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By email

Date
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Dear Sir or Madam

Post Office Horizon IT Inquiry (the "Inquiry") – Post Office Limited's ("POL") response to NFSP Submission on List of Issues

We refer to the National Federation of Sub-Postmasters' (NFSP) letter to the Inquiry of 17 November 2022 requesting an amendment to the List of Issues, and the Inquiry's email of 30 November 2022 requesting POL to respond in writing to this request by 4pm on 9 December 2022.

The NFSP's letter of 17 November 2022 requests that the Inquiry amends the Consolidated List of Issues (CLI) to the effect that every reference to "SPMs, managers and assistants" be amended to "SPMs, managers, assistants and 'Post Office employees'".

The NFSP has explained that its motivation behind making this request is to avoid "an incomplete public understanding of the risk posed to anyone who worked in a post office during the relevant period." POL fully understands and shares the NFSP's view that the Inquiry should seek to avoid there being an incomplete public understanding of that risk. However, it considers that were the Inquiry to accede to the NFSP's request that would have wide-ranging and unintended consequences, which we invite the Inquiry to consider before reaching any decision on the NFSP's request.

We note that the List of Issues appears to have deliberately drawn a distinction between three categories of persons: (i) SPMs (which are defined for the purpose of the CLI to designate sub-postmasters and sub-postmistresses); (ii) "SPMs, managers and assistants" and (iii) 'Crown Office employees' (i.e. Post Office employees).

Examples of issues which relate to SPMs only are:

- CLI 61 (policies and guidelines regarding the contractual liability of SPMs for shortfalls shown by the Horizon IT system)
- CLI 72 (who was responsible for conducting audits of SPMs' branch accounts during the relevant period)
- CLI 88 (who was responsible for decision-making during the relevant period regarding the suspension and reinstatement of SPMs and the termination of SPMs' contracts etc.)

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Examples of issues which relate to SPMs, managers and assistants are:

- CLI 109 (policies and guidelines adopted regarding the bringing of private prosecutions against SPMs, managers and assistants alleged to be responsible for shortfalls shown by the Horizon IT system)
- CLI 164 (support and representation available to SPMs, managers and assistants alleged to be responsible for shortfalls shown by the Horizon IT system)

There are just two issues relating to Crown Office employees:

- CLI 66 (the extent, if at all, to which policies and guidelines in relation to contractual liability for shortfalls applicable to SPMs differed from the approach taken to Crown Office employees)
- CLI 115 (the extent, if at all, to which policies and guidelines in relation to the bringing of private prosecutions against SPMs, managers and assistants differed from the approach taken to Crown Office employees)

The NFSP's proposal would have the effect of undermining these carefully drawn delineations.

As an obvious starting point, were CLI 109 to be amended in the way proposed then CLIs 66 and 115 would be meaningless: the policies and guidelines adopted in relation to "SPMs, managers, assistants and POL employees" (as proposed) would necessarily not differ from those adopted in relation to Post Office employees.

However, the greater and more fundamental risk is that by adopting the NFSP's proposal throughout the List of Issues is that it would lead to a considerable and (we believe) unintended expansion of the scope of the Inquiry.

As we read the current CLI, the Inquiry has deliberately chosen to have regard to the factual circumstances of Crown Office employees in just two circumstances, in both cases by way of counterpoint to the policies and procedures applicable to SPMs, managers and assistants (namely, in relation to the contractual liability for shortfalls and private prosecutions). By contrast, for example, in the context of debt recovery, the CLI does not include an equivalent provision to CLI 66 or 115 and therefore does not (at least on its face) seek to consider any distinction between the approach adopted in relation to sub-postmasters, managers and assistants as distinct from Crown Office employees. Similarly, there is no equivalent of CLI 66 or 115 in relation to the conduct of criminal investigations (CLIs 121 -129), charging decisions (CLIs 130 – 139) or prosecutions (CLIs 140-149). Were the NFSP's request to be acceded to, it follows that the scope of the CLIs would be considerably expanded, with the result that the rule 9 process would be likely to need to be revisited in order to ensure that suitable requests were made for documents and statements not previously anticipated to be relevant prior to the inclusion of Crown Office employees in these issues.

POL recognises, of course, that the Inquiry may, after suitable consideration and having received submissions from other CPs on the matter, consider that it does wish to extend the scope of the CLIs in this way, and it would obviously not object to it doing so were that to be the case. However, its primary concern is that the Inquiry should not inadvertently do so by the 'sidewind' of the NFSP's request, which request does not appear to have anticipated some of its potential consequences.

Finally, there is a real risk that the NSFP's proposal to create a category of persons comprising Post Office employees alongside postmasters, managers and assistants, would lead to greater confusion rather than less, by blurring the distinction between those persons (in particular, between Post Office employees and postmasters who are neither employees nor workers).

In this context POL notes that in the Chair's Progress Update on Issues relating to Compensation August 2022 the term sub-postmaster was used to include not only sub-postmasters, sub-



postmistresses, their managers and assistants, but also *“any person employed by [POL] or its predecessor companies who claim to have suffered loss by reasons for the Horizon IT System unless the context dictates otherwise”*. Whilst this approach may be understandable in the compensation context, not least because neither the HSS, OHC or new GLO ex gratia scheme distinguish between Post Office employees and sub-postmasters, POL suggests that it may be appropriate to retain elsewhere the existing careful delineation of the various categories set out in the CLIs unless the Inquiry is persuaded that it should expand the scope of the issues to be considered and determined by the Inquiry.

POL hopes that these submissions assist the Inquiry in considering the NFSP's proposal.

Yours faithfully

Herbert Smith Freehills LLP

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