BEIS0000083

Department for Business, Energy & Industrial Strategy

OFFICIAL SENSITIVE: COMMERCIAL

Date: 1 August 2019
From: Beth White, Deputy Director, Post Office Policy GRO
DG/SCS clearance:

Minister/SpAd	To Note/Comment	To Approve/Decide
Permanent Secretary		X
Kelly Tolhurst	X	

POST OFFICE BONUSES

Summary

Following your conversation with Tim Parker on Tuesday 20 July about Post Office Limited (POL) senior POL bonuses, Tim Parker and Ken McCall have provided a revised proposal which brings reductions to the bonuses of the Executive if BEIS continue to seek a revise to the proposed bonus position. POL continue to prefer to pay the bonus as initially proposed.

Following legal advice, it is recommended that you do not accept this revised position, as the likelihood of challenge by the affected individuals is high and legal advice is that this challenge is very likely to be successful. The gravity of this risk was not included in the proposal.

We recommend that you respond:

1) ask REMCO to consider if there are ways to reduce the Group Executive bonuses to address the concerns that you have raised, that does not create such a high legal risk. In practice this means reducing the STIP awards rather than the LTIP awards: and
2) agree that the STIP to the remaining POL staff, c1,450, are paid as per the original proposal, and this proceeds to their proposed timetable

Timing

Urgent. POL have requested a response by close 2 August.

Decision

That you respond to the email from Tim Parker and Ken McCall from 31/8 to:

- repeat that you had asked for REMCO to identify ways to bring forward a significant reduction to the Executive's bonus as you outlined in your letter to Tom Cooper;
- that you recognise that they have reflected this in the revised proposal, but, that this proposal as presented to you does not reflect the legal risks associated with it and that you understand those risks to in practice prohibit them from pursuing the proposal;

BEIS0000083

Department for Business, Energy & Industrial Strategy

OFFICIAL SENSITIVE: COMMERCIAL

- that you would therefore like the REMCO to consider if there is a proposal which does not incur high legal risk;
- agreeing to the payment of the STIP for those not in the POL Group Executive.

A draft response is at Annex A.

Background

1. On 23 July BEIS received notification via UKGI of POL's proposed bonuses to their Group Executive and its large number of senior managers (approx. 1,400 staff). You wrote on the 29th to Tim Parker and had a telephone call on 30 July at which you made it clear that because of the judgement from the litigation, that the discretionary bonuses of those in the Group Executive, should be significantly reduced to reflect the judgement. You noted that those below the Group Executive, who therefore were not in a position to influence the litigation, should not have their bonuses impacted.

2. On 31 July, Tim Parker and Ken McCall emailed you to provide an updated proposal, taking on board your views. This in summary proposed:
   a. No changes to the bonuses provided to the senior managers below the Group Executive, due to over 1,400 staff;
   b. Recommended making no reductions to the proposed bonuses in 18/19 as POL's preferred approach but indicated their willingness to reduce payment in 2019/20;
   c. Suggested the following possible approach to reducing 2018/19 bonuses, if that was still BEIS's preferred approach:
      i. A 10% reduction in the Group Executive's Short-term Incentive Plan (STIP) award;
      ii. A 30% reduction in the Group Executive's Long-term Incentive Plan (LTIP) award.

Argument

3. The proposal from POL meets your position on not impacting the Group senior manager cohort, however, the bonuses paid to the Group Executive still remain high, with an overall net 19.38% reduction. There is an argument that this doesn't reflect a significant reduction in bonuses to the GE you were expecting, especially those who were able to oversee the litigation approach, many of whom have now left the organisation, but it would be a material reduction.

4. The recommendation in the email from Tim Parker and Ken McCall refers to a legal risk: "We are also concerned that although the bonus schemes in question are stated to be discretionary, discretionary schemes are vulnerable to challenge on the basis that they have become contractual and were we to make any reductions to bonus payments for a financial year that has already passed we could face significant class action.", but this sentence does not sufficiently draw out this advice, and so we

BEIS0000083

Department for Business, Energy & Industrial Strategy

OFFICIAL SENSITIVE: COMMERCIAL

have worked to clarify POL's advice.

5. We have since discovered that the proposal put forward by the POL REMCO yesterday and specifically the risk entailed in adopting the proposal (to reduce LTIP by 30%) does not reflect the level of legal risk presented to the REMCO by their external legal advisers. Taking a risk averse approach to legal privilege, they did not provide an explanation of the underlying risks to the options proposed. The proposal was a demonstration of their eagerness to find a viable option to address the Permanent Secretary's concerns. REMCO also calculated that a 30% reduction to the LTIP for the far smaller cohort of executives (c. 9 individuals) was the best of the possible commercial options available to them notwithstanding the legal risks in the sense that it affected a tiny proportion of the longer serving employees who were executives at the relevant time. However, having read the legal advice, we believe we must alert the Permanent Secretary to the real risk of further litigation and the high likelihood of success arising if this proposal is adopted.

6. In short, entitlements to payments under LTIP are contractual and linked to specific performance targets. There is therefore no clear contractual basis for making a reduction (for this year). To do so could lead to claims of (i) breach of contract and (ii) constructive dismissal (if any of the executives resign). By contrast, and according to the legal advice presented to REMCO, there would appear to be more room to manoeuvre under the STIP scheme to adjust the payments which are at the sole discretion of the Post Office. This option is not without risk, we understand that members of the GE group who are in line for a payment under the STIP scheme constitute a slightly different and newer group of employees than those who qualify under the LTIP and could argue that the exercise of the discretion to cut their bonus is irrational or punitive. However, it would appear to carry less risk that using the LTIP to reduce bonus payments. As far as we are aware REMCO have not yet fully explored the viability of this option so they would need to confirm that there are no other additional risks associated with this route.

7. From the limited interactions with their legal advisers, we understand the risk to be as follows:

- LTIP: the likelihood of members of the GE group taking legal action is medium but the likelihood of such an action being successful is high;
- STIP: the likelihood of members of the GE group taking legal action is medium low (we believe it is unlikely that all the individuals will be minded to take legal action) and the likelihood of such action being successful (based on our current understanding) is medium.

8. Based on the legal risk, we are not able to recommend to you that this proposal for the change to the GE bonus is accepted.

9. We are able to recommend that you continue to support the proposal that those below the GE are paid their STIP as per normal arrangements.

BEIS0000083

Department for Business, Energy & Industrial Strategy

OFFICIAL SENSITIVE: COMMERCIAL

10. Tom Cooper has further advised that reductions to bonus payments should not be carried out over multiple years due to the impact on retention. POL will need to communicate to the individuals affected that it is not intended to repeat the reductions in future years unless the conduct of the litigation changes or significant new information emerges.

Options

There are 4 options available with regard to manage the GE bonus protocol:

a) If BEIS continue to seek a reduction to the bonuses paid, accept the proposal received from Tim Parker and Ken McCall. If POL action this, there is a high risk of challenge by affected parties, and any challenge is likely to be successful. Whilst the political point will have been made that POL is addressing the bonus issue, this will lead to further public criticism of POL's senior leadership, have a financial cost, and risk BEIS' reputation for supporting such a position.

b) Support the STIP payments for those below the Group Executive as the legal risks associated with this approach are too high.

c) Ask Tim Parker and Ken McCall to identify other ways of reflecting the concerns held that doesn't carry such high legal risk. It is likely that any new proposal will be to reduce STIP payments only given that this carries less legal risk. The Post Office will need to seek further legal advice on this point.

d) Support POL's preferred position of the payment of all bonuses as originally proposed and request that there is engagement with officials over the next year to discuss the 2020 bonus payments so that we are not working against such deadlines.

Based on the legal advice, I have discounted the option of you pushing for a greater reduction in the GE bonus payment using the LTIP route.

Recommendations

That we follow the steps in option B and C.

Next Steps

1. That you respond to Tim Parker and Ken McCall's email as drafted below.
2. That Tom Cooper supports REMCO considering again the options available to POL.

BEIS0000083

Department for Business, Energy & Industrial Strategy

OFFICIAL SENSITIVE: COMMERCIAL

Clearance

Legal: Jane Corera

Annexes

Annex A: Draft email response (below)

Annex B: Legal advice will be sent in a separate email from Pinsent Masons

Draft email response:

Dear Tim and Ken

Many thanks for your email of the 31 July. I have reviewed this, and the legal advice that accompanied your recommendation. Whilst your proposal has reflected my concerns, I do not feel that the legal risks to the proposal were sufficiently raised in your recommendation, as my understanding of these are that they are significant. I therefore cannot support your proposal as currently drafted.

As discussed on Tuesday, I am not proposing any change to the proposed bonuses for the vast majority of those eligible, and therefore I am content that STIP payments are made for all eligible employees outside of the Group Executive.

My concern remains, as to how those who have overseen POLs litigation, and the contingent liability to which POL is now exposed, have this risk reflected in their bonus payments. Whilst I cannot support the current proposal, I ask that you consider if there are other routes available that do not carry such legal risk and respond accordingly.

Ends

BEIS0000083