

Paul Scully MP - Parliamentary Under-Secretary of State

Department for Business,
Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET

Our ref: DE/JFSA/PAP

25 March 2021

JUDICIAL REVIEW PRE- ACTION PROTOCOL LETTER

Dear Sirs,

Re: Department for Business, Energy and Industrial Strategy refusal to re-establish the current non statutory Post Office Horizon IT Inquiry as a Statutory Inquiry.

Please treat this letter as a pre-action letter within the pre action protocol for judicial review.

The Proposed Claimant – Mr Alan Bates

The Proposed Defendant - Department for Business, Energy and Industrial Strategy

Reply Date - 15 April 2021

References

Our ref: DE/JFSA/PAP
Your ref: MCSL2021/04726

The decision under challenge

Our client intends to challenge the decision dated 9 March 2021 of the Department for Business, Energy and Industrial Strategy refusing to pause the current non-statutory Post Office Horizon IT Inquiry, to re-establish this inquiry as a Statutory Inquiry and to hold a consultation on the terms of reference, to take account of pressing matters of public importance, including *inter alia* the question of abusive prosecutions of subpostmasters (copy of decision enclosed).

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Background

We are solicitors for the above-named proposed Claimant, Mr Bates, who was the lead Claimant in a previous group litigation against Post Office Ltd. A summary of the facts in the case are set out in Judgment No.6 of the judgment of Fraser J in Alan Bates and Others v Post Office Limited [2019] EWHC 3408 (QB). Given that Post Office Ltd is wholly owned by Her Majesty's Government under the direction of the Department for Business, Energy and Industrial Strategy, you will be well aware of that litigation and of the underlying facts which gave rise to it.

In around 2000 the Post Office introduced a computer system called Horizon across all Post Office branches. The system was developed by Fujitsu, and was to be used for a variety of tasks, including accounting and stocktaking. The system changed in 2010 to an online version called Horizon Online or HNG-X, and the former is now called Legacy Horizon. Mr Bates maintained in High Court proceedings that both Legacy Horizon and Horizon Online (which used many elements of the existing system) contained '*bugs, errors and defects*' such that they were unreliable, which led to unexplained shortfalls and discrepancies in their branch accounts for which the Post Office unfairly held subpostmasters responsible.

Many subpostmasters' lives were affected by the actions of the Post Office in that they received criminal convictions and endured dire financial consequences as a result of having to repay sums which the Post Office claimed were due. Many lost their franchises, business and livelihoods, all of these harms resulting as a consequence of the defective system. These difficulties were compounded by the fact that the subpostmasters had no access to software which would expose the errors in the Horizon system, and were therefore unable to challenge the Post Office's claims. Some of the harms suffered by the subpostmasters were summarised in the Court of Appeal on 22 March 2021 by Maloney QC in this way:

"All had the shame and humiliation of arrest and prosecution. All experienced the enormous psychological toll associated with that process.

"Some saw their marriages break up, others suffered bankruptcy and some are dead, having gone to their graves with their previous convictions still extant."

The Post Office alleged that the systems were robust. It is reported that the Post Office brought over 900 prosecutions for shortfalls against subpostmasters, which were based *inter alia* on allegations of fraud. 555 sub-postmasters brought civil actions against the Post Office in April 2016. Those proceedings were consolidated into a group action, in which the subpostmasters succeeded and the Post Office agreed to pay damages; albeit that the subpostmasters were effectively compelled to accept a compromise agreement as a result of lack of funds to continue the litigation to its natural conclusion.

Mr Justice Fraser, the judge in civil proceedings¹, wrote to the Director of Public Prosecutions on 14 January 2020. In that letter, he expressed concerns that at least two employees of Fujitsu gave apparently perjured evidence in criminal and civil cases involving the Post Office and subpostmasters². Fraser J's letter stated:

¹ *Bates & Others v Post Office Ltd [2019] EWHC 606 (QB)*

² *R v Misra and Post Office Ltd v Castleton [2007] EWHC 5 (QB)*

“On the basis of information that has come to my attention as a result of the Post Office group litigation, I consider important evidence given both to the Crown Court and the High Court on previous occasions in other cases was not true, and was known not to be the truth, the whole truth and nothing but the truth, at the time it was given...”

On 13 November 2020, the Metropolitan Police announced that it had opened a criminal investigation into Fujitsu staff who gave evidence in trials of subpostmasters. We and our client have been in discussions with the Metropolitan Police, who are currently engaged in an investigation of the alleged perjury, and who have confirmed that the pool of potential victims of perjury has risen from 2 to 5 named individuals. It is anticipated that the number of potential victims and alleged perpetrators will rise.

We note from your letter of 9 March 2021 that as a consequence of the group litigation, the Criminal Cases Review Commission referred 51 convictions to the Court of Appeal. Six persons have already had their convictions overturned. We understand that the CCRC is considering a further 20 cases and we expect many more to be submitted to the CCRC.

Mr Bates considers (as an example) that the issue of whether scores, if not hundreds, of British citizens were or will be found to have been prosecuted on unreliable and potentially perjured evidence by a company wholly owned by Her Majesty’s Government is a matter of the utmost public importance that can and must be considered by a statutory inquiry.

Establishment of a Non-Statutory Inquiry

Following the conclusion of the group litigation the Department for Business, Energy & Industrial Strategy issued Ministerial Statements on 10 June 2020 and 30 September 2020. The Department for BEIS subsequently commissioned a non-statutory Inquiry, which is chaired by Sir Wyn Williams, a former High Court Judge. The Inquiry will aim to submit its findings to the Secretary of State for BEIS by summer 2021. The terms of reference of the Inquiry are set out on the Government website as follows:

The Inquiry shall:

A: Understand and acknowledge what went wrong in relation to Horizon, leading to the Group Litigation Order, by drawing on evidence from the Horizon judgments and affected postmasters’ experiences and identify what key lessons must be learned for the future.

B: Build upon the findings of Mr Justice Fraser, by obtaining all available relevant evidence from Post Office Ltd, Fujitsu and BEIS to establish a clear account of the implementation and failings of Horizon over its lifecycle.

C: Assess whether Post Office Ltd has learned the lessons from the criticisms made by Mr Justice Fraser in the ‘Common Issues’ and ‘Horizon Issues’ trials and those identified by affected postmasters and has delivered or made good progress on the organisational and cultural changes necessary to ensure a similar case does not happen in the future.

D: Assess whether the commitments made by Post Office Ltd within the mediation settlement – including the historical shortfall scheme – have been properly delivered.

E: Assess whether the processes and information provided by Post Office Ltd to postmasters are sufficient:

- (i) to enable both parties to meet their contractual obligations*
- (ii) to enable postmasters to run their businesses. This includes assessing whether Post Office Ltd's related processes such as recording and resolving postmaster queries, dispute handling, suspension and termination are fit for purpose. In addition, determine whether the quality of the service offer for postmasters and their relationship with Post Office Ltd has materially improved since the conclusions reached by Mr Justice Fraser.*

F: Examine the governance and whistleblowing controls now in place at Post Office Ltd and whether they are sufficient to ensure that the failings that led to the Horizon case issues do not happen again.

Significantly, the Terms of Reference include a final paragraph, which states that Post Office Ltd's prosecution function, matters of criminal law, the Horizon group damages settlement, the conduct of current or future litigation relating to Horizon and/or the engagement or findings of any other supervisory or complaints mechanisms, including in the public sector, are specifically excluded from the Inquiry's scope.

The Proposed Claimant's position.

Mr Bates believes that a non-statutory Inquiry (even with revised terms of reference) would not enable obvious and significant matters of public concern to be properly investigated. This is because, *inter alia*, a non-statutory Inquiry has no power to compel the attendance of witnesses or compel the production of evidence, and nor does it take evidence under oath.

It is unlikely that witnesses from the Post Office or Fujitsu would voluntarily give evidence as to those parties' involvement in the scandal, their knowledge of the flaws in the Horizon system at the time that the demands for payments to the subpostmasters were made or their role in the prosecutions of hundreds of subpostmasters on unreliable and potentially perjured evidence.

On 3 and 22 February 2021 this firm, acting for Mr Bates, wrote to the Prime Minister (copies enclosed for ease of reference) and called for the following steps to be taken:

1. pause the current non statutory Post Office Horizon IT Inquiry;
2. re-establish the Inquiry as a Statutory Inquiry; and
3. hold a short public consultation on the Terms of Reference.

Decision of Department for Business, Energy and Industrial Strategy

On 9 March 2021 Paul Scully MP, the Minister for Small Business, Consumers and Labour Markets responded to this firm's letter to the Prime Minister on behalf of the Department for Business, Energy and Industrial Strategy. The Minister made the following assertions in his letter:

- (i) The purpose of the Inquiry is to understand and acknowledge what went wrong in relation to Horizon.
- (ii) The Inquiry's Chair, Sir Wyn Williams, is independent of both the Post Office and the Government, which means he can draw conclusions and make recommendations on the evidence submitted.
- (iii) It is common practice for the sponsoring Department to be the lead Department on the issues addressed by the Inquiry. As the sponsoring Department, BEIS will be well placed to implement the delivery of any recommendations from Sir Wyn Williams.
- (iv) As the Post Office, Fujitsu and BEIS have all agreed to cooperate fully with the Inquiry, it does not seem necessary to establish the Inquiry with the powers to compel evidence and witnesses.
- (v) It was considered inappropriate for the inquiry to consider matters of criminal law and the issue of perjury is a matter for the Director of Public Prosecutions.
- (vi) It is not appropriate for the Government to comment on the validity of the convictions of sub postmasters as the Criminal Cases Review Commission has to date referenced 51 cases to the appropriate appeal court, 38 of which will be heard in March 2021. The CCRC currently has 20 cases under consideration.
- (vii) The Inquiry's work will be vital in determining whether concrete changes have taken place at the Post Office. The Post Office is continuing its efforts to right the wrongs of the past.

The Proposed Claimant's responses to the position of BEIS

Mr Bates considers that the responses of BEIS are inadequate and that the decision of the Secretary of State to refuse to reinstate the non-statutory Inquiry on a statutory basis is unreasonable and unlawful.

Furthermore, the decision of BEIS fails to take account of the statutory test in Section 1 of the Inquiries Act 2005, which materially states:

- (1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that*
 - (a) Particular events have caused, or are capable of causing, public concern, or*
 - (b) There is public concern that particular events have occurred.*

As to the points made in the letter of 9 March 2021, Mr Bates considers as follows:-

- (i) If the purpose of the current non-statutory Inquiry is to understand and acknowledge what went wrong in relation to Horizon, the terms of reference do not reflect that purpose. A fundamental aspect of 'what went wrong' will include the decision to prosecute over 900 subpostmasters for theft and fraudulent accounting in circumstances when the Post Office knew or ought reasonably to have known that the accounting discrepancies were the fault of the system and not of the sub postmasters. The decision to prosecute, and the aggressive pursuit of those prosecutions, is a central and inseparable tenet of the unfair treatment meted out to subpostmasters.
- (ii) The independence of Sir Wyn Williams is not in dispute. The issue which we have raised is that the terms of reference prevent the Inquiry Chair from investigating, receiving evidence on or making findings and conclusions on an egregious aspect of the Horizon scandal, which is the abusive prosecutions of the sub postmasters.
- (iii) The difficulty with BEIS being the sponsoring Department is that it has a controlling and financial interest in the Post Office. This would lead to a perception of bias by those subpostmasters who were affected by the Horizon scheme. Indeed, the perception of bias is so strong that, as matters stand the position of the JFSA is to refuse to participate in the current non-statutory Inquiry. The Home Office's sponsorship of the Independent Review on Windrush is cited as an example of a sponsoring Department conducting a review. However, in that case the matters complained of were fully investigated, albeit against the backdrop of calls by anti-racism groups for an independent Inquiry. The analogy to Windrush is furthermore inapt because in that case there was no commercial link between the sponsoring department and the scheme that was under investigation. Further, the matters to which Windrush relates were, comparatively, a long time ago. The treatment of subpostmasters is within the institutional memory of BEIS; it is likely that BEIS staff will have had experience of the Horizon scandal and of the current non-statutory Inquiry. The potential crossover in staff at BEIS compounds the appearance of bias. That perception of bias would be displaced through the checks provided for within the statutory Inquiry process.
- (iv) The purported agreement of the Post Office, Fujitsu and BEIS to co-operate does not ensure that witnesses who may have been involved in a conspiracy to pervert the course of justice and who may be liable to criminal prosecution will co-operate with the Inquiry on a voluntary basis. This is a fundamental flaw in the decision to conduct the Inquiry on a non-statutory footing.
- (v) A public Inquiry cannot make any findings that pertain to criminal or civil liability. However, this does not prevent a public Inquiry from examining matters that are of public concern. There is no statutory bar to a public Inquiry being conducted where matters raised are also the subject of separate civil or criminal proceedings, although it may become necessary for an Inquiry hearing to be conducted at the conclusion of any criminal hearing, so as not to prejudice any trial. This course of action was recently taken by both the Statutory Grenfell Tower Inquiry and the Statutory Independent

Inquiry into Child Sexual Abuse in its investigation strand “*Institutional responses to allegations of child sexual abuse involving Lord Janner*”. Thus, the fact that the Metropolitan Police is conducting an investigation does not render the holding of a public Inquiry inappropriate; quite the reverse is the case.

As matters stand, the scheduled timetable of the current inquiry is so short that it is certain to conclude its work before important evidence in relation to the Horizon IT scandal becomes available to it. Judgments from the Court of Appeal in the 47 cases referred to it by the Criminal Cases Review Commission are likely to be unavailable before the inquiry reports. The Inquiry’s currently published schedule details that it will aim to submit its findings to the Secretary of State for Business, Energy and Industrial Strategy at the latest by summer 2021. As such, its evidence gathering stage will have completed by April or May at the latest (in fact it is reported that the call for evidence closed on 26 February 2021). It is therefore certain that the inquiry will not, at the time of drafting its report, have before it most material evidence arising from the Metropolitan Police Investigation and the Court of Appeal.

- (vi) Neither do the considerations of the CCRC amount to any bar to a statutory Inquiry in relation to Post Office having brought prosecutions in the knowledge that the subject matter of its claims was connected to failings in the Horizon system and not the actions of the subpostmasters. There is no bar to the establishment of a statutory Inquiry, which will hear evidence on this particular issue after the deliberations of the CCRC and the resolution of matters by the Court of Appeal. Indeed, we understand that the CCRC has made very substantial written submissions to the Chair of the non-statutory inquiry on the conduct of Post Office Ltd’s prosecutions of subpostmasters, however the Chair is precluded from considering these pressing matters of public importance by the current terms of reference.

Action that we require the Proposed Defendant to take

In the circumstances we require that the Proposed Defendant takes the following action:

- (1) Set aside the decision of 9 March 2021 refusing to reconvene the Horizon IT non-statutory Inquiry as a Statutory Inquiry.
- (2) Pause the non-statutory Inquiry, re-establish it as a statutory Inquiry and hold a short public consultation on the Terms of Reference.
- (3) Alternatively, reconstitute the Horizon IT Inquiry as a statutory inquiry for the purpose, *inter alia* of consideration of the aspect of Horizon scandal, which is at the forefront of public interest - the abusive prosecutions of sub postmasters, in circumstances where Post Office Limited, Fujitsu and/or BEIS knew or ought reasonably to have known that the alleged accounting discrepancies were the fault of the Horizon IT System and not of the subpostmasters.

Action to be taken by the proposed Claimant

Should the proposed Defendant fail to take the action as set out above Mr Bates will commence Judicial Review proceedings in accordance with the pre-action protocol and seek to recover the costs of bringing the claim from you.

Given that the matters are plainly matters of public importance, Mr Bates will seek a Costs Capping Order under CPR 46, which the Defendant will be invited to agree and which we anticipate the Court will grant.

Decision under challenge

For the avoidance of doubt the decision under challenge is:

The decision dated 9 March 2021 of the Department for Business, Energy and Industrial Strategy refusing to pause the current non-statutory Post Office Horizon IT Inquiry, re-establish it as a Statutory Inquiry and consult on the terms of reference (*inter alia* with a view to examination of the question of abusive prosecutions of subpostmasters).

Proposed grounds of challenge

For the avoidance of doubt the grounds in such an application will be based on the following:

- The refusal of BEIS to pause the current non statutory Post Office Horizon IT Inquiry, re-establish it as a Statutory Inquiry and consult on the terms of reference interest is unlawful and unreasonable as BEIS failed to consider section 1 of the Inquiries Act 2005.
- Alternatively, the refusal by BEIS to reconstitute the Horizon IT Inquiry as a statutory inquiry with terms of reference to consider matters at the forefront of public interest is unlawful and unreasonable as BEIS failed to consider section 1 of the Inquiries Act 2005.
- The decision (as alternatively pleaded) is unlawful and unreasonable as the test in section 1 of the Inquiries Act 2005 is met.
- The reasons provided by BEIS in the decision dated 9 March 2021 are erroneous and unreasonable, taken individually and cumulatively.
- The decision is not in accordance with the public interest in holding institutions to account through the Inquiry process.

The proposed Claimant reserves his position on whether to add further grounds of challenge.

If you are responding close to the given deadline then please ensure that the letter is sent by email as well as by post to ensure receipt prior to the given deadline.

If you have any queries, please contact David Enright or at partners@howe.co.uk.

Alternative Dispute Resolution

Mr Bates is happy to consider any proposal from the Proposed Defendant in relation to Alternative Dispute Resolution within the next 14 days.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Howe & Co'.

DAVID ENRIGHT JP
PARTNER
HOWE & CO SOLICITORS

Encl. Decision of 9 March 2021
Letter to Prime Minister 3 February 2021
Letter to Prime Minister 22 February 2021

CC. Government Legal Department, by way of formal service

Sir Wyn Williams (Chair – Post Office Horizon IT Inquiry), out of courtesy, and as Sir Wyn may consider that his inquiry may be interested party in any proceedings