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JRT/DLXF/JWM

6 January 2006

ROYAL MAIL/POL – SUB POST OFFICE NETWORK
PRELIMINARY ADVICE NOTE

1. Issue

- 1.1 To assess whether the availability operation by Post Office Limited (“POL”) of discretionary payments and compensation schemes regarding Sub Post Offices (“SPOs”) has created a legitimate expectation that compensation will be payable to Sub Postmasters (“SPMs”) whose SPOs are closed as part of ~~upon~~ any future proposed reduction in the numbers of SPOs in the network.

2. Summary of Advice

- 2.1 There is a risk that the current availability of discretionary payments and compensation schemes operated by POL could be considered by a Court to have given rise to a legitimate expectation that a compensation scheme would apply in any future SPO closure programme. Denial of compensation to SPMs in those circumstances would therefore give rise to an appreciable risk of successful challenge by way of judicial review.
- 2.2 There are a number of factors which would favour Post Office Ltd (“POL”) in any judicial review proceedings. However, the area of law comprising legitimate expectation has evolved significantly in the recent past and is likely to continue to do so. This makes the way in which these factors may be viewed by the Courts uncertain.

3. The Facts

Existing POL Compensation Schemes

- 3.1 The relationship between POL and the SPMs is governed primarily by the 1994 edition of the Consolidated Subpostmasters Contract (as amended) (“the SPM contract”) which provides for mechanisms of termination. There are POL operates two funds of relevance which offer or have offered payments compensation to SPMs upon termination of the SPM contract. Both operate entirely separately from the SPM contract, which does not provide for compensation on termination of the SPM contract, are aimed at compensating the SPM for his inability to ‘sell on’ the SPO and realise its value in circumstances where POL decides to close the SPO.
- 3.1.1 POL/NFSP Discretionary Fund (“POL/NFSP Fund”): Created by virtue of a non-legally enforceable agreement dated 1 April 1989 between Post Office Counters Limited (referred to as “POL”) and the National Federation of Sub Postmasters (“NFSP”), the scheme exists to make discretionary payments to compensate an SPM who has either:

- (i) terminated the SPM contract by giving proper written notice and the SPO has subsequently been closed by POL, or;
- (ii) had the SPM contract terminated by POL giving not less than three months written notice and POL has not re-established an SPO on the premises of the outgoing SPM.

3.1.2 The amount of compensation payable under the Fund is 26 months remuneration (an amount which is in line with derived from drawing upon the compensation regime applicable under the Commercial Agents (Council Directive) Regulations 1993), the fund for which is provided from the NFSP agreeing to forego 1% of the expenses element of the SPMs' remuneration. The fund is 'topped up' by POL depending upon the circumstances in which the payment is made.

3.1.3 Post Office Network Reinvention Programme Fund ("PONR Fund"): The PONR Fund was created specifically to compensate SPMs whose SPOs were closed as a result of the Network Reinvention Programme ("NRP"). It was funded by central government to the tune of £180 million, this funding receiving state aid clearance from the European Commission and Parliamentary approval in accordance with the Industrial Development Act 1982. The level of compensation payable under the scheme was 28 months remuneration, a figure derived from the starting point of the POL/NFSP Fund, as amended following discussions between POL and the NFSP.

3.1.4 The NRP commenced in 2002 and whilst there are a small number of SPOs which are still in the process of closure owing to practical matters, the programme concluded its selection of SPOs for closure in Spring 2005. Of the £180 million in the PONR Fund approximately £165 million will have been paid out once the final closures have been completed.

3.2 We understand that the combined effect of the two ~~compensation~~ schemes has been that since the creation of the POL/NFSP Fund each time POL decides to close a SPO POL's approach has been to pay compensation, has made a payment to the outgoing SPM where the eligibility criteria for a payment have been met.

PO Closure Policies

3.3 The NRP involved a rationalisation of parts of the SPO network in light of a perceived over-supply of SPOs and a change in the nature of the service that they provided. Amongst the recommendations of the POL Cabinet Office Performance and Innovation Unit (PIU) Report, "A Counter Revolution", was the need to "*ensure its SPMs who are affected [by the closure of their SPO] are adequately compensated for the loss of value of their asset*". ~~Therefore, the NRP policy itself highlights the need for compensation.~~ [Anna says: The PIU is not the NRP policy]The PIU recommendations have been made public.

3.4 The assessed alternative to the NRP was the uncontrolled closure of SPOs dictated by their gradually becoming economically unsustainable. The need for closures has been

acknowledged by central government and parliament. Central government is due to consider their on-going policy towards the SPO network in the first half of 2006 after which it is possible that there will be a further programme of closures.

- 3.5 Despite the closures of SPOs under the NRP, POL anticipates that central government ~~may~~ will want it to operate a more economically sustainable network, particularly in rural areas. There is some evidence to date, however, that the government will be reluctant to fund a compensation scheme of a similar nature to that available to SPMs under the NRP and POL is concerned that the operation of ~~the previous compensation~~ schemes could be considered by a Court to have created a legitimate expectation that SPMs affected by any future closure programme would ~~receive~~ be similarly ~~payments~~ compensated.

4. Legal Advice

Right to Terminate

- 4.1 Clause 1(10) of the SPM contract allows POL to terminate the contract on giving "*not less than 3 months' notice*" to the SPM. There is no requirement laid down in the contract that reasons be given for termination by POL. Nor is there any mention of compensation being payable in respect of termination under Clause 1(10).

Legitimate Expectation – Preliminary Analysis

- 4.2 **Introduction:** In addition to the contractual relationship between POL and the SPMs, POL may have additional obligations to SPMs in the manner in which it operates the SPO network if a Court considers that it has created a legitimate expectation because of the policies it has operated or representations it has made. An imprecise analogy but one that the Courts have drawn is that legitimate expectation is akin to breach of contract in private law. The Courts act to prevent frustration of the legitimate expectation through judicial review.
- 4.3 In approaching the analysis, the first step is to consider whether a legitimate expectation has arisen. If it has then the public body can override that legitimate expectation eg by changing its policy but the Courts will assess whether the public body is justified in doing so by reference to a number of factors. The law regarding legitimate expectation has evolved significantly in the last decade and in conducting this assessment the courts have shown an increasing willingness to enquire more closely into the decisions of public bodies.
- 4.4 **Public Body:** As a preliminary point, the concept requires that the activities that the body engages in and which give rise to the legitimate expectation be public in nature. The functions that POL exercises in relation to the operation of the SPO network could be considered public in nature. POL ~~operates~~ maintains the SPO network which provides a public service. The public nature of this service is highlighted by the fact that decisions regarding the structure of the network are made in consultation with central government. Further, central government makes payments (the Social Network

Payment) to ensure its continuation. Whilst there are arguments as to whether POL could be considered amendable to judicial review (and we are not aware that the matter has definitively been decided in the Courts) there are arguments that could be advanced to the effect that, in any future SPO closure programme, POL could be considered a 'public body' for the purposes of legitimate expectation. This note proceeds on the assumption that POL would be considered a public body. [could we add "without concluding that it is one"?).

- 4.5 **Bases of Legitimate Expectation:** In order for a legitimate expectation to arise, it is not necessary that it be based on a legal right. 'Legitimate' in this context has been interpreted as 'reasonable' such that it encompasses "*expectations that go beyond enforceable rights, provided they have some reasonable basis*".
- 4.6 Where a public body has altered benefits? [rights] that a person has enjoyed or has allowed a person to enjoy a benefit on the basis that the public body will not change it without prior consultation then a legitimate expectation may arise. Further, where that public body gives a "clear and unambiguous representation" regarding a substantive benefit which it was reasonable for that person to rely upon then that person may develop a legitimate expectation to that benefit so long as that substantive benefit is not inconsistent with the public body's statutory duty.
- 4.7 On the evidence which we have seen, it is possible that POL could be considered to have made a clear and unambiguous representation that the SPMs would benefit from a compensation scheme in the event of any future closure programme. The Government ~~it~~ has published the PIU report which makes reference to compensation being necessary on closure, a recommendation that POL ~~it~~ has followed. However, it is uncertain whether such a representation would be considered clear and unambiguous.
- 4.8 Nonetheless, the Courts also look to the existence and operation of policies by the public body. In this regard POL has acted in a consistent manner towards SPMs in operating the schemes described in section 3 compensation policies. SPMs could claim that the policy regarding the PONR Fund compensation in effect applied to the whole network and not to an artificially separate part of it (ie just selected SPOs in urban areas). There is nothing that we have seen to suggest that those SPOs dealt with under NRP are different in any material way to the remaining SPOs to justify separate treatment vis-à-vis compensation. As such, the SPMs would argue, the policy of providing compensation that was operated for those SPMs under NRP could be considered to have applied to the remaining SPMs and to apply in the future.
- 4.9 In the event that the SPMs' argument that the existing policies applied to them failed (if for instance the NRP compensation scheme was explicitly limited), they could still claim that as two previous POL policies had been put in place regarding closures then they had an expectation that where a SPO was 'closed' (following resignation or termination by POL) payments would be made compensation would be payable. The adoption by the PONR Fund of similar levels of compensation to the discretionary payments under the POL/NFSP Fund could be considered supportive of the expectation to the extent

that it shows consistency of approach by POL in providing payments compensation on 'closure' of SPOs regardless of the parts of the SPO network being closed.

- 4.10 Whilst the argument in paragraph 4.9 relies upon the remaining SPMs bringing themselves within the policy adopted for SPMs under the NRP (as opposed to an explicit policy applying to them which has then been altered), should a Court consider the matter on the basis of the fairness of the denial of the legitimate expectation (as some recent cases suggests a Court may) this argument would be likely to be viewed favourably. It should be noted that the fact that the agreement between POL and NFSP (the POL/NFSP Fund) is explicitly noted (clause 24) as not being legally enforceable would not prevent a legitimate expectation from arising.
- 4.11 **Policy Changes:** The basis for the NRP policy was the economic need to rationalise the network. [This basis is equally applicable across the SPO network?]. Any new closure programme would be likely to have the same underlying rationale for the policy therefore remains the same. In this context the expectation would be that both the process of any future closure programme including the need for public consultation aspects (the procedure) and the compensation (the substantive right) would be similar to the NRP.
- 4.12 In reality, policies will always change at some point and the Courts acknowledge this. To conclude otherwise would fetter the discretion of public bodies, itself anathema to the Courts. The Courts will attempt to draw a balance in assessing whether the public interest in changing the policy overrides the legitimate expectation. Put simply, although the public body is free to consider a change to its policy it does not have an unfettered ability to do so in the context of a legitimate expectation that its policy will remain unchanged. The following factors have been considered relevant in assessing the relative merits of the legitimate expectation and the public interest where a policy has changed:
- a. the objective importance of the individual's interest;
 - b. the nature of any representation made or policy previously in place;
 - c. the scale of the expectation;
 - d. the number of persons affected by the change in policy or representation;
 - e. the degree to which questions of general policy or 'macro-political' issues are raised;
 - f. the public interest (not defined) in changing the policy.
- 4.13 We understand that the underlying rationale for the policy on any future closure programme would remain the same as for the NRP. However, at the heart of the present problem is the anticipated reluctance of central government to fund a compensation scheme in respect of any future closure programme. If, as anticipated,

the SPMs were to argue that the failure to operate a compensation scheme would amount to a change of policy, the Courts would look at the public interest in changing that policy to assess whether it outweighed the legitimate expectation.

- 4.14. This is a difficult area in which the Courts have adopted different approaches in recent cases. In a case involving treatment of a patient at a care home with discrete facts, not engaging policy issues at the wider national level and having modest financial consequences for the public body, a Court was prepared to look at the expected outcome from the perspective of fairness to the patient. However, in a further case involving the availability of assisted places at schools, the Court suggested that the 'intrusive quality of their review' would vary. Where questions of general policy affecting the public at large, exemplified by those at the 'macro-political level' were involved, the Court would consider itself less well-equipped to adjudicate on the decision to change the policy and would confine itself to an assessment of the rationality or reasonableness of the decision-making process itself rather than looking into the fairness of decision to those affected. The law in this area continues to evolve and neither approach (reviewing the fairness or the rationality of the decision) has emerged as that clearly adopted by the Courts.
- 4.15 The issue of compensation being paid upon the closure of SPOs involves decisions at the national level and the cost of a compensation scheme would be significant. From our discussions with POL we understand that were POL to be required to compensate SPMs in respect of any future closure programme in their current financial position, this would "severely undermine POL's solvency". A decision not to do so would, on that basis, be likely to be rational or reasonable. If the Courts were to adopt the approach in the second case referred to at 4.14, this would tend towards an assessment of the rationality of the decision rather than looking into its fairness. However, the uncertainty in the law at present prevents any reliable prediction of whether the Court would consider the frustration of the expectation from the perspective of fairness or simply from the perspective of the rationality of the decision.
- 4.16 **Detrimental Reliance:** A further factor that the Courts have considered in determining the existence of legitimate expectation is the degree, if any, to which reliance has been placed on the representations or the expectation. Whilst the Courts have not adopted a unified approach there appears to be consensus that reliance is not a pre-requisite to the existence of legitimate expectation. Nonetheless, the Courts have considered that reliance is a significant and persuasive evidential factor as it underlines the "unfairness" which they seek to protect against.
- 4.17 In the context of any future closure programme it is possible that an ~~an~~ ~~former~~ SPM could argue that he had avoided resigning (and thereby relying upon the POL/NFSP Fund) as he believed a compensation scheme akin to the PONR Fund would be created. Whilst this may be difficult to prove, the absence of detrimental reliance would not be fatal to a claim by an SPM.

5. Timings

The time within which SPMs would be required to bring a claim for judicial review is short (3 months from the date that the claim arose). In the context of any decision not to provide compensation for SPMs in any future closure programme, there are two points at which claims could be considered to arise. From the perspective of the SPMs as a group (if represented by the NFSP for instance), it could be argued that their expectation was frustrated at the point that the policy of closure of SPOs without any compensation was announced. As regards individuals, an SPM's claim would be likely to arise at the point that the decision to close his particular SPO without compensation was made, this being the point at which the expectation of the individual SPM would be considered to have been frustrated. Thereafter, from the issue of a claim it can take up to 12 months for judicial review proceedings to reach a conclusion.

6. Remedies

The remedies available upon judicial review could extend to the rural SPMs securing the compensation that they sought (protection of the substantive right) or simply the Court requiring POL to reconsider its decision not to adopt the previous policy (protection of the procedural right). Should a Court consider that the SPMs have a legitimate expectation that it will protect then the practice of the Courts has been to secure that expectation. In light of the compensation that the SPMs expect, that would mean an amount of 28 months remuneration.

7. Preliminary Conclusions

- 7.1 On the information we have seen, there is evidence upon which SPMs could make out a case that they have a legitimate expectation that they will be treated in accordance with the policies applicable to those SPMs dealt with under the NRP including their right to compensation on a similar basis. There is an argument that POL is acting in a public manner in respect of the operation of the NRP such that it would be amenable to judicial review.
- 7.2 The policy of compensation adopted in respect of the NRP drew upon the existing (POL/NFSP Fund) ~~compensation~~ discretionary payment scheme, using comparable levels of payment ~~compensation~~. In the circumstances of the operation of the SPO network and absent any material difference between the SPOs closed under the NRP and the remaining SPOs that would justify different treatment, there is an argument that POL operated a policy that it was reasonable for those remaining SPMs to consider would apply to them and which they expected to apply in any future closure programme.
- 7.3 In reviewing the decisions of POL, the national nature of the closure of SPOs, the numbers involved and the costs would favour a Court reviewing the rationality of the decision not to compensate SPMs in any future closure programme rather than assessing its fairness. In the absence of central government funding for a compensation scheme and considering the obligation upon POL to maintain the SPO network, POL would have a reasonable argument to resist challenge on this narrow basis.

- 7.4 However, this would not be the end of the matter as the noted willingness of the Courts to entertain a broader concept of legitimate expectation, particularly as regards substantive rights, means that there remains the potential for a Court to enquire into the fairness of the decision as a whole. Viewed on this basis, the availability of compensation to SPMs under the NRP which is denied to SPMs in any future closure programme marks a stark difference in treatment which may be difficult to justify.
- 7.5 The manner in which the Courts have evolved the concept of legitimate expectation recently creates a degree of uncertainty in predicting the route that a Court would take in the future. The tendency towards adopting a more 'intrusive' approach when considering the decisions of public bodies in light of claims of legitimate expectation therefore warrants a cautious assessment such that there must be considered to be an appreciable risk of successful challenge—to fairness ?