



Decision: Should Post Office admit two additional implied terms to its Subpostmaster Contracts?

1. SUMMARY

- 1.1 In this paper, we set out our recommendation that Post Office accepts two of the implied terms proposed by the Claimants, namely:
- 1.1.1 A term limiting Post Office's right to suspend to cases where there is a *reasonable basis or grounds* for the suspension on one or more of the grounds for suspension identified in the express terms of the contracts (**the Suspension Term**).
 - 1.1.2 A term providing that Post Office's contractual power to withhold, and to ultimately not pay, remuneration to a Subpostmaster during a period of suspension must not be exercised dishonestly or in an arbitrary, capricious or irrational manner (**the Back-pay Term**).
- 1.2 Counsel have advised that there was a medium to high risk that these two implied terms would be approved by the Court. There is therefore tactical advantage in accepting these terms, rather than fighting them and losing these points at trial.
- 1.3 We have investigated whether these implied terms, if accepted, would have an adverse effect on the business. The feedback we have received is that their effect is thought to be minimal because the business is in practice already complying with them.
- 1.4 We and the Counsel team are therefore recommending that Post Office concedes the above implied terms because:
- 1.4.1 There is a real risk that the Court will imply the above terms as these terms have been implied in previous reported court decisions. The Suspension Term was implied in the case of **McLory v Post Office**.¹ Post Office conceded the Back-pay Term in the Court of Appeal decision of **Lalji v Post Office**.² Given these reported decisions, the Managing Judge will be more likely to imply these terms during the Common Issues trial.
 - 1.4.2 By conceding the above two terms, Post Office will appear more reasonable and not lose credibility before the Managing Judge. Counsel will be in a better position to defend the other more onerous implied terms being sought by the Claimants, not only in relation to suspension, but more generally.
 - 1.4.3 The Counsel team anticipates that the Managing Judge may be looking for some points on which he can give a small victory to the Claimants. Conceding the two above terms allows for this.

¹ [1992] ICR 758

² [2003] EWCA CIV 1873

2. POST OFFICE'S RIGHT TO SUSPEND AND WITHHOLD REMUNERATION IN THE CONTRACTS

The right to suspend

- 2.1 Under section 19-4 of the Subpostmasters Contract, Post Office may suspend a Subpostmaster where Post Office considers it "*desirable in the interest of [Post Office] in consequence of [the Subpostmaster]*":
- (i) *being arrested;*
 - (ii) *having civil or criminal proceedings brought against him; or*
 - (iii) *where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of Post Office, or are admitted, or are suspected and are being investigated.*
- 2.2 The NT Contracts contain a similar term. Clause 15.1 of Part 2 of both the Mains and Locals Standard Conditions state that "*Post Office Ltd may suspend the Operator from operating the Branch where Post Office Ltd considers this to be necessary in the interests of Post Office Ltd as a result of:*
- 15.1.1 *Operator and/or any Assistant being arrested, charged or investigated by the police or Post Office Ltd in connection with any offence or alleged offence;*
 - 15.1.2 *civil proceedings being brought against the Operator and/or any Assistant; or*
 - 15.1.3 *there being grounds to suspect that the Operator is insolvent, to suspect that the operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the Branch, the Basic Business or any Post Office® branches with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct).*
- 2.3 The manner in which the above provisions operate is that the suspension right arises where:
- 2.3.1 one of the grounds referred to in the above clauses arises; and
 - 2.3.2 Post Office considers it "*desirable in its interest*" (under the Subpostmasters Contract) or considers it "*necessary in the interests of Post Office*" to suspend the Subpostmaster/Operator.

The right to withhold remuneration

- 2.4 Section 19-3 of the Subpostmasters Contract states that "*[w]here a Subpostmaster is suspended his remuneration in respect of any period of suspension will be withheld so long as the suspension continues*".
- 2.5 At the end of the suspension period, whether by termination or re-instatement, section 19-4 provides that "*the Subpostmaster's remuneration in respect of the suspension period may, after consideration of the whole of the circumstances of the case, be forfeited wholly or in part.*"
- 2.6 The NT Contracts contain similar provisions. Clause 15.2.1 provides that "*During the period of suspension Post Office Ltd may suspend payment of all sums due to the Operator under the Agreement.*"

- 2.7 Clause 15.2 provides that *"Following the end of the period of suspension, Post Office Ltd may, in its discretion, taking into account the relevant circumstances, agree to pay to the Operator all or part of such sums as have been suspended in accordance with clause 15.2.1."*

3. THE IMPLIED TERMS THE CLAIMANTS ARE SEEKING

- 3.1 At the Common Issues Trial, the Claimants will be alleging that Post Office's contractual rights to suspend should be limited or restricted in the following ways:
- 3.1.1 Post Office may not suspend Subpostmasters (i) *"arbitrarily, irrationally or capriciously"*, (ii) *"without reasonable and proper cause"* and/or (iii) *"in circumstances where the [Post Office] was itself in material breach of duty"*.
- 3.1.2 Post Office may not suspend Subpostmasters on a *"knee jerk"* basis.
- 3.1.3 Post Office may not suspend Subpostmasters without first giving *"fair consideration to all relevant circumstances and to whether or not to suspend [Subpostmasters] even if the threshold for doing so was established"*.

4. LITIGATION RISKS AND TACTICS

- 4.1 The implied terms sought by the Claimants are quite onerous. Of particular concern is the restriction on Post Office's suspension right where Post Office itself is in material breach. This would have the practical effect of making it unclear whether Post Office can and cannot suspend where there is a dispute between the parties. This may then hold up the suspension of postmaster in circumstances where Post Office needs to suspend quickly so that it can protect its cash and assets.
- 4.2 Counsel's opinion is that the restrictions on the right to suspend being sought by the Claimants (as per section 3) are unlikely to be accepted by the Judge.³ This is because they have taken their case to an extreme position in trying to fetter Post Office's right to suspend. Had they been more conservative, and sought more modest restrictions on the right to suspend, they may have had more success.
- 4.3 However, our Counsel team identified two areas of weakness where the Managing Judge may be minded to imply terms to restrict the extent of Post Office's rights to suspend and to restrict Post Office's discretion in not paying remuneration during the suspension period (regardless of the Claimants' pleaded case).
- 4.4 First, our Counsel team is of the view that there is a real risk that the Managing Judge may find that there is an implied term to limit the exercise of the right to suspend to cases where there is a reasonable basis or grounds for suspending a Subpostmaster on one of the grounds identified in the express terms of the contracts.
- 4.5 The risk arises from a 1992 employment case of **McLory v Post Office** which was a case concerning suspension on grounds of suspected misconduct by an employee postman. The Claimant in that case sought to imply terms importing notions of fairness into the express right to suspend similar to the implied terms the Claimants are seeking in the Group Litigation. The Court in **McLory** rejected the implied terms sought. However, the judge in that case implied a limited term that that Post Office could only suspend if it had "reasonable grounds" to do so and could only continue the suspension for so long as those reasonable grounds continued. Whilst **McLory** was an employment case, we and the Counsel team see a real risk that the Managing Judge in the Group Litigation may adopt a similar approach.

³ See further paragraph 53 – 55 of Counsel's Opinion dated 10 May 2018.

- 4.6 The second risk area concerns the Post Office's contractual power to withhold remuneration, and ultimately not pay remuneration, during a period of suspension. At present, the subpostmaster contracts give Post Office a wide discretion on whether to pay remuneration during suspension. Where one party has a contractual discretion, there is an established line of authority that the discretion must be exercised in good faith and not arbitrarily, irrationally or capriciously. Further, such an implied term was conceded by Post Office in the Court of Appeal decision of **Lalji v Post Office**. Given the case authority, it would be difficult to argue against this implied term if this issue were to arise during the Common Issues trial.
- 4.7 The Claimants are seeking to impose a much more restrictive set of implied terms that risk curtailing the flexibility Post Office has in suspending subpostmasters quickly with limited information. Conceding the two less restrictive implied terms identified above (the Suspension Term and the Back-pay Term) therefore also has a tactical advantage:
- 4.7.1 These two terms offer Subpostmasters some protection against improper decision-making by Post Office and therefore negate the need for the more onerous protection under the Claimants' implied terms.
- 4.7.2 Post Office will appear more reasonable and not lose credibility before the Managing Judge. Counsel will be in a better position to defend the other implied terms being sought by the Claimants, not only in relation to suspension but more generally. As a general strategy adopted from the outset of this litigation we have sought to avoid taking pedantic or weak points. Instead we have been prepared to concede small losing points in order to avoid them undermining the credibility of our arguments on important points.
- 4.7.3 The Counsel team anticipates that the Managing Judge may be looking for some points on which he can give a small victory to the Claimants. Conceding these two implied terms allows for this and, as we will outline below, this concession should not have significant operational impact on Post Office's practices.

5. LIMITED OPERATIONAL IMPACT

The suspension decision

- 5.1 To recap, in relation to suspension, the implied term we are proposing be conceded is that Post Office may suspend only in cases where there is a reasonable basis or grounds for the suspension on one or more of the grounds for suspension identified in the express terms of the contracts.
- 5.2 The effect of such an implied term is that, in any given case, Post Office would have to demonstrate that:
- 5.2.1 the suspicion of misconduct or other contractual trigger for suspension was genuine and based on some reasonable evidence (i.e. not on a whim); and that
- 5.2.2 Post Office believes that the suspension is desirable or necessary in its interests is reasonable.
- 5.3 Our view is that, in most cases, the above requirements should be met.
- 5.4 During our discussions with John Breeden when taking his statement, John confirmed that, in his experience, all precautionary suspension decisions are taken after some investigation on the day to confirm the suspicion of misconduct (i.e. the requirement in paragraph 5.2.1 above is met) and consideration is given to whether it is in the interest to Post Office to suspend (the requirement in paragraph 5.2.2 above).

- 5.5 Suspension decisions are not taken lightly given the disruption the suspension causes both to the subpostmaster and Post Office (in having to arrange a temp. etc.). Since 2014, all suspension decisions were made by the team leader in consultation with the contracts advisor and the rationale for the decision was recorded. The decision is taken after a preliminary investigation into the misconduct. Mr Breeden confirmed that consideration is also given as to whether the decision to suspend is in Post Office's interest. In most cases, the decision is taken to minimize the risk of loss of the cash and stock and/or protection of Post Office's reputation. Prior to 2014, the suspension decisions were made by the contracts advisor but Mr Breeden confirmed the reasons for the suspension should be the same and that the decisions were still recorded.

The withholding of remuneration

- 5.6 The implied term we recommend be conceded is that with respect to both the decision to withhold the remuneration at the start of suspension period and the decision to not pay or partly pay the withheld remuneration at the end of the suspension period must not be made dishonestly, arbitrarily, irrationally or capriciously.
- 5.7 The effect of the implied term is that decisions to withhold and ultimately not pay the remuneration should be objectively justifiable.
- 5.8 Historically, Post Office practice has been to withhold remuneration in all suspension cases. When the suspension period comes to an end consideration is given to whether remuneration during the suspension period should be paid. We understand that over the past 6 years, other than in 2 cases in 2013, Post Office has not paid remuneration to any suspended subpostmaster.
- 5.9 We also note from the report prepared by Sally Buchanan⁴ that the decision on whether to pay the remuneration is not documented but the contract advisors have confirmed that a discussion does take place, meaning that fair consideration is given to the need to pay back-pay.
- 5.10 It appears therefore that the implied term should not significantly impact Post Office's approach to withholding and not paying remuneration in most suspension cases. Where there are legitimate grounds to suspend, Post Office can justify the non-payment of the remuneration because either (i) a Temp has taken over operating the branch and the remuneration earned from sales is paid to the Temp or (ii) where the branch closes no remuneration should be due to the subpostmaster as no Post Office business is being conducted. Such a decision is justifiable and would not have been taken dishonestly, arbitrarily, irrationally or capriciously.
- 5.11 An area of weakness for Post Office is that the decision to withhold and not pay the remuneration is not usually documented. Steps should be taken to ensure that the decision on whether to pay the remuneration and the reasons thereof is properly documented in all cases. This documentation does not need to be lengthy or complicated. A few paragraphs of written explanation recorded on the branch file, an email capturing the decision or a ticked-off checklist would be adequate.

6. RECOMMENDATION

- 6.1 We recommend that, prior to the Common Issues trial, we inform the Claimants that Post Office is prepared to agree to the Suspension Term and the Back-pay Term.
- 6.2 If Post Office supports this recommendation, the exact timing of this communication to the Claimants will be left to Counsel and made when most tactically appropriate.

⁴ Titled "Remuneration Approach during the Period of Postmaster Suspension"