

Re: [CJSM] AS - Confidential

From: Roddy Dunlop [Redacted]@foa.cjsm.net>
To: Christine O'Neill[Redacted]@sgld.cjsm.net
Cc: [Redacted]@scotland.gsi.gov.uk.cjsm.net, Paul Cackette [Redacted]@scotland.gsi.gov.uk.cjsm.net
Date: Sat, 22 Dec 2018 15:30:37 +0000

Apologies, but another point occurs to me.

There has been some suggestion of calling JM as a witness, to rebut the problems we have re bias.

In addition to the obvious problem, already made, that calling her could only ever rebut actual bias and not apparent bias, we now have the further problem of her meeting Ms A on 16 Jan: immediately before Ms A lodged her complaint.

The problem with this is that JM stated in the commission yesterday, on oath, that she could not remember that meeting. That leaves us unable to aver, let alone prove, what happened at that meeting, and thus unable to rebut the rather obvious inferences that will otherwise be drawn from the fact that it occurred.

If one needed a watershed moment where the case moved from very difficult to unstateable, that was it. Given the amount of work ongoing I must urge that a view be taken thereon as soon as is possible. Continuing to rest on pleadings that we know to be untrue is liable to result in severe judicial criticism.

With repeated apologies at delivering further unwelcome advice, and with a further entreaty that urgent instructions be obtained in light thereof, I wish all of you a merry festive season.

Best

Roddy Dunlop QC

On 2018-12-21 15:43, Christine O'Neill wrote:

[Sending to [Redacted] for transmission direct to Lord Advocate.]

Lord Advocate/Paul

I am aware of the discussions overnight between Roddy and the Lord Advocate. I understand that as part of those discussions we have been asked to provide a list of work that would require to be undertaken if the case was to be progressed. That list is provided below. It goes without saying that our overall position vis-à-vis the case remains the same.

Disclosure

The further searches that are underway within SG for relevant documents were explained at the Commission this morning. In addition the havers who appeared, particularly but not exclusively Judith Mackinnon, gave personal undertakings to search for specific items (which may or may not exist) identified by the petitioner's counsel.

Judith made reference to documents she believes exist and in one case to a document that she said had already been disclosed, being a note of the meeting she and Nicky Richards had with Ms A on 5 December. That is new to us: we have not seen such a note before and had understood that there was no note of that meeting. It may be that there is confusion in Judith's mind about dates or the like. Judith also said that she had a call with Ms B on 23 or 24 January (prior to the formal complaint being made): that is new information.

The petitioner's counsel and the Commissioner were, understandably, unhappy with the suggestion that the further search exercise might not be complete until 7 January. We think it would be untenable standing the court timetable for the search exercise to take that length of time. It has been agreed that there will be a further procedural calling of the commission – by telephone – at 11am on Friday 28 December. Substantial progress would need to be made between now and then.

There was particular concern about the inaccessibility of the electronic files of Nicky Richards and Liz Lloyd who are out of the country until 7 and 8 January. Undertakings were given to investigate whether access to their material could be achieved meantime.

Adjustment

The pleadings require extensive revision to correct inaccuracies and to put more fully the respondents' position.

Corrections include (i) dealing with the erroneous suggestion that there were no further meetings with the complainers after Christmas and in January 2016 prior to them making their formal complaints and (ii) qualifying the averment that Judith's call with Ms B on 7 December 2017 did not involve a discussion about the content of her potential complaint. There is, in the note of the telephone call that Paul sent last night, reference to the FFM [Redacted] and there is also reference to '[Redacted]' which reads as a reference to the complaint that the FFM [Redacted]Ms B [Redacted].

The relevant adjustments cannot properly be made without a full precognition (beyond the note version provided last night) from Judith Mackinnon (including getting to the bottom if possible of whether Nicky Richards was also at the meeting on 16 January).

As mentioned on previous occasions, adjustment is also required to meet the complaint of bias against the Permanent Secretary. That would require a comprehensive precognition from the Permanent Secretary, as requested previously.

Prospects

It need not be said but the new information over the last 24 hours about further contact between Judith Mackinnon and the complainers simply reinforces our views about the case in relation to her prior involvement/apparent bias. The note of call of 7 December suggests that Judith had information not only about Ms B's complaints but had been given a wider picture of an [Redacted] (created by the FFM) which might well be such as to impact her ability to be impartial.

Regards

Christine

[Redacted]
