



Establishing Loss

Dispute Resolution Team Training
November 2021

Version 1.1

Agenda for today

1. Objectives
2. GLO – background / context
3. Common Issues Judgment – key findings & outcomes
4. Establishing Loss – the legal principles underpinning discrepancy investigation
5. Policy and Documents
6. Next Steps & Additional Support

Why am I here...

- Following the introduction of the new **Target Operating Model** for investigation of accounting discrepancies, a need was identified for additional guidance and training in relation to investigating Discrepancies and how Post Office establishes that it has suffered a loss that it is legally able to recover from a postmaster.
- The Dispute Resolution Teams are working to the **Postmaster Accounting Dispute Resolution (PADR) Policy** – aim of this training is to draw out and develop the legal principles underpinning the investigation process set out in the PADR Policy, explain some of the key concepts used and their basis on the obligations in the contracts in place between Post Office and the postmasters.
- Explain the background of the GLO and the outcomes of the Common Issues Judgment - how these have **changed Post Office contracts with its postmasters** and how these underpin the PADR Policy and Post Office's approach to investigating Discrepancies.

Objectives & Outcomes

Objectives:

- Allow you to **better understand some of the terminology and concepts arising from the Common Issues Judgment** that are now embedded into the PADR Policy and Post Office working more generally.
- Provide guidance on making judgements when **investigating a Discrepancy** to **establish a genuine loss** or gain to Post Office.
- Allow you to understand Post Office's **contractual obligations** when undertaking an investigation.

Outcomes:

- Team members have the knowledge and skills required to properly undertake an investigation into a Discrepancy and **establish whether a genuine loss** or gain has occurred.
- Team members are able to **better support postmasters** through the investigations process
- Team members understand that **investigating Discrepancies involves difficult and often nuanced legal concepts** - escalation to the Review Committee and further legal advice may be required in respect of some Discrepancies.

GLO – background / context

- The case was brought by a group of current and ex postmasters in 2016 – the case is sometimes referred to as the "Group Litigation" or "GLO".
- Postmasters alleged that discrepancies and shortfalls in branch accounts were caused by the Horizon system not by the fault of Postmasters.
- Postmasters alleged that Post Office's previous decisions to require them to pay back shortfalls and in some cases to suspend or terminate their contracts were wrong.
- There were two trials in 2018-2019:
 - Common Issues Trial - looked at the meaning of the contract between Post Office and postmasters – judgment given March 2019
 - Horizon Issues Trial - looked at a number of issues in relation to the Horizon system – judgment given December 2019.
- Settlement of the claims reached in December 2019. This ended the litigation.
- Post Office has made lots of changes to business processes and procedures to reflect the outcome of the case and to re-set the relationship with Postmasters.
- Change to loss recovery processes - the new target operating model and introduction of the PADR Policy.
- Compliance – ongoing and a collective responsibility

Duty of good faith

"Both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are..... implicit within the implied obligation of good faith"

Justice Fraser , CIJ

Nick Read CEO

"When I took up this job in September 2019, I said that the key priority for me and the business was to **transform our relationship with postmasters**.

"For our respective businesses to succeed, Post Office needs to adopt a fresh approach to how it supports postmasters to run thriving businesses and serve our shared customers every day.

"Our business needs to take on board some important lessons about the way we work with postmasters, and I am determined that it will do so.

"We are committed to transforming our relationship with postmasters, **placing them at the centre of everything we do**. They are at the heart of our purpose and everything we do should support them and their businesses – otherwise we shouldn't be doing it. Post Office Limited's role is to be here for postmasters – supporting and working with them to deliver for customers and corporate clients.

"We look forward to continuing the hard work ahead of us in shaping a modern and dynamic Post Office and a genuine commercial partnership with postmasters."



Common Issues Judgment

Implied Terms

Key definitions before we go further...

- **"Discrepancy"** means any difference between (i) the actual cash and stock position of a branch and (ii) the cash and stock position shown on Horizon as derived from transactions input by branch staff into the branch's terminals.
- **"Established Gain"** means an event that causes a positive Discrepancy (i.e. the situation where the branch has more cash and/or stock than the derived figures for cash and/or stock on Horizon), which has been investigated by Post Office, or agreed by the postmaster, and found to be a genuine gain to Post Office.
- **"Established Loss"** means an event that causes a negative Discrepancy (i.e. the situation where the branch has less cash and/or stock than the derived figures for cash and/or stock on Horizon), which has been investigated by Post Office, or agreed by the postmaster, and found to be a genuine loss to Post Office.
- **"Postmaster"** means the person or entity (which may be a company, sole trader or partnership) contracted with Post Office. In Locals/Mains contracts the contracting party is the "Operator" and in the Standard Subpostmaster (SPMC) contracts it is the "Subpostmaster".

The Common Issues Judgment (I) – outcomes

- The Common Issues Judgment was made public in March 2019. This judgment dealt with the questions regarding the legal relationship between Post Office and postmasters.
- The key outcome in the Common Issues Judgment is that the contracts between Post Office and postmasters were found to be relational and a duty of good faith was implied into the contracts. This was a fundamental change to the way the contracts operated and the obligations on both parties.
- Duty of good faith - broadly speaking this means not acting in a way that reasonable and honest people would consider to be commercially unacceptable in the relevant context.
- The judge was also critical of Post Office's past behaviour towards postmasters and the way in which Post Office had recovered shortfalls from postmasters.

The Common Issues Judgment (2) – recovery of shortfalls

- Under the contracts, the postmaster is responsible for all losses caused through his or her own negligence, carelessness or error and also for all losses caused by the negligence, carelessness or error of his or her assistants.
- The judgment restricted the way in which Post Office could recover losses and implied a number of terms into the contracts dealing with what Post Office must do to be able to recover losses.
- What is an implied term?

This is a contractual term that has not been expressly agreed between the parties (in writing or orally) but has instead been implied into the contract by the Court.

- Post Office is unable to recover losses until it has:
 - established that the alleged shortfall represents a genuine loss to it;
 - carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it is properly attributed to the postmaster under the terms of the contract; and
 - it has complied with additional duties implied into the contract (or some of them) [see the next slide]

The Common Issues Judgment (3) – implied terms affecting Discrepancies

The additional duties implied into the contract regarding Discrepancies:

- Post Office Ltd shall provide adequate training and support, including through the provision of training materials, to the Operator, particularly if and when the Post Office Ltd imposes new working practices or systems or requires the provision of new services.
- Post Office Ltd shall provide the Horizon system, which shall be reasonably fit for purpose, including any or adequate error repency.
- Post Office Ltd shall:
 - properly and accurately effect, record, maintain and keep records of all transactions effected using Horizon;
 - properly and accurately produce all relevant records and/or explain all relevant transactions and/or any alleged or apparent shortfalls attributed to the Operator;
 - co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfalls and/or whether or not there was indeed any shortfall at all;
 - seek to identify the causes of any such apparent or alleged shortfalls, in any event;
 - disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to the Operator candidly, fully and frankly;
 - make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof);
 - communicate, alternatively, not conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for the Operator;
 - communicate, alternatively, not conceal the extent to which other operators of Post Office branches are experiencing problems relating to Horizon and the generation of discrepancies and alleged shortfalls;
 - not conceal from the Operator Post Office Ltd's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfalls) depend; and
 - properly, fully and fairly investigate any alleged or apparent shortfalls.

The Common Issues Judgment (4) – overriding duties

In addition a number of overriding duties were implied that affected not only the recovery of Discrepancies but also applied to the relationship between Post Office and the postmasters more generally. These are referred to as Overarching Duties in the SPMC.

- Each Party shall:
 - at all times in the performance of its obligations and exercise of its rights under the Agreement act in good faith;
 - take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls);
 - refrain from taking steps that would inhibit or prevent the other Party from complying with its obligations under or by virtue of the Agreement; and
 - provide the other Party with such reasonable cooperation as is necessary to the performance of the other Party's obligations under or by virtue of the Agreement.
- Post Office Ltd shall:
 - not take steps which would undermine the relationship of trust and confidence between the Operator and Post Office Ltd;
 - exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred;
 - not exercise any discretion arbitrarily, capriciously or unreasonably; and
 - exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence.
- These overriding duties are binding contractual obligations and Post Office must ensure it upholds them in its conduct with/and towards postmasters. This means that they apply to Post Office's investigations into Discrepancies and its ability to recover shortfalls.



Establishing Losses & Gains

Negative discrepancy

- **What is a Discrepancy?**

Any difference between (i) the actual cash and stock position of a branch and (ii) the cash and stock position shown on Horizon as derived from transactions input by branch staff into the branch's terminals.

- A Discrepancy can be either negative (also referred to as a shortfall) or positive (known as a gain).

But what does this mean in practice...

A negative Discrepancy could take one of three forms:

1. An accounting entry on Horizon that causes a shortfall on Horizon. For example, where a customer hands over the correct amount of cash but the transaction is incorrectly recorded on Horizon.
2. An accounting entry that does not cause a shortfall on Horizon but still causes a financial loss to Post Office. For example, completing a transaction in branch without remitting the correct paperwork to Post Office meaning that Post Office cannot then recover payment for that transaction from a client.
3. A loss of physical cash or stock from a branch.

Positive discrepancy

A positive Discrepancy could take one of three forms:

1. An accounting entry on Horizon that causes a gain. For example, where a customer hands over the correct amount of cash but the transaction is incorrectly recorded on Horizon;
2. An accounting entry that does not cause a gain on Horizon but causes a financial gain when the transaction is completed with the client. For example, incorrect paperwork is remitted that may result in Post Office recovering incorrect payment from a client;
3. It could be a customer handing over too much physical cash or not taking stock that they have purchased with them from the branch.

Recovering a shortfall

- **In order for Post Office to recover a shortfall it must:**

- establish that the alleged shortfall represents a **genuine loss** to it
- carry out a **reasonable and fair investigation** as to the cause and reason for the alleged shortfall and whether it is **properly attributed to the postmaster** under the terms of the contract; and
- comply with the **implied terms** relating to both Discrepancies and the relationship between the parties more generally.

These obligations and how they translate to the work of the Investigations Teams are explored further when we look at the Tier 3 workings and the Dispute Resolution Checklist.

Investigating positive discrepancies

- Unlike for negative Discrepancies, the contract does not prescribe the scope and nature of the investigation into positive Discrepancies.
- Post Office must investigate to ensure that any issues that may be the cause, especially in relation to errors or problems with Horizon, are ruled out and some of the procedural steps in the investigations will be similar.
- However, Post Office must be aware of its overriding duty to act in good faith and deal fairly with postmasters when investigating a gain – this means dealing with the Established Gain in a timely way.
- The obligations and tests in respect of Establishing Loss are more prescriptive being set out in the contract and applying those to the investigation of a gain is not strictly necessary in all cases and could potentially breach the duty of good faith.
- Post Office must be mindful of the duty of good faith both in respect of the investigation undertaken and the timescales involved when investigating a gain and consider the scope that is appropriate to the particular case.

Proving the existence of a negative discrepancy

- Post Office must prove the existence of a shortfall, amongst other things, before it is able to take steps to recover the loss from a postmaster.
- In proving a shortfall, it is no longer adequate (as in pre-Common Issues Judgment) to rely solely on a branch trading statement taken from Horizon that showed a shortfall. A trading statement of itself is not proof of a shortfall.
- Post Office can seek to prove the existence of a shortfall by comparing:
 - the cash and stock figures shown on Horizon against
 - the actual physical cash and stock present in the branch.
- The cash and stock on hand can be found on the branch trading statement or, if the shortfall arises mid-trading period, may need to be compiled from the underlying branch accounts.
- The actual physical cash and stock in branch can be determined using:
 - the figures provided by the postmaster (if they are not disputed); or
 - the figures provided by a Branch Assurance Visit to the branch

Proving the cause of a negative Discrepancy

- Post Office is entitled to recover a shortfall based on the balance of probabilities
- Post Office needs to be satisfied that it is more likely than not that the postmaster is liable to compensate Post Office for the shortfall
- Question is - Did the negligence, carelessness or error of the postmaster or their assistants more likely than not cause the shortfall?
- Shortfalls caused by either:
 - Single incidents
 - Amalgamated shortfalls: where the shortfall only presents itself in the branch accounts after a period of time (typically the end of a trading period) and is an amalgamation of smaller errors over time.
- Single incidents – forensic examination of the branch records & discussion with the postmaster, Post Office may be able to determine what happened in branch & have sufficient proof to show it was due to the error of the postmaster or their assistants
- Amalgamated shortfalls - it is unlikely that Post Office will be able to identify each of the errors made by the postmaster or their assistants as Post Office is not present in the branch and does not have first-hand knowledge of the transactions undertaken. Post Office is left with proving the postmaster is liable for the shortfall by eliminating all other possibilities – Post Office, clients or Horizon



Investigation Process

General Principles

- Investigations should be:
 - proportionate in scope to the value of shortfalls or gains and complexity of the issues under investigation;
 - transparent to the postmaster, giving them fair access to information and fair opportunity to comment; and
 - reasonably documented, including recording the investigations undertaken, factual findings made and conclusions reached.
- Must be fair, reasonable and transparent.
- Each investigation will be different and will need to be adjusted to the circumstances, including whether a loss or a gain is being investigated.

For shortfalls

- For cases involving an amalgamated shortfall where a process of elimination is required, the various areas listed in the Tier 2 checklist and the Case Investigation Checklist will need to be considered and, if appropriate, reviewed and eliminated.
- Not all areas listed will need to be reviewed and eliminated depending on the shortfall being investigated
- Horizon is a key area of investigation
- The investigation will involve Post Office seeking information from the postmaster, Post Office teams or clients about the various areas that have the potential to cause a shortfall – considering that evidence & eliminating as appropriate.
- This process of elimination will need to be followed for all of the potential causes of the shortfall so that Post Office is either able to eliminate each potential cause or can identify the cause (or likely cause) of the shortfall.
- If Post Office is able to eliminate all potential areas that may cause the shortfall, then it must consider whether, on the balance of probabilities, the error of the postmaster or their assistants was more likely than not the cause of the shortfall.



Policy & Documents

Postmaster Accounting Dispute Resolution Policy

- The PADR Policy sets out the process that needs to be followed in conducting the investigation.
- This includes the Case Investigation Report that must be completed by Tier 3 when they conduct investigations – this will be provided to the postmaster as part of Post Office's upholding of transparency and fairness obligations.
- As part of completing the Case Investigation Report, Tier 3 must complete the Dispute Policy Checklist.
- This lists 5 areas that Post Office needs to satisfy itself of before the contractual obligations of the contract can be met regarding shortfalls & a loss can be established.

Dispute Policy Checklist

1. The alleged shortfall has been properly, fully and fairly investigated in a timely manner
 2. The shortfall represents a genuine loss to Post Office properly attributable to the postmaster
 3. A review of the Horizon system has been undertaken to ensure that it was not a contributory factor to the discrepancy
 4. Any action (or inaction) by Post Office Limited has not been a contributory factor that led directly to the shortfall
 5. The shortfall has been caused through the postmaster's negligence, carelessness or error and/or the shortfall has been caused by the negligence, carelessness or error of their Assistants
- These are the minimum thresholds that Post Office must meet to establish a loss whilst continuing to apply the other terms implied into the contract.

Outcomes – Establishing Losses, Gains or not?

- Loss Established – If Post Office is able to show that the shortfall is an Established Loss then Post Office may seek to recover the Established Loss from the postmaster.
- NB: only by meeting the contractual requirements is Post Office able to recover a shortfall from a Postmaster. In the event that Post Office is unable to satisfy itself that the 5 areas of the Dispute Resolution Checklist have been met then a loss has not been established and recovery cannot take place.
- Loss Not Established - If Post Office is unable to show that the shortfall is an Established Loss then Post Office cannot make a recovery from the postmaster and a decision regarding writing off the shortfall must be made.
- Gain Established - If Post Office has established that a positive Discrepancy is an Established Gain then Post Office needs to ensure that payment is made to the postmaster as quickly as possible.

Taking action if something isn't right..

- If something is not right – call it out.
- Escalate to line manager or Post Office Legal
- Whistleblowing – be mindful of the whistleblowing policy and the protections it provides to both postmasters and their assistants. This policy is available on The Hub:
<https://poluk.sharepoint.com/sites/thehub/SitePages/Updated-Whistleblowing-policy.aspx>



Next steps

Next steps

- Detailed Guidance Note – to be circulated
- Legal Support at Monthly Review Committee
- Further Training
 - Refresher training on Establishing Loss in Q1/Q2 2022
 - Scenarios
 - Report writing
- ***Questions...?***



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