

Post Office Complaints and Mediation Scheme

24 November 2014

1. We are assuming that POL is reviewable (i.e. exercises sufficient public law functions to make it susceptible to JR).
2. Not all its decisions are reviewable – private law decisions will not be reviewable.
3. Matter of fact and degree. Different courts reach different conclusions. Following principles:
 - 3.1. Aga Khan [1993] 1 WLR 909 - where powers derive from agreement of the parties and give rise to private rights, then not a public law decision.
 - 3.2. PIA [2001] EWHC Admin 247 at [12] PIA Ombudsman not reviewable because legal authority arises from consensual submission to the jurisdiction
 - 3.3. Insurance Ombudsman [1994] CLC 88 – Insurance Ombudsman was not reviewable
 - 3.4. Swann v AG Turks & Caicos [2009] UKPC 22 at [14] – claim for unpaid remuneration was a “classic private law claim based on breach of contract”
4. So here, what is the nature of the scheme and what role does public law have to play?

5. First, underlying claims are private law claims for breach of contract. A decision to bring proceedings against a sub-postmaster would not be susceptible to JR. Ditto the decision to defend proceedings brought by a sub-postmaster.
6. Second, a decision by POL to mediate a claim brought by or against a subpostmaster would not be susceptible to JR.
7. Third, was then the decision to set up the Scheme a decision that is susceptible to JR?

7.1. The scheme is an attempt to provide a framework for the resolution of private law disputes, without the need for litigation.

- (1) It was to give *“an opportunity to raise their concerns directly with Post Office. In partnership with Subpostmasters, the JFSA, Second Sight and interested MPs, all sides can then work towards resolving those concerns”*

7.2. Why should a scheme to oversee this process make it susceptible to JR?

7.3. The scheme is not about Horizon – it is about the individual cases submitted by the applicants – and providing a framework for those cases to be resolved.

7.4. A scheme for individual applications who will voluntarily submit to the jurisdiction of the Scheme (but can withdraw at any moment).

8. Fourth, would any decision under the Scheme be reviewable?

8.1. It is only “final” as to the inapplicability of mediation.

- 8.2. But it cannot be binding as to a mediation in fact taking place. It is merely a finding that mediation is appropriate.
- 8.3. Applicant could decide not to participate – although it does not say that POL would participate, given that mediation is a consensual process would be odd to compel mediation
- 8.4. That said, there is an offer for costs to be covered.
- 8.5. But it looks like a voluntary submission to a non-binding dispute resolution process by the Applicant – without any clear obligation on the part of POL. Looks like the Ombudsman or the Jockey Club.
9. Fifth, would any decision to withdraw the Scheme be reviewable?
 - 9.1. Decision to set it up not reviewable.
 - 9.2. Why should a decision to withdraw from the Scheme be reviewable?
 - 9.3. Will they say that it is? Probably
 - 9.4. How to protect yourselves? Consult.
 - (1) They will say a legit expectation that the Scheme will be used. We will say that it is has broken down and is not working. Material change of circumstances
 - (2) They will say irrational to withdraw. We will say that it is has broken down and is not working.
 - 9.5. You have not said that you will not start proceedings. You could do so.
10. Sixth, is POL required to accept the view of SS?

10.1. No. They were required to give a recommendation and to act independently.

11. Seventh, JFSA's letter dated 10 November is almost incomprehensible

12. So to your questions

12.1. (a) decisions taken in relation to the Scheme are private in nature

12.2. (b) Not reviewable

12.3. (c) there is a risk – likelihood of JR is low – and in any event protect yourselves by consulting.

12.4. (d) timings

(1) Promptly and in any event within 3 months of a decision

(2) AoS within 21 days of service of the CF

(3) Then decision on permission – paper and then oral renewal.

(4) If permission, 35 days later for our detailed grounds/evidence

(5) Then a hearing.

12.5. (d) prospects of success – much will depend on the reasoning process and the consultation exercise.

12.6. (d) remedy – keep the scheme going? Shows the ludicrous nature of the claim.