

From: [Roddy Dunlop](#)
To: [\[Redacted\]](#)
Cc: [\[Redacted\]](#); [Christine O'Neill](#); [\[Redacted\]](#); [Paul Cackette](#)
Subject: Re: [CJSM] Comments on adjustments
Date: 13 November 2018 16:31:27

court has only just risen. Will get there ASAP

R

On 2018-11-13 13:55, [Redacted] wrote:

Roddy

I have spoken with FM's office, I will meet you at the Parliament . Meeting is set for 4 45.

Christine – will just see you there. I have 2 contact numbers so should not be any difficulty.

The Perm Sec is intending to come along. Liz Lloyd will be there, as will [Redacted]. John Somers, FM Private Office will be there.

[Redacted] is hoping to have a word about the document request from L&M after the meeting.

[Redacted]

From: Roddy Dunlop <[\[Redacted\]](#)>
Sent: 13 November 2018 13:23
To: [\[Redacted\]](#)
Cc: [christine.o'neill](#) [\[Redacted\]](#); [\[Redacted\]](#);
[\[Redacted\]](#) [Paul.Cackette](#)[\[Redacted\]](#)
Subject: Re: [CJSM] Comments on adjustments

Regrettably i remain involved in court and will be so involved until approx 4.15pm today. I am thus unable to look at anything additional before travelling to Parliament for the consultation, but hopefully can leave such matters in Christine's capable hands.

What are the arrangements for the consultation? It is not in my diary and i am unsure as to where we are to meet.

Roddy Dunlop QC

On 2018-11-13 12:28, [Redacted] wrote:

Christine/Roddy

Please see the attached comments from clients on the adjustments alongside some proposed amendments in track changes.

I would be grateful if you could consider the points raised in the comments and the proposed adjustments and provide a response / final draft of the adjustments for discussion with the FM this afternoon. Clients have advised that should you require an early discussion with Nicky and others to clarify their understanding in relation to 6.5.5, this can be facilitated this afternoon.

I am awaiting confirmation of the arrangements for this afternoon, where and who will be attending and will send this as soon as I receive it. My understanding is that it is taking place at 4.45pm at the Parliament.

As discussed, clients are pulling together the requested documents from the petitioners and we will send this on as soon as it is received.

Kind Regards

[Redacted]

This correspondence is from the Scottish Government Legal Directorate. To the extent that it may contain legal advice, it is legally privileged and therefore may be exempt from disclosure under the Freedom of Information (Scotland) Act 2002 or the Environmental Information (Scotland) Regulations 2004.

This e-mail (and any files or other attachments transmitted with it) is intended solely for the attention of the addressee(s). Unauthorised use, disclosure, storage, copying or distribution of any part of this e-mail is not permitted. If you are not the intended recipient please destroy the email, remove any copies from your system and inform the sender immediately by return.

Communications with the Scottish Government may be monitored or recorded in order to secure the effective operation of the system and for other lawful purposes. The views or opinions contained within this e-mail may not necessarily reflect those of the Scottish Government.

Tha am post-d seo (agus faidhle neo ceanglan còmhla ris) dhan neach neo luchd-ainmichte a-mhàin. Chan eil e ceadaichte a chleachdadh ann an dòigh sam bith, a' toirt a-steach còraichean, foillseachadh neo sgaoileadh, gun chead. Ma 's e is gun d'fhuair sibh seo gun fhiosd', bu choir cur às dhan phost-d agus lethbhreac sam bith air an t-siostam agaibh agus fios a leigeil chun neach a sgaoil am post-d gun dàil.

Dh'fhaodadh gum bi teachdaireachd sam bith bho Riaghaltas na h-Alba air a chlàradh neo air a sgrùdadh airson dearbhadh gu bheil an siostam ag obair gu h-èifeachdach neo airson adhbhar laghail eile. Dh'fhaodadh nach eil beachdan anns a' phost-d seo co-ionann ri beachdan Riaghaltas na h-Alba.

*** This email has been transmitted via the **Criminal Justice Secure eMail** service. ***

*** Anfonwyd y neges ebost hon drwy wasanaeth **ebost Diogel Cyfiawnder Troseddol** ***

*** This email has been transmitted via the **Criminal Justice Secure eMail** service. ***

*** Anfonwyd y neges ebost hon drwy wasanaeth **ebost Diogel Cyfiawnder Troseddol** ***

This email has been received from an external party and has been swept for the presence of computer viruses.

*** This email has been transmitted via the **Criminal Justice Secure eMail** service. ***

*** Anfonwyd y neges ebost hon drwy wasanaeth **ebost Diogel Cyfiawnder Troseddol** ***

*** This email has been transmitted via the **Criminal Justice Secure eMail** service. ***

*** Anfonwyd y neges ebost hon drwy wasanaeth **ebost Diogel Cyfiawnder Troseddol** ***

This email has been received from an external party and has been swept for the presence of computer viruses.

SP

SGHT

HT

C

Petition

27 Allegation D – Breach of Legitimate Expectation, Irrationality and Oppression.

[Redacted]

SP

SG

HT

C

Answers**27 Allegation D – Breach of Legitimate Expectation, Irrationality and Oppression.**

Admitted that this complaint concerns an incident which took place in 2013. *Quoad ultra* denied. **[Redacted]**

43683594v1

[Redacted].

The relevant section of the 2013 Fairness at Work policy would have been 6.5.5 Complaints About Ministers. Clauses 6.1.6 and 6.1.7 and 6.3.1 referenced by the petitioner were for issues that arose between civil servants and are therefore irrelevant. However, neither 6.1.6, 6.1.7 and 6.3.1 nor the Informal Resolution procedure described in section 6.5.5 were followed. Complainer A's line manager did not agree which manager in the line management chain was most appropriate to deal with the issue (Fairness at Work, 6.15) nor approach the Head of HR to arrange a meeting to discuss and outline the problem (Fairness at Work, 6.5.5). Complainer A's line manager did not confirm in writing what decision had been taken (Fairness at Work, 6.1.6). Her manager did not arrange to review the situation with her (Fairness at Work, 6.1.7). The Head of HR did not gather background information and discuss with the complainer whether an informal resolution was possible and what they saw as a satisfactory outcome of their complaint nor did the Head of HR approach the Minister outlining the problem and suggesting a possible solution (Fairness at Work 6.55). The first respondent had no evidence before her from [Redacted] or [Redacted] about complaint D [Redacted]. The petitioner had asked for statements to be taken from [Redacted] and [Redacted] but made it clear that he did not wish them to be asked about complaint D. The decision report (paragraphs 59 to 65) draws on the evidence received by the IO that Ms A told her line manager ([Redacted]) about the events that form the basis of complaint D. [Redacted] and [Redacted] then considered what to do. The decision report (paragraphs 72 to 78) records why the first respondent concluded that the 'informal' resolution of this matter was unsatisfactory, that no formal record was kept of the incident and no HR involvement had been sought. **It records that "the Fairness at Work policy does not appear to have been invoked at the time" (para 77).** Reference is made to Fairness at Work (2013). There is no question of *res judicata* arising: there has been no prior determination by a court (or tribunal) of competent jurisdiction: *Regina (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146. Separately and in any event the "grounds giving rise to [this part of] the application" for judicial review relate to the fact that

complaint D was to form part of the investigation. The petitioner was aware that the Procedure was being used to investigate complaint D by, at the latest, 7 March 2018. He had engaged solicitors by, at the latest, 16 March 2018 and can be expected to have sought and received advice about complaint D at any early stage. Objection was taken to the investigation of complaint D in a letter from the petitioner's solicitors to the first respondent on 23 April 2018. Any challenge to the investigation of complaint D should have been brought, at the latest, by 6 June 2018: Court of Session Act 1988, s.27A. The petitioner's remedy, if any, was to seek to prevent any determination on complaint D by interim interdict (cf. the case of *Mandic-Bozic* [2016] EWHC 3134 (Admin), cited by the petitioner), not to await that determination and then to complain thereof.

Petition

28 [Redacted].

This is another violation of the petitioner's right to a fair determination in accordance with the principles of natural justice and his article 6 rights. [Redacted]. The petitioner was prevented from making submissions about this. Separately that determination is irrational in respect that it is acknowledged that [Redacted]

[Redacted]. These reasons are perverse because Fairness at Work does not require or suggest that a formal record is appropriate and any such record would be contrary to the spirit of an informal resolution. Also, Fairness at Work does not suggest HR involvement save in specific circumstances which did not arise in this case. The respondents' averments in answer are denied. In an answer to a Freedom of Information ("FOI") request dated 21 September 2018 concerning harassment and/or bullying claims received by the second respondent in the last five years the second respondent said: *"Managers in the Scottish Government are encouraged to deal with concerns about internal harassment and/or bullying at an early stage, on an informal basis under the Fairness at Work policy, where appropriate. There is no requirement to report informal action to HR and no information is held centrally about cases that have been dealt with informally."* This is an accurate statement of the policy and practice of the second respondent [Redacted]. The first respondent was or ought to have been aware of that policy and that practice when she made the decision and issued the Decision Report. [Redacted]. It was taken in contravention of a legitimate expectation that the first respondent would recognise and respect that policy and practice. The FOI answer incorporated an answer to a Parliamentary Question which contained part of the Information requested in the FOI request. The FOI answer also stated that the second respondent could not provide a breakdown of the numbers of these claims in the last five years *"Due to small numbers and to avoid possible disclosure of personal data under section 38(1)(b) of FOISA."* The second respondent was prepared to publish in the press release referred to in paragraph 11 above the fact that they had received the two complaints which are the subject matter of this petition.

Answers

28 Denied, under reference to the foregoing Answers. Explained and averred that any informal resolution was not such as to give rise to res judicata or equivalent, or otherwise to prevent the investigation of complaints made regarding the petitioner. This is an inaccurate reading of the Fairness at Work policy 2013, both the section relating to disputes between civil servants and that relating to Ministerse. In disputes between civil servants there is an expectation that the manager's decision and action taken will be set out in writing to the complainer (6.1.6.). The FoI dated 21 September 2018 confirms that there was no

information held centrally about cases that have been dealt with informally. In this instance, the information was not recorded locally or confirmed in writing to the complainant.

SP

SG

HT

CC

Comments from Liz Lloyd

Regarding the issues around Fairness at Work –His petition refers to parts of the informal process (6.1.6, 6.1.7, 6.3.1)...suggesting his “belief” is not that it was the “informal local resolution” of 6.5.5 but the “informal process” set out in 6.1.

Can we make more of the point that he has set out the Fairness at Work process by which he believes it was handled – so hang it on that part. It clearly wasn't.

As well as stating that the actions under 6.5.5 didn't take place (which aren't currently mentioned)....

Eg No matter how you read it, it wasn't F@W.

Other suggestion would be that where we highlight the procedures at 6.1.6 etc that were not followed. It would also be worth highlighting 6.1.4 – that no further enquiries or investigation took place....eg to detail every step that was not used.

Perhaps also worth stating that the witnesses make no mention of [Redacted] having been involved at all

In terms of names, just a question from me.... is it possible to refer to people by their positions? And would the prohibition on reporting things which could identify the complainants mean witnesses names couldn't be reported.

And some guidance from counsel on whether we are submitting the witness statements?

Christine, we have discussed the last comment, whilst we would not seek to lodge the witness statements they may be sought by the petitioner and it may be difficult to resist such a request.

Comments from Judith MacKinnon and Nicky Richards

Judith and I have been through these and made some corrections and suggested amendments to the documents. We've included amendments as suggested by Liz – accept for the point about [Redacted] as I think this is already covered sufficiently and his affidavit doesn't suggest that he spoke to any of the other witnesses relevant in incident D.

Agree with Christine that in our view what happened by way of 'resolution' in 2013 is essentially irrelevant.

The key point which I can see is hard to get across in this kind of response is the extreme power imbalance that was at play here – [Redacted]

[Redacted]

On the proper reading of F@W 2013.

We have amended the answers to clarify that it should have been 6.5.5 Complaints About Ministers that was used not the clauses referenced by the Petitioner. These relate to disputes between civil servants. We have amended the answers to reflect the informal handling process for complaints about ministers. As Liz suggests, we have also retained the points that 6.1.1 wasn't followed either.

The section relating to Ministers opens with a statement 'where local, informal handling cannot resolve differences the following procedure applies..' and then goes on to describe the informal stage of the procedure, which involves contacting the Head of HR. If the procedure had envisaged 'local handling' to form part of the actual process it would have included instructions on how this should be handled (as it does in the section related to informal resolution of civil service disputes at 6.1.1 to 6.1.7).

In this instance, [Redacted], the 'local informal handling' which occurred was not an application of the informal stage of the policy as set out in 6.5.5. Nor was it an application of 6.1.1 to 6.1.7.

[Redacted]

My reading of the first sentence in 6.5.5 is that if having talked to your line manager you/they decide that it is necessary to invoke/apply the FAW the provisions set out in the bullets is the process you follow in relation to complaints against Ministers – none of which was done. [Redacted]