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Saturday, 1st April 2023

Dear Minister Hollinrake,

Re: The Post Office and Compensation Arrangements
The unfair treatment of convicted claimants – time to tear up the OHC scheme?

I am as surprised as you may be, that I am writing to you within the space of a week in connection with the same matter. As you know, I represent some of the victims of the Post Office in their claims for compensation.

I believe that my reason for my now writing to you, further to my letter of 23rd March 2023, is a matter of considerable public importance. I would not trouble you were it not. I believe that it is a matter that may merit consideration by Parliament. It is surprising, given the fundamental importance of the issue (and its obviousness, once it is explained), that it has not been raised before now.

I shall explain the issue briefly. Once it becomes apparent and is understood, it may well require Parliament to determine how it is to be addressed. Parliament rightly determined that parties to the Post Office GLO litigation must be properly and fairly compensated for their losses and the harm inflicted upon them by the Post Office and its lawyers. For that purpose, the terms of the deed of settlement of the GLO litigation of December 2019, the effects of which had become both a public scandal and an embarrassment for the government as the Post Office's owner, are treated as no bar to "further compensation" (in Sir Wyn Williams's formulation) to be paid under the scheme recently announced by DBT (the "GLO Scheme"). Further compensation is to be paid *ex gratia*, and not as of right (because strict legal rights are subject to the order of the court made in December 2019 following settlement and Mr Justice Fraser's judgment in **Bates and ors. v Post Office Ltd (Horizon Issues) No.6** [2019] EWHC 3408).

The issue arises, and has become apparent to me, as a result of two circumstances:

- (1) As I explained to you in my letter to you of 23rd March 2023, it is both unfair and unsatisfactory that those convicted of offences on prosecution by the Post Office, who were parties to the GLO litigation and who have had their convictions quashed on appeal ("convicted GLO claimants"), should be barred, by the terms of the 2019

settlement deed that brought an end to the group litigation, from claiming damages against the Post Office, under the scheme administered by Herbert Smith Freehills (the “Overturned Historic Convictions” (OHC) scheme), for the Post Office’s obstruction and interference with their rights of access to the court by deliberately withholding from them information and material that would have enabled them to appeal their convictions long before 2021.

As I have explained, for many affected, that obstruction/interference with legal rights resulted in years of untold suffering and avoidable loss and harm that in law would attract exemplary (punitive) damages. There is no similar bar to claims for damages/compensation for those who were similarly affected, but who were either not a party to the litigation at all and who have had their convictions quashed on appeal (unrestricted damages), or else who were, for example like Mr Castleton, the subject of civil rather than criminal proceedings. Mr Castleton is eligible for full compensation for losses suffered by him under the DBT “GLO compensation scheme”. The reason for the bar asserted by the Post Office to claims by formerly convicted claimants, is that under the terms of the 2019 settlement, *the only* residual claim left, to those who otherwise surrendered all their other civil claims for damages for *£nil* value under the terms of the December 2019 settlement of the GLO litigation, is a claim for damages for malicious prosecution - a narrow legal wrong and a difficult claim in law. It is a claim that the Post Office is zealous to confine within the four corners of the terms of the 2019 settlement deed.

- (2) I have recently had cause to advise a formerly convicted postmaster on their claim for compensation. Their conviction has been quashed on appeal and they have made a claim for malicious prosecution against the Post Office and the losses that they have suffered as a result. The Post Office has adopted a (doubtful) formulation by the Court of Appeal in **Hamilton v Post Office Ltd** [2021] EWCA Crim 577. The Post Office contends that, although pragmatically the Post Office (as prosecuting authority) did not resist the appeal against conviction by the individual concerned, with the result that their conviction was quashed by order of the court, theirs (the Post Office asserts) was a not case in which *Horizon* was ‘*essential to their prosecution*’. Accordingly, it is asserted by the Post Office, any claim by them for malicious prosecution would likely fail. The result is that the Post Office is willing to pay compensation in an exiguous amount that bears no relation to the individual’s ruination, or to the destruction of their livelihood, that resulted from their false conviction for an offence of dishonesty. It is an amount that would represent for the Post Office little more than a nuisance payment.

Those circumstances, considered together, have caused me to reflect upon an issue that I do not believe anyone has previously considered or raised. (If it has, I will no doubt be corrected.)

The question is as follows:

*Why is a convicted GLO claimant, who has had their conviction quashed on appeal, constrained in their ‘compensation’ and confined, under the ‘OHC scheme’, to the terms of the 2019 settlement deed, that restricts and limits their claim solely to damages for malicious prosecution, once their conviction is quashed, and bars all other heads of loss for harm inflicted upon them (such as for breach of contract/breach of trust/abuse of process) (because these were surrendered for £nil value in 2019 under the settlement deed), when a GLO claimant, who was not convicted, but who did receive compensation under the terms of the 2019 settlement deed, is now not similarly restricted and limited but is able to claim compensation under the DBT ‘GLO scheme’ for the full difference¹ between the compensation paid under the terms of the 2019 settlement deed and the actual harm that they suffered as the consequence of the Post Office’s actions towards them, that is to say, across the whole range of claims that are otherwise formally, as a matter of strict law, subject to the 2019 settlement deed - but which is treated under the DBT GLO scheme as not binding for the purposes of paying *ex gratia* “further compensation”?*

The obvious point (or perhaps not obvious – because no one has raised it before now (except obliquely, by me in written submissions to Sir Wyn Williams in the Inquiry)) is that a convicted postmaster whose conviction has been quashed and who receives compensation under the OHC scheme will then be to all intents and purposes in the same position as the position a not-convicted GLO claimant was in, *who had received* payment under the terms of the settlement of the litigation in 2019 - *viz* inadequate compensation compared with the loss and injury in fact sustained by them, in exchange for surrender (resolution/settlement) of all their legal claims.

In short, why should convicted claimants not be entitled to claim, in the DBT GLO scheme, the difference between whatever compensation they may recover under OHC scheme (if any), for malicious prosecution, and *the losses that they actually suffered*? That is to say, in just the same way that non-convicted GLO claimants are able to claim these under the DBT GLO scheme that was last week announced?

If, for the sake of argument/hypothetically, a formerly convicted GLO claimant’s preserved right to claim malicious prosecution is considered to be so weak as to be not worth pursuing, it would mean that such a formerly falsely convicted GLO claimant:

- (a) Has received no compensation under the 2019 settlement deed (convicted GLO claimants are expressly excluded from the settlement sum that settled the claims in the litigation (other than malicious prosecution claims)).
- (b) Would recover no compensation (damages) under the OHC scheme (an *ex hypothesi* weak case on malicious prosecution not being pursued).

¹ Publicly stated to be intended to put the person back in the position, so far as financial compensation can, that they would have been but for the Post Office’s actions towards them.

- (c) Is ineligible (as things stand) for compensation under the DBT GLO compensation scheme – this, despite them having surrendered all their claims in 2019 for nothing – other than one considered ultimately not worth pursuing (*i.e.* (b) above).

They would thus therefore *be wholly uncompensated* for the wrong done/harm inflicted upon them by the Post Office – a sort of *Catch-22*/'falling between the stools'. The issue is plainly only marginally affected by a bad/wholly inadequate settlement of a malicious prosecution claim (which is what prompted me to think further about the issue). (A further problem here is that such inadequate settlements will likely be hedged around by heavy confidentiality terms demanded by the Post Office.)

I believe that there is no principled answer that is available as to why a formerly convicted GLO claimant should not be able to claim under the DBT GLO scheme. It might be said that the OHC scheme results in settlements that are “full and final” as between a claimant and the Post Office. But that should be no bar to “further compensation”, any more than the 2019 settlement deed is binding for GLO claimants. The point is that the DBT scheme is *ex gratia* and informed by principles of fairness, not of right.

There is no reason why formerly convicted claimants should not be able to claim in the DBT GLO scheme the difference between the damages (*if any*) that they receive from the Post Office under the ‘OHC scheme’ (which is *not* a compensation scheme but, rather, is *litigation* for the payment of *damages* in law (not resolved in 2019) for malicious prosecution (for those who were parties to the GLO litigation)) and *the loss that they actually suffered* as the consequence of their wrongful conviction. This would be in recognition that they, like not-convicted GLO claimants, gave up all their other claims under the (unsatisfactory) 2019 settlement. Indeed, once raised, it is obvious, as a matter of fairness, that they *should be able* to claim that difference.

That the “OHC scheme” is treated as somehow the ‘end of the line’ for convicted GLO claimants is wrong in principle, because it fails to recognise that convicted claimants, like not-convicted claimants, gave up *all* their legal claims (save for malicious prosecution) under the (unsatisfactory) 2019 settlement. It results in formerly convicted GLO claimants having rights to compensation for the injury inflicted upon them by the Post Office cut-down and limited, compared with not-convicted GLO claimants, in a way that is self-evidently unfair.

The public would be astonished to know that falsely convicted postmasters, whose lives have been devastated, and in many cases in truth ruined, by the Post Office, in the most extensive miscarriage of justice in English legal history, *are in a worse position than those whom it did not prosecute*. Once the disparity in treatment, and the unfairness, is exposed, the maintenance of the existing arrangements becomes untenable and also seriously objectionable. It is the consequence, I believe, of failing to identify that the result of the ‘OHC scheme’, is to put convicted claimants in the same position as non-convicted claimants were in under the settlement reached in the GLO litigation in December 2019. That was the point of departure for the government recognising that the terms of settlement were manifestly unfair for GLO claimants, as compared with those who benefitted from the litigation, but who were not parties to it, and who are eligible to claim under the Historic Shortfall scheme (HSS). Payment of damages for malicious prosecution simply brings a convicted claimant to the position that their non-

convicted fellow claimants were in in 2019 – viz they will be inadequately compensated for the losses they suffered and the harm inflicted upon them by the Post Office.

The issue then becomes, as it is for others, *what is the true loss suffered* by them and the appropriate compensation that must be paid, in fairness, in recognition of the difference between what they suffered and what they receive/have received in *settlement of their legal claims*? That applies with as much force to convicted claimants as to those who were not convicted, but who also suffered harm at the hands of the Post Office (*i.e.* those now eligible to claim in the DBT GLO scheme).

The problem, in part, I apprehend, is the result of insufficient regard being had to one group of GLO claimants (those previously falsely prosecuted and convicted) being treated as restricted to their strict residual legal rights (a limited head of claim in law) as the measure of their ‘compensation’ (damages in law), but the other group (those not-convicted) being compensated by a measure determined and informed by principles of fairness. (There are further reasons – *e.g.* failure to recognise that whilst it was seen that not-convicted GLO claimants settled their claims for a sum that was plainly inadequate to their loss, convicted GLO claimants, under the terms of settlement gave up all their claims (save, contingently, for malicious prosecution) for £nil.)

There is no principled basis for such disparity in treatment.

I am confident that you will recognise the importance of the issue that I have raised. How it is to be addressed, once raised, is a matter for you and, I apprehend, for Parliament. I am conscious that addressing it may impact upon the timeline for payment of compensation under the statutory arrangements and the voting by Parliament of public money for the payment of compensation.

I am copying this letter, for information, to Sir Wyn Williams, to Lord Arbuthnot and to Professor Richard Moorhead.

Yours faithfully,

[GRO]

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