortfall; and
 - b) evidence that customers stopped supporting the postmaster's business as a result of the Horizon Shortfall.
- 5.9.4. If the postmaster claims that their business suffered a downturn in revenue as a result of the damage to their reputation, they should provide copies of business accounts before and after the Horizon Shortfall became known to others in the community.
- 5.9.5. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.

5.10. Personal injury/harassment

- 5.10.1. Postmasters who themselves held a direct contract with Post Office (rather than through a company) may be able to claim Consequential Losses for personal injury or harassment they have suffered as a result of a Horizon Shortfall. Personal injury can include physical injuries as well as psychiatric harm.
- 5.10.2. This will require evidence, preferably contemporaneous, that the personal injury/harassment was caused by the Horizon Shortfall. Postmasters should provide the following information when making a claim for personal injury/harassment:
 - a) a detailed description of their injury including (i) the symptoms they have experienced; (ii) medical treatment they have received; (iii) any expenses/financial losses they have suffered; and (iv) the effect of their injury;

- b) a letter from their GP (or from another medical professional who has treated them) setting out details of matters including the nature and potential cause(s) of the injury;
- c) medical notes and records including copies of the notes and records kept by the postmaster's GP, any other medical professional who has treated them and any hospital to which they have been admitted. Postmasters should only provide the records that are relevant to the injury for which they are bringing a claim;
- d) evidence of the harassment, how often it occurred and what constituted the harassment; and
- e) other relevant information, for example where the postmaster is seeking to recover for financial losses (e.g. medical expenses and/or loss of earnings) the postmaster should include documents in support of those claims.

5.10.3. The postmaster needs to provide a calculation showing how the amount being claimed has been quantified.