



Horizon Compensation Advisory Board correspondence on Post Office “without prejudice” letters

Email to Post Office from Advisory Board, 7 December 2023

As Advisory Board members we have been advised of problems with offer letters/correspondence being sent out to claimants marked without prejudice. You will remember the concerns raised by Dan Neidle, and how the Post Office’s approach to such correspondence might drive fear and a reluctance to get advice and support around settlement decisions.

We know of one particular example where a letter is recording a decision declining to pay compensation and is nonetheless referred to as without prejudice. This has engendered, we are told, the same kinds of fear that Dan refers to. We can see no reason why a decision letter that declines compensation can be without prejudice. In so far as solicitors have been involved in such correspondence it may also be a breach of SRA guidelines and their Code of Conduct.

Could we ask you to review and report to us on the approach adopted to marking settlement and decision letters as without prejudice to address these concerns please?

Post Office response 12 December 2023

As you and the Board are aware, this issue is the subject of a complaint by Dan Neidle to the SRA and the SRA's fact find is ongoing. They have not launched an investigation against POL's lawyers, but we have provided them with the suite of offer letters we use on the scheme and are co-operating fully with them. We have no update as yet on when we should expect to hear from them again, but we are happy to share the outcome of their analysis, when we have it.

WP communications are a form of legal privilege, which only subsists for as long as the communications which are subject to it remain confidential. The reason the offers are WP is to allow the kind of commercial settlement negotiations that we undertake on the HSS. We designed the scheme to be as postmaster centric as possible and as [name of senior external lawyer redacted] has recently commented, the very low evidential burden on postmasters means that we can make the sorts of offers that a court would not be in a position to make. While we are in discussion with a postmaster, those discussions remain confidential until such time as we have reached a settlement. This is very normal and protects both sides. None of our claimant firms have challenged the point as they understand the benefit to both parties and the fact that there is no disadvantage to their clients.

We have had feedback from postmasters that they value their privacy in these matters and had concerns about others in the community discovering the level of compensation that they had received. We also had concerns of our own that as cases are decided on their own merits and often include consideration of some very sensitive and private information, allowing postmasters to compare offers could have some unwanted consequences. It generally isn't possible to read across from one case to another and comparing totals gives no understanding as to how Panel has reached its assessment.

It should also be noted that there are no confidentiality provisions within the settlements which means that postmasters are free to discuss them after they have settled, should they wish to do so.

In terms of the application of WP on a nil offer, again, until it's agreed, it's still subject to negotiation and postmasters can seek legal advice which we pay for and may produce further evidence or argument that changes the outcome. Therefore, to be consistent the advice is that it remains appropriate for all offers to be marked WP.

Hopefully this explanation will help to allay the AB's concerns, but please do let us know if we can be of any further assistance.

Advisory Board Chair to SRA Chair 17 January 2024

Further to my email of 11th January, my colleagues and I on DBT's Horizon Compensation Advisory Board thought that you might like to see the letter below that we have written to the CEO of the Post Office. We are concerned about legal practice here.

Advisory Board Chair to Post Office CEO 17 January 2024

I am writing as Chair of DBT's Horizon Compensation Advisory Board (Lord Arbuthnot, Kevan Jones MP, Prof Richard Moorhead and myself). My colleagues and I noticed in your evidence yesterday to the Select Committee that you appeared to deny using NDAs in the compensation settlement process, and then said that the settlements were subject to confidentiality. Our understanding is that this is an NDA as defined by the SRA. The [SRA's warning notice says](#):

This warning notice covers the use of non-disclosure agreements (NDAs) and we use this term to include **any form of agreement or contract, or a clause within a wider agreement or contract, under which it is agreed that certain information will be kept confidential.**

We are concerned about the use of confidentiality clauses that may inhibit proper discussion and scrutiny of settlement in the SPM community. We are also concerned about incorrect representations on the use of NDAs, which you are presumably doing on advice. Could you confirm the basis on which you made such representations to the Select Committee?

We have sent a copy of this letter to the SRA to reinforce concerns we have expressed about the Post Office's use of without prejudice correspondence inappropriately. We have already written to the SRA on that matter and engaged with your organisation through the DBT (I am told [Post Office name redacted] was the point of contact on this). And we would be grateful for an update on your continued use of without prejudice letters and confidentiality clauses. We do not think these help anyone.

SRA Chair to Advisory Board Chair 19 January

Thank you for your correspondence on the 11 January and 17 January raising additional issues of concern about solicitors and law firms linked to the Royal Mail / Post Office Horizon scandal.

You highlight three core issues that could relate to potential misconduct: inappropriate use of non-disclosure agreements (NDAs), inappropriate labelling of correspondence, and potential overcharging.

All three are issues we take seriously, and where we have been clear with the profession about our expectations:

- NDAs can be used legitimately, but we have [warned the profession](#) about their inappropriate use. In particular, we are concerned that they are not used to prevent reporting to us, other regulators and law enforcement agencies or making disclosures which are protected by law.
- In [our warning to](#) the profession about abuse of the litigation process, we are clear that we expect firms to take particular care to avoid labelling correspondence in a way that could be misleading, particularly when dealing with recipients who may be vulnerable or unrepresented.
- Solicitors are required to ensure clients are able to make informed decisions about the services they need, including the costs of those services and the way they are funded. Evidence of inappropriate overcharging of clients will breach our ethical standards.

This is not to comment on any of the specific allegations you raise. As with any such allegations, we would need to investigate them fully. As I know you are aware, we have an extensive investigation into a number of solicitors and law firms working on behalf of the Royal Mail/Post Office and/or linked to the Horizon scandal.

Today we have published [an update on our investigation](#). In summary, our investigation covers multiple, multifaceted issues where there may have been potential misconduct. We expect to be in the best position to take any meaningful action to get the right outcome after the full facts and all the relevant issues have been aired through the inquiry. We will, however, move sooner if we have evidence that any solicitor presents an ongoing risk to the public that needs to be addressed through urgent action.

I have made sure Juliet Oliver, our General Counsel, and her team who are carrying out our ongoing investigations into this case, have copies of your correspondence and will review it as part of their wider investigation.

I would like to pick up one final issue you raise. You suggest that the Post Office is continuing to inappropriately label correspondence, and that 'Part of their justification is that SRA enquiries on this matter are ongoing, and they await hearing from you.' We will be urgently seeking clarification on this point from the Post Office and their lawyers, while reminding them of their obligation to comply with our rules and guidance on an ongoing basis.

Thank you again for highlighting these issues. Please continue to raise concerns about potential misconduct with us, particularly if you have other evidence that you think we may not be aware of.

Post Office CEO response to Advisory Board Chair 25 January 2024

Thank you for your email and for drawing my attention to your concerns. We noted your colleague, Professor Moorhead's article on the same issues and took the opportunity to reply to him, via our colleagues at DBT, but I can repeat what we said here.

NDA's/Confidentiality Clauses

I understand that I made an error when responding to the Committee on this issue, for which I can only apologise, and I agree that NDAs are confidentiality clauses. No one has advised me to the contrary and we are taking steps to correct that error with the Committee.

Use of confidentiality provisions in compensation settlements

On the Horizon Shortfall Scheme, there are no confidentiality provisions in the settlements and postmasters are free to discuss their settlements in full with anyone they choose to, once they have been agreed. We mark the offer letters 'Without Prejudice' so they are confidential while we are agreeing settlements, to enable both sides to conduct a commercial settlement process, and applicants are offered legal advice which we pay for to assist them in this.

On the Overturned Convictions process, we do have confidentiality clauses in our settlements, which state that the fact of the settlement is not confidential, but the settlement terms are. This can be waived, with consent from both sides and Post Office would be content to waive that for a postmaster, should we be asked to. To my knowledge, no one has ever asked us and neither have any of the applicants' lawyers ever challenged the clause. It is standard practice in legal settlements and was put in place largely to protect applicants.

In fact, we had contact from a firm representing a significant number of claimants after the announcement of the £600,000 settlement scheme, expressing their clients' concerns around privacy, as they were being contacted by family and friends, who were now aware of the level of settlement they would be receiving, which caused them problems. We are always open to discussion regarding changes to process, but given our experience on the Overturned Conviction settlements, we would strongly recommend that any proposed changes are discussed with the claimant firms, since they may find that suggestions to make the settlements more open will not be well received.

I note that you have referred your concerns to the SRA, and I am aware that the use of the term 'Without Prejudice' on offer letters is already the subject of a complaint to that body. We understand that the SRA is considering whether to investigate the matter and we await further contact from them. Until such time as we receive a substantive response, you will understand that it would be inappropriate for me to comment any further.

In the meantime, [Post Office staff name] and his team remain open to discussion with DBT and the Horizon Compensation Advisory Board on all aspects of the schemes. To that end, and as we mention above, we are taking steps to reach out to claimant firms and seek their views on the use of these clauses. We will share their responses with you and consider our position again when we understand postmasters' views.

SRA General Counsel to Advisory Board 31 January 2024

Thank you for your correspondence dated 11 and 17 January 2024 which I have had sight of, and I note the initial response you have received from our Chair, Anna Bradley.

I am writing further to the email you received from Ms Bradley to explain the next steps following the concerns you have reported to us relating to the conduct of solicitors involved in the Post Office compensation schemes. I understand those concerns to be three core issues: Namely, in relation to solicitors acting for the Post Office, the inappropriate use of non-disclosure agreements (NDAs) and inappropriate labelling of correspondence; and potential overcharging by solicitors acting for those making compensation claims.

Your concerns have been passed on to the investigation team attached to the Post Office Inquiry to investigate, and we have commenced making enquiries into all three issues. Sharon McCann is the Investigation Manager and an Investigation Officer from her team will be in touch shortly to explain further details about our process and timelines. They will wish to ask for any further information you might have regarding the matters you have raised. We would be grateful if you would confirm the best contact at the HCAB for us to liaise with.

In relation to the labelling of correspondence, in particular, we can confirm that we have an open investigation following the receipt of a previous complaint, as well as the concerns you have raised with us. You have stated that when you raised your concerns with the Post Office, the response you received was to defend the practice as legitimate, with part of the justification being that SRA enquiries on this matter are ongoing.

I can confirm that we have written to the Post Office and their lawyers to confirm that whilst the particular facts and circumstances relating to matters that are under investigation remain to be determined, this does not override the obligation to ensure that all labels are used correctly and are not misleading.

We have reminded them of our Warning Notice on Strategic Lawsuits against Public Participation (SLAPPs). This sets out that we expect solicitors to ensure that they do not mislead recipients of their correspondence by labelling or marking correspondence 'not for publication', 'strictly private and confidential' and/or 'without Sensitivity: General prejudice' when the conditions for using those terms are not fulfilled. Particular care in this regard may be needed where that recipient may be vulnerable or unrepresented. Such markings cannot unilaterally impose a duty of privacy or confidentiality.

The 'Without Prejudice' rule governs the admissibility of evidence, and the use of the term should only be attached to an offer to negotiate (*Galliford Try Construction Ltd v Mott MacDonald Ltd* [2008] EWHC 603 (TCC) at [5]). As our Warning Notice goes on to state, "correspondence should not be marked as 'without prejudice' if that correspondence does not fulfil the conditions for that label. You should consider whether the communication represents a genuine attempt to compromise an existing dispute. There should ordinarily be no need to apply it to correspondence which does not offer any concessions and only argues your case and seeks concessions from the other side."

We have asked both the Post Office and their solicitors to confirm as a matter of urgency that they are not and will not going forward use labels other than in accordance with the Warning Notice.

Thank you again for highlighting these issues.

Post Office to Advisory Board 22 February 2024

As advised earlier this week, Post Office has been undertaking a review of HSS template offer letters in conjunction with advice from external counsel.

Following that review, discussion in our governance committees, and after careful consideration of the feedback we have received, we have taken the decision to remove 'Without Prejudice' wording from our HSS offer letters.

Aside from the labelling of nil offers which we accept was inappropriate, and without waiving privilege in their advice, our legal advisers confirmed that the 'Without Prejudice' label on offers of financial compensation was entirely correct and proper as a matter of law and recommended that we keep the labelling on such offers. You have said that we are perceived as hiding behind legal rhetoric and using it against unrepresented applicants. While this has never been our intention, ultimately the feedback on this issue is far more important to us than maintaining the legal position, and we have acted accordingly.

We hope that this review demonstrates the seriousness with which we have taken your views on the matter and our genuine desire to atone for the past and try to rebuild trust with our postmasters and the wider public.

We are also reviewing offers under other remediation schemes to ensure that they all take account of the advice we are receiving and will update the Board when this work is complete.

Post Office to DBT 5 March 2024

We have updated our website with the position which can be found at: <https://www.onepostoffice.co.uk/scheme>. In summary, however, we can confirm that while we are satisfied that our usage of the term 'Without Prejudice' in financial offers made to postmasters was legally correct, we have made a policy decision to remove it. Engagement with postmasters and the feedback we receive is of paramount importance to us and more so than maintaining the legal position.

We paused sending any outcome letters to postmasters until this decision was made and confirmed. Our last batch of offer letters which resumed last Friday have therefore been updated to remove all the WP wording, highlight that we have done so and to explain to postmasters what that decision means for them. Letters are also being finalised to all the claimant representative firms to explain the position. I can also confirm that we have updated the SRA as to the work we are doing on this and that we continue to undertake to ensure that everything we send is compliant and that we make improvements wherever we can.

The Inquiry will also be updated via our Inquiry Legal team.

Hope that assists you, but please let us know if you have any further questions on this.