



## Horizon Compensation Advisory Board

### Report of sixth meeting held on 31 July 2023

Members present: Prof. Christopher Hodges (Chair); Lord Arbuthnot; Kevan Jones MP; Prof. Richard Moorhead.

Also present: Carl Creswell; Rob Brightwell; Eleri Wones (all DBT).

#### OVERTURNING CONVICTIONS

1. The meeting was joined for this item by Simon Baker KC, Jacqueline Carey KC, Nick Vamos (Peters & Peters) and Simon Recaldin (Post Office), who described the work which Peters & Peters and Counsel had been doing to review the convictions of everyone prosecuted by the Post Office since 2000. The Chair noted that there was a close link between the Board's main focus on compensation and the quashing of convictions, because compensation could not be paid to those whose convictions had not been overturned.

#### LEGAL FRAMEWORK

2. The Peters & Peters/Counsel team explained the legal framework governing the way in which convictions can be overturned in England and Wales. They explained that their overriding objective was not to protect or defend the Post Office, but rather to ensure that unsafe convictions were quashed and that safe convictions were upheld. (In Scotland and Northern Ireland, prosecutions were conducted by the public prosecution agencies.)
3. A postmaster convicted in the Crown Court could ask the Court of Appeal for leave to appeal (which would include consideration of whether the normal time-limit for appeals should be waived). Such cases could also be referred direct to the Court by the Criminal Cases Review Commission (CCRC) which would bypass the need to obtain leave to appeal. The Court of Appeal would overturn convictions if they were 'unsafe'. Before doing so it would review the detailed evidence from all parties and form its own view based on that evidence: it would not quash convictions simply because the Post Office asked it to do so.
4. Cases of postmasters who pleaded guilty in the Magistrates' Courts could only be appealed if their case was referred by the CCRC. This meant that cases could be reopened if the CCRC considered that there was a *real possibility* that the conviction would be overturned by the Court. Appeal cases went to the Crown Courts where they were dealt with by way of a fresh hearing. If an appeal was referred, the Post Office would apply the Full Code Test set out in the Code for Crown Prosecutors – i.e. they would be assessed to establish whether there was a realistic prospect of conviction and the retrial was in the public interest. The Post Office had to date not sought to re-prosecute any such cases, either on evidential or public interest grounds, so the Crown Courts had been able to overturn convictions without contest.
5. Convictions in Scotland can be referred for appeal by the Scottish CCRC (SCCRC) to the High Court. The tests applied by the SCCRC in making a referral and the High Court in granting an appeal are slightly different than in England, Wales and Northern Ireland.
6. In its judgment on the *Hamilton* case, the Court of Appeal had indicated that it was prepared to overturn cases in which the reliability of Horizon data was "*essential to the prosecution*" (which it labelled as 'Horizon cases'). As the CCRC had made clear in its [recent article](#), published on 25 July 2023, cases which did not meet that test *could* also be considered for review based on the facts of the case. However, the Court of Appeal made clear that if a case was not a 'Horizon case', and an appellant wished to advance other grounds of appeal, they would need to persuade the Court to extend the time limit for appealing, which might be "*a very difficult hurdle for an appellant to surmount*". This would particularly affect cases where an appeal would be on the basis of information that was known to the appellant at the time of the prosecution and conviction

and therefore could have been raised at the time of the original trial/conviction by the defendants' lawyers.

*Review process*

7. The Post Office had conducted a tracing exercise in order to contact the 700 postmasters who had been convicted in cases which might have relied on Horizon. It had sent three sets of letters offering them disclosure and the case papers from their case (where available) and inviting them to appeal. In the light of concerns about the way in which approaches from the Post Office would be received by convicted postmasters, the Post Office had also asked the CCRC to send a further round of letters independently.
8. The Post Office had also engaged with other bodies who had prosecuted cases which may have relied on Horizon data. The Public Prosecution Service for Northern Ireland had responded very positively and two convictions had already been overturned. Other bodies were also pursuing cases. The Post Office continued to offer them encouragement, co-operation and access to its case material. The Board discussed the role of these other prosecuting bodies, such as the CPS and DWP, who had brought over 170 cases.
9. To date, 86 convictions had been overturned. 48 appeals had been unsuccessful, whether rejected by the CCRC, the Court of Appeal or abandoned by appellants. Checks would be made with the ICO to determine whether it would be possible for the Post Office to share details of unsuccessful Post Office cases with the Board.
10. The Post Office, Peters & Peters and Counsel shared the concern of the Board that many postmasters had not yet sought to have their cases overturned. All were very aware of the urgency of encouraging early appeals: as time passed, it might be more difficult to find evidence and more postmasters would become ill or pass away.
11. The Post Office had therefore commissioned Peters & Peters to undertake a pro-active review all convictions which it had prosecuted which may have relied on Horizon data (save for those whose appeals had already been considered by the Courts). To assess individual cases, Peters & Peters had engaged Simon Baker KC and Jacqueline Carey KC, both highly experienced criminal barristers in independent practice who acted for both prosecution and defence, and a team of experienced independent junior counsel. They had extensive experience of disclosure issues. Their professional obligations required them to take an independent view of cases based on the facts and the applicable legal framework and to ensure that unsafe convictions were quashed. Their role was not to try to uphold convictions: the Post Office had not asked them to do so, and in any case such action would be contrary to their professional obligations. All cases have been reviewed by junior counsel. Those cases flagged as being potentially appealable are being reviewed by both KCs. The review is ongoing.
12. The team explained that, because of the burden of proof in the Court of Appeal, the Post Office could only pro-actively offer to concede cases if it was in possession of sufficient material to be satisfied that it was a 'Horizon case'. However, the team emphasised that even if the team was not able to advise that an appeal could be pro-actively conceded based on the evidence presently available to the Post Office, that did not mean that an appeal by that individual would not be conceded if further evidence became available (including fresh evidence from the individual themselves). Moreover, the team emphasised that the Post Office was never the final arbiter of whether a conviction was unsafe, and that the Court of Appeal could allow an appeal even if it was not conceded by the Post Office. The Post Office had written to all convicted postmasters to provide them the disclosure and case papers for their case (where available) to enable them to take their own legal advice as to whether to appeal (and that there were several firms willing to do this with no charge to the postmasters).

***Availability of evidence***

13. Because of the passage of time, the application of data retention policies, and a lack of systematic storage and retention of papers by the Post Office, there was limited evidence in the Post Office's possession in about a quarter of cases. This was particularly true for cases prior to 2007, where the available evidence for some cases did not even reveal the nature of the charges. Even for later cases, evidence was often patchy.
14. In considering appeals, the review of evidence is not limited to the evidence held by the Post Office. Evidence is sought from other sources, including, but not limited to, from the postmasters themselves, the GLO case, the Williams Inquiry, court records and local newspapers. In some cases, the Post Office had tracked down the Post Office investigators or other witnesses who had worked at the branch or been involved in the investigation. These sources could sometimes fill in gaps in the record.
15. In many cases postmasters had chosen to plead guilty – often in the light of legal advice – and some had made confessions in their interviews or in writing. The review did not regard those confessions as automatically reliable: it considered the reasons why they might have been made, and whether they were corroborated by other available evidence. Some cases had been conceded despite the existence of such confessions.
16. If a postmaster's evidence (either at the time of the prosecution or by way of fresh evidence thereafter) indicated that s/he did not know how the shortfall had arisen, and there was no reliable evidence independent of Horizon to the contrary, the team took that as an indication that the reliability of Horizon was essential to the prosecution. Appeals in such circumstances were conceded.
17. The team had taken a broad view of potential unfairness. In some cases, postmasters had used money from the Post Office or manipulated pension and allowance payments to recoup the cost of meeting previous unexplained Horizon shortfalls (and/or covered up such use of the money). In such cases, the Post Office had always regarded such instances as consequences of the failures of Horizon. In cases where there was reliable evidence (including from appellants) that this is what had happened, the Post Office had conceded appeals.
18. The team had noted the Board's previous recommendation that the Minister should encourage the Post Office, when considering which potential appeals meet the Court of Appeal's criteria, only to resist appeals in which there remained substantial evidence wholly free of taint. The team noted that in response to early applications to the Court of Appeal, the Post Office had said that it was willing to concede appeals where there was insufficient evidence to show whether or not Horizon evidence was essential to the prosecution. However, at a directions hearing in the case of *Allen & Others* (19 July 2021) and then again in its judgment in the case of *White & Others* [2022] EWCA Crim 435, the Court had indicated that the normal rules of criminal appeals applied so the burden of overturning cases should remain with the postmaster, and that the Post Office should not concede such appeals. If the Post Office was nonetheless to try to concede them, the Court would be unlikely to accept this – and the postmaster would have to go through the stress of a potentially unsuccessful appeal. The team explained that because of the different test applied to magistrates' court cases, the burden of proof in such cases was effectively reversed in favour of the postmaster once the case had been referred by the CCRC.
19. The team stated that the evidence showed that not all allegations about misconduct by the Post Office were true. For instance, there was clear evidence, based on verbatim transcripts and audio recordings, that in initial interviews, Post Office staff had generally followed guidance requiring them to offer postmasters access to publicly funded lawyers to advise them in the interview or have a 'Post Office friend' accompany them. If necessary, interviews were adjourned until such advice could be provided. There was evidence that this had occurred even where the interviewees had claimed otherwise.

20. The Board noted concerns that Post Office interviews may have been oppressive, especially given the vulnerability of some of the people accused. The team did not dispute this had happened in some cases. The team always looked to see whether there was evidence, whether on the papers, from appellants or otherwise, to indicate whether this had been the case in any specific case under consideration or review. In response to a suggestion that there could be a presumption that confessions in interview were unreliable due to oppression in other cases, the team noted that each case had to be determined based on its own facts, and that the Court of Appeal had consistently ruled that a confession would not automatically be deemed unreliable simply because it was obtained in an interview conducted by an individual, organisation or team that had been found to have acted oppressively or improperly in other cases. The team could not recall any case where a postmaster had not been legally represented in court.

*Results of the review to date*

21. The review was still under way: Counsel continued to work through cases. They had focussed initially on those in which the Post Office's own papers indicated clearly that it was a Horizon case. Even once the process had been completed, the door would still be open for the consideration of any additional evidence which came forward.
22. The review had already led the Post Office to write to a number of postmasters to indicate that any appeal would be conceded based on the evidence held by the Post Office, identifying law firms who were involved in overturning such cases. (The Board noted that some firms provided this service free of charge). Further letters are likely to follow. The review had also found a substantial number of cases where there was strong evidence, independent of Horizon reliability, that the postmaster was guilty of theft or other offences.
23. Counsel reported that they had very good and constructive relationships with their legal colleagues who represented postmasters. To date there had been few differences in respect of individual cases.

*Encouraging postmasters to appeal*

24. The circular letters from the Post Office and CCRC had generated a disappointingly low number of responses. Even where, in the light of the review, the Post Office had written personally to a postmaster to say that it would not oppose an appeal, some were reluctant to make one. The reasons for this are not known but might include misunderstanding of what the process might entail, disillusionment with the legal system, a desire to maintain closure in respect of Post Office issues and pressure in other parts of their lives.
25. The Post Office had discussed informally with the CCRC whether it could take forward some cases without the appellant's active support. The CCRC had indicated that it could not refer a case for appeal in such circumstances. It had made the same point in its recent online article. The Board noted that section 14 of the Criminal Appeals Act 1995 appeared to allow it to do so. It would take up this issue with the CCRC.
26. The Board discussed the possibility of an independent third party – perhaps associated with the JFSA – being commissioned to engage personally with convicted postmasters to encourage them to appeal. It would be important to address any data protection issues involved. Help on this might be needed from the Courts, the Information Commissioner's Office or from secondary legislation.

*Conclusion*

27. Board members thanked the team for their work in difficult circumstances, and for their presentation of it. They concluded:
  - a. that there were important constraints on the criminal appeals process arising from the legislative framework and the approach of the Court of Appeal to leave applications, the presumption against overturning cases on a generalised basis where evidence was

missing, and their reluctance to treat evidence obtained by investigators from a discredited prosecution team as inherently unsafe (see paragraphs 3, 18 and 20 above);

- b. noted the commitment of those involved to ensuring that their review and decisions remain independent and objective;
- c. that since the Court's approach had been to warn the Post Office and appellants' lawyers that they required a specific case to be made for an appeal (and any leave application), if the Post Office were to concede a wider range of appeals, there was no guarantee that the Court of Appeal would agree to quash the convictions concerned. Given the limits of evidence held by the Post Office in many cases and the Court's approach to appeals, this meant that there was an unidentified but plainly sizeable body of cases that required evidence from postmasters before the Court would allow them to proceed. Without such evidence, Post Office lawyers would not feel able to advise that an appeal should be conceded.
- d. That whilst this indicated the benefits of postmasters being willing to engage with the review (which they should be encouraged to do), there were serious issues of trust and the traumas of the victims inhibiting this engagement.

28. The Board noted that the overall process seemed likely to lead to only a small number of convictions being overturned, when it was clear to them that many more were ill-founded. Whilst this was not a reflection of the team's work, it was not acceptable.

29. The Board recognised that the Counsel team, the Post Office and Government wanted to see more postmasters submitting appeals.

30. Board members stood ready to help with any communications to postmasters to encourage them to appeal. However, in their view, although letters and publicity had a role, this effort would require personal engagement with postmasters through a proactive and neutral intermediary. They asked DBT, in discussion with the Post Office and the JFSA, to consider how this could be achieved.

31. Even with a vigorous programme of engagement, however, the Board took the view that most convicted postmasters would be unable to get justice as a result of the legal constraints described above.

32. The Board noted that phase 4 of the Williams Inquiry should provide important evidence about the way in which prosecutions had been conducted. It would want to consider these issues further in the light of that evidence. The Board hoped that the Inquiry's recommendations would consider the impact of the Court of Appeal's policies and make appropriate recommendations which could secure the quashing of convictions for hundreds more postmasters. A letter would be drafted for and approved by the Advisory Board for the Inquiry to ensure the issues were before it.

33. If the legal system could not deliver a fair outcome for this large group of wronged people, the Board believed that there was a case for legislation to ensure that their cases were considered against a presumption of innocence, or even quashed en masse. In the Board's view it would be better to overturn the convictions of all postmasters – including some who were genuinely guilty – rather than to allow a large number of innocent people to remain stained by wrongful convictions and uncompensated for their effects. The Board agreed:

- a. **To reflect what they had learned in their forthcoming letter to CCRC, including the possible use of section 14 of the 1995 Act to allow cases to be referred without the active involvement of the postmaster;**
- b. **To send a copy of this report to the Williams Inquiry, offering to discuss it with Sir Wyn if that would be helpful.**

### **Interim report of the Inquiry**

34. The Board discussed the interim report which the Inquiry had published in July. Among other things, this had recommended that the Board:

- should not be prevented from monitoring individual compensation cases;
- should monitor whether compensation payments were full and fair;
- should produce prompt written reports of its meetings;
- should be augmented with additional members if necessary;
- should publish a three-monthly review of whether, in its view, full and fair compensation was being paid.

35. DBT confirmed that there was nothing to prevent the Board reviewing anonymised information about individual cases. Board members expressed an enthusiasm for doing so where it would help them to assess the fairness of the system. That could involve samples of cases selected either at random or to illustrate particular policy issues.

36. However Board members expressed concern that if it were thought that they could influence the outcome of individual cases, they would be faced with large numbers of requests to do so. That would undermine their core role of advising on the fairness of the system, which they were keen to continue to do from a system-wide perspective (e.g. scrutinising specific areas of concern and providing advice to the Minister, rather than being the decision-maker for individual cases).

37. The review of a large number of cases would be impractical for a Board which typically meets every six weeks. It would also be inappropriate: those appointed to make decisions on cases were selected for their professional expertise in aspects of compensation and related matters. Those were skills which Board members did not necessarily have: they would not want to overwrite the judgements of such professionals.

38. The Board considered whether and how it could advise Ministers that the various appeals arrangements were fair. It could scrutinise processes to ensure that they were robust and establish from performance data whether they were working properly. However these steps would not indicate whether the *outcomes* of the processes were fair. That would probably require some element of sampling. Assessing such samples would be intrinsically difficult because “fairness” always involved some element of subjective judgement. Furthermore it was not clear that the Board had the specialist abilities necessary to reach such judgements.

39. The Board would instead need to rely on the professional judgement of others who were suitably independent. In some cases these independent entities were already part of the system. Where such entities were not yet in place, the Board would recommend their introduction. There was a spectrum of solutions available, ranging from case-by-case assurance as part of the process of making awards to sampling larger numbers of outcomes.

- An example of the case-by-case approach was the GLO Panel’s role of forming independent judgements about compensation cases which could not be resolved bilaterally; and the Reviewer’s in assessing whether the Panel had made a manifest error or irregularity in a final assessment. In respect of the Horizon Shortfall Scheme the Board’s previous meeting had recommended that the Minister should consider the creation of a route of appeal which was independent and was seen to be so.
- At the sampling end of the spectrum the Board discussed whether its proposed HSS appellate entity should undertake sample testing of cases in order to give wider assurance of fairness. Groups of settlements could be revisited if unfairness was found on a particular issue (whether the amount of compensation for a particular head of loss or a process point such as the availability of legal representation). The Board noted that this sampling

approach might allow the fairness of the scheme to be assessed more readily and economically than opening up a right of appeal to all those whose cases had been settled.

- Towards the middle of the spectrum, the proposed appellate entity might be asked to consider the fairness of the principles used in some aspects of the scheme.

40. The Board agreed to consider more fully at a future meeting how it could take an overview of the fairness of the various schemes.

41. The Board noted that it already published reports of its meetings, typically within a week. These reports were communicated to the Minister and should be taken as the Board's view of the issues.

42. The Board agreed to write to Sir Wyn Williams to outline their views on these issues, including an offer to meet.

**Any other business**

43. DBT provided updates on

- its work in response to the recommendations made at the Board's previous meeting;
- progress on compensation payments (including the first in principle acceptance of a GLO offer); and
- discussions between the Post Office and claimants' lawyers in respect of principles for the treatment of pecuniary claims in respect of overturned convictions.

44. Board meetings would be set approximately every six weeks for the remainder of the year.