



Northern Ireland
Assembly

Committee for Regional Development

OFFICIAL REPORT (Hansard)

DRD v Lennon: Ministerial Briefing

20 February 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Jimmy Spratt (Chairperson)
Mr Seán Lynch (Deputy Chairperson)
Mr John Dallat
Mr Stewart Dickson
Mr Alex Easton
Mrs Dolores Kelly
Mr Declan McAleer
Mr Ian McCrea
Mr David McNarry
Mr Cathal Ó hOisín

Witnesses:

Mr Danny Kennedy	Minister for Regional Development
Mr David Orr	Department for Regional Development

The Chairperson: Minister and David Orr, you are very welcome indeed to the Committee. I am sorry that we are running a bit late. We had a closed session. We are dealing in this session specifically with the Lennon case. I understand, Minister, that you will make a presentation, then leave yourself open for questions.

Mr Danny Kennedy (The Minister for Regional Development): Thank you very much indeed, Chairman, members of the Committee and the secretariat, and those who have joined us in the Public Gallery. Thank you very much for the opportunity to meet the Committee this morning. I am very pleased to be here to discuss issues surrounding the case.

As you are aware, it was not possible for me to discuss the matter before the settlement of the case as it was sub judice. Now that matters have been settled, I am in a position to discuss some aspects of the case. I want to make it clear that I had no desire to be involved in the case. The events that led to the tribunal taking evidence in this case happened before I had assumed the role of Minister for Regional Development. It was just one of a number of controversial issues that I inherited from my predecessor.

When the Fair Employment Tribunal served notice of its decision on 20 June 2012, it upheld Dr Lennon's claim of discrimination by my predecessor, Conor Murphy. At that time, I made clear that it was only proper to take time to consider the tribunal's findings and the merits of any appeal, taking into account a range of factors, including any legal advice received. Let me say that I have absolutely no doubt whatsoever that I considered the issues appropriately and at length — in fact, at some considerable length — before coming to a conclusion, which I remain confident was in the public

interest. Factors that I took into account in coming to my decision were made clear at the time. To be helpful, I will restate those.

First, substantial public money had already been spent by the Equality Commission and my Department in contesting the matter at tribunal. I think we should bear in mind that both sides were funded by public money, and both sides would have been further funded by public money. In the theoretical event of an appeal succeeding, both sides would have been funded to run the tribunal again; possibly, indeed, to the position where an appeal would have been considered for a second time. All that would be funded by public money.

Secondly, the prospect of success in any appeal was, at best — at best — uncertain. Having considered all the relevant material, I formed the opinion that the prospect of success in any appeal was, at best, uncertain. I think that assessment is self-explanatory.

Thirdly, I think that a tribunal panel hearing live witness evidence is, more often than not, best placed to assess evidence and its value. As you are well aware, I did not hear the evidence live or have the opportunity to assess the witnesses before the tribunal, and neither was I, nor need I have been, in a position to assess the demeanour of witnesses as they gave their evidence. My role came after that.

Fourthly, further cost to the public purse of any appeal could be substantial, and I have already set out the potential scenario that would have likely flowed from any successful appeal.

Fifthly, even if an appeal had been successful, it could have resulted in further proceedings, incurring further cost to the public purse. Such costs were unquantifiable but likely to be significant. It is fair to say that the future costs of a theoretical appeal would not have been precisely quantifiable. That said, we knew that a large amount had been spent by both sides in getting to the point where an appeal was considered, and that assisted with reasonable estimates.

Both sides in this case had been funded by public money, and that would have continued to be the case in further proceedings. As I indicated, I think that it is important to bear in mind that the Equality Commission is funded by public money. Even if no cost award is made, the taxpayer pays in full.

The tribunal decision sets no precedent in respect of public appointments. Had it been the case that my decision had set some form of precedent, it may have been arguable that a varied set of factors would have to be considered. As the tribunal decision set no precedent in respect of other public appointments, it was my belief that there was no compelling argument to rerun this case.

Taking all those matters into account, I was satisfied that it was not in the public interest to appeal the tribunal's decision. Some of my Executive colleagues had enquired about the case, so, at the time, I wrote to advise them of my decision. I shared with the Executive the legal advice that I had received from counsel, which I had provided an undertaking to do. I emphasise that the legal advice carried a legal professional privilege and that it should not be disclosed.

I am aware that my decision was not welcomed by all. In some political quarters, it was wrongly claimed — wrongly claimed — that my decision had been in some way political or politically motivated. Of course, the Committee knows me well and knows that that simply was not the case. I can say with absolute confidence — absolute confidence — that, presented with the same factors today as I was presented with last year, I would have reached the same decision now as I did then. It was not in the public interest to pursue an appeal last year, and that continues to be a fair and proper assessment.

There has been some comment on the settlement figure, as there nearly always is in high-profile cases such as this one, but it was well below the amounts that were initially mentioned at the tribunal as being sought by the claimant. Having considered legal advice on that point, taking into account the damages that the tribunal might have awarded and the accumulating legal fees, I formed the opinion that that was a reasonable approach in all the circumstances.

Liability had been established by the tribunal when it reached its decision in June. The decision to settle the case without further proceedings was one made in the public interest.

So, Chairman, I hope that I have, in some way, assisted you today by setting out the approach taken to decision-making in this matter.

Committee members may well have been apprised of many of these issues through information that was available in the course of the proceedings and decision-making. As always, I am happy to accept

questions from members. I will answer those faithfully in so far as possible. I say "in so far as possible" because, naturally, there are related matters subject to legal professional privilege.

The Chairperson: Thank you, Minister, for that presentation. Can I just clarify that you presented the legal advice to ministerial colleagues in closed session at the Executive?

Mr Kennedy: Three Executive colleagues sought that, and I circulated it to all colleagues.

The Chairperson: Thanks for that, Minister. I remind members that this session is being recorded by Hansard. Members should be very careful in what they say and in the questions that they ask. I say that for your own protection and nobody else's. I will leave it up to you, but I will step in if I think that the questioning is overstepping the mark and if I get advice in relation to that. I will take questions from John Dallat first, because I know that he has Deputy Speaker duties at noon.

Mr Dallat: It is at 11.50 am. Thanks, Chairperson. Thanks, Minister, for your answer. In your opening remarks, you said that this was one of a number of controversial issues that you inherited. Minister, put us out of our agony: what other skeletons are in the cupboard?

Mr Kennedy: I thank the member for his question. However, the member will know that the business before us is to discuss the Lennon case. I would prefer to concentrate on that.

Mr Dallat: All right. You told us that you communicated your views to the Executive. Did you have any discussions with your predecessor, Conor Murphy? If you did, can you tell us what his reaction was?

Mr Kennedy: Again, I thank the member for his question. As I said, I shared legal advice with Executive colleagues on the basis of that being treated confidentially. When I reached my decision, I afforded my predecessor the courtesy of a telephone call to inform him of that decision. I prefer to keep that conversation private. I think that it would be unfair to do otherwise.

Mr Dallat: Minister, you are not telling us an awful lot. Are you prepared to go to any length to impart any additional information in the confines of this discussion, for example, if the Committee were to agree to go into closed session? It seems to me that people who have been reading about this on the internet are more likely to know the full facts than I am. Are there any circumstances in which you would be prepared to go into closed session to tell us exactly what happened?

Mr Kennedy: I can understand your line of questioning. I strongly believe that the privilege in respect of the legal advice and the other advice that was afforded to me is an important one. There would be consequences for not only me but Executive colleagues if I were to depart from that. It is part of the ministerial code. I can simply reassure you, and state once again, that my decision was taken in the public interest. I would take exactly the same decision today.

Mr Dallat: Finally, you have told me, and I respect your views, that you are not going to tell us what your predecessor said when you made that important phone call. However, I take it that he was not screaming from the rafters.

Mr Kennedy: I do not think that it is particularly beneficial to explore that.

Mr Dallat: Thanks.

The Chairperson: I call the Deputy Chair, Seán Lynch.

Mr Lynch: Thanks for coming along, Minister. We had the legal people in before you. The advice that was given to us is that you could make the information available to the Committee. You took considerable time to think over your decision. I am not a lawyer. I do not know whether you are a lawyer —

Mr Kennedy: Happily not.

Mr Lynch: If I were in your position, and I was as sure of my decision as you say you are, I would make the legal opinions available to the Committee so that it, in its scrutiny role, could decide whether

you made the right decision. We cannot carry out that role as a Statutory Committee. If you were so certain of your decision, I believe, as the legal person said, that —

The Chairperson: Can I interject here, Deputy Chair? In the discussion that took place in closed session, legal advice was given to us as a client. I do not want you to stray into that legal advice. I thought that was made very clear during the closed session. I issue a warning that that information is not to be disclosed in the public domain now.

Mr Lynch: The Minister would be aware of that. I feel that you are hiding behind the non-disclosure of the information; that is my view.

I want to move on. How many pieces of legal advice did you get on this case, Minister? Can you say how much money it has cost? I am not talking about the payout. I am talking about the total cost. Did you get an estimate of what an appeal would cost?

Mr Kennedy: I thank the member for his question. I understand his line of questioning. However, I made it perfectly clear that I am not willing, nor would it be proper for me, to breach ministerial guidelines and the ministerial code by indicating legal advice. That would not be productive, quite frankly.

Legal advice was a part — an important part — of the wider issue that was before me and to which I had to give consideration. I gave that issue serious consideration. I did not rush into this. I was not stampeded into it or anything like that. I was careful about the public comment that was made. I reflected much on all the issues that were before me. I simply want to reassure the member and the Committee that, having reached my decision, I believe that I made the correct decision in the public interest.

I shared legal advice with Executive colleagues. It was perfectly possible that, under arrangements made by the First Minister and deputy First Minister for the benefit of Executive colleagues, they could have called that decision into the centre had they thought that it was serious enough, of special consequence or whatever. They chose not to do so. They chose to trust the Minister for Regional Development to act properly in respect of his ministerial duties and Pledge of Office and to give consideration to an issue, which is what I did.

It is fair to say that it was also possible that any individual could have legally challenged it by way of judicial review. Indeed, I can recall a judicial review that my predecessor was involved in when he took, I think, Peter Mandelson, the then Secretary of State, through the courts to review an issue. So, that option was also open to individuals.

Let me restate and reassure the member that full consideration was given to all these issues. As I said, when I reflect on and look back at my decision, I can say that I would make exactly the same decision today for the same reasons of public interest.

Mr Lynch: Minister, with respect, the First Minister and deputy First Minister are not the scrutiny Committee; we are. You have not answered the question about whether you got an estimate of the cost of an appeal. Had that been carried out, it would have informed you, as part of your very considerable thought processes, not to appeal this case. What is in public domain suggests that it lay in the Department's favour. That is in the public domain. There are a number of pages on 'The Detail' website today. They show that one of the pieces of legal advice was that the arguments lay in the Department's favour. The term "unsatisfactory and ripe for challenge" was used. I am not a legal person, but, if I was in your position, I would have taken your decision seriously.

Mr Orr, were you the permanent secretary at the time?

Mr David Orr (Department for Regional Development): No.

Mr Lynch: Who was?

Mr Orr: At the time of the appointment?

Mr Lynch: Yes.

Mr Orr: It was Dr McKibbin. I was the permanent secretary at the time the Minister considered the appeal.

Mr Lynch: Can that information be made available to the Committee?

Mr Orr: About the costs?

Mr Lynch: No, about his opinion to the Minister at the time. No doubt the Minister sought the advice of the permanent secretary at the time. Why can that not be made available? We asked for all the information.

Mr Kennedy: I think that the member will know — if he does not, he should — that the advice provided by senior officials remains confidential, and so it should. There is a very good reason for that, and it is the service of government to ensure that that is protected and maintained.

I understand the line you are trying to pursue, but I am not prepared to enter into discussion about the legal advice that you referred to. I simply restate and reassure you that, for the best reasons of public interest and setting aside political and personal considerations, I made the right decision.

Mr Lynch: I want to put a final comment on the record. This caused reputational and financial damage to the Department. I believe that you are hiding behind the non-disclosure of the legal advice that was given to you. It was very clear. It used the term "ripe for challenge", and the arguments were in favour of the Department.

The Chairperson: That is, of course, your opinion, Deputy Chair; not the opinion of —

Mr Lynch: That is the reason, Minister, why you are not giving the Committee the legal opinion.

Mr Kennedy: I think that anyone who asks that particular question must believe that the tribunal finding or ruling did indeed damage my predecessor or his reputation. That is the point that you are making. I am not going to make any comment on that.

The Chairperson: OK. I think that is clear.

Mr Easton: Thanks, Minister. You will be pleased to hear that I have every faith in your decision. I have a couple of questions, but I am not sure whether you will be able to answer them. Are we allowed to know what settlement figure Dr Lennon received? If not, it is OK.

Mr Kennedy: The settlement figure of £150,000 is a matter of public record. Legal fees incurred by the Department— I think that this addresses the earlier question — were in the region of between £130,000 and £140,000. You will be aware of the point that I made about the Equality Commission's support of Dr Lennon in bringing this case. It bears its own costs as indeed does tribunal service. I do not have information on those figures, but, ultimately, the taxpayer pays for those. That is a breakdown of the figures.

Mr Easton: That is a huge amount of money.

I have one final question. When you gave the legal advice to Executive colleagues, would it be fair to say that the majority were supportive of your decision? You do not have to go into that totally.

Mr Kennedy: I simply tabled the advice as I indicated I would. I fulfilled that undertaking. It is not for me to comment on what Executive colleagues thought or otherwise. As I said earlier, they had the opportunity to perhaps bring the matter into the centre through the Office of the First Minister and deputy First Minister (OFMDFM). They chose not to do that. Ultimately, the decision was mine. I made the decision. I believed then that it was the right decision and I believe now that it was the right decision.

Mr McNarry: I put on record my personal thanks to the Minister for his clear and competent presentation to the Committee on this issue. In my opinion, the matter at hand has been exhausted, if one endorses the action and the decision made by the Minister and the manner in which he reached that decision, which he has outlined. I believe that to be the case today.

I have a two-part question on the issue of privileged information being pursued. Do you or your advisers think that the pursuit of privileged information is all about mounting a legal challenge against either you or your Department over the decision not to appeal the Lennon case ruling? Do you think that the advice given to you would be any different, irrespective of whom the Minister was?

Mr Kennedy: I am grateful to the member for his question and initial comments. The member will know, as a former special adviser, the unique position in which advice is offered.

It would not be proper for me to speculate on anybody's motives. I can assure everyone that the advice I received was non-political. Ultimately, as Minister for Regional Development and a member of the Executive, I made the decision. That is what I am paid to do. That is what is expected of me in my performance, under the Pledge of Office and the ministerial code. I am entirely satisfied and comfortable that, with the advice I assessed, the measure I gave and time I took to assess it, and the careful consideration that I gave all points, I made absolutely the right decision.

Mr McNarry: That is good enough for me.

Mr McAleer: Thank you, Minister. I have a couple of points. I have never in my life seen officials get as easy a time as when I came onto this Committee. Week after week, I sat here with lower-level officials from health, education and even rural transport, and they were given a rollicking and a terrible time. Now, people are tiptoeing around you today. You are getting a handier time than some of your own officials.

The Chairperson: I hope that you are not referring to me as Chair or to —

Mr McAleer: I am not referring to you as Chair. I am referring to some of the other members, who —

The Chairperson: Other members can speak for themselves. I do not think it is helpful, Declan, to go into presentations from other meetings.

Mr McAleer: Thank you, Chair.

We derive our statutory basis from section 44 of the Northern Ireland Act. That gives us High Court powers to get the people and the paperwork to help us execute our duties. I feel that that duty has been undermined by the implication of legal privilege. I will not go into that any further.

The facts remain, as you just said yourself, that your decision to disregard legal advice from the Attorney General has resulted in £150,000 being given to the person involved in the Fair Employment Tribunal. What I find unusual is that the tribunal found that Mr Lennon was discriminated against on the basis of religion for the particular post. Yet, when he applied for a post on the board of Northern Ireland Water, you did not see fit to appoint him. You must have some query around his competence and ability to fulfil a role in Northern Ireland Water that would not even be as challenging as the role that he was allegedly not given on a religious basis.

The Chairperson: I am going to have to warn you that, in relation to the issues around Dr Lennon's appointment, you are leaving yourself very open. You do not have absolute privilege on this Committee, Declan. I warn you of that, in your own interests.

Mr McAleer: Thank you, Chair. I am just referring to information that is in the public domain.

The second point that I want to get clarity on relates to the information that you would have received from your senior officials. You said a moment ago that information that you receive from your officials remains confidential. You did not say whether legal privilege was being invoked. I make reference to a Supreme Court ruling from 23 January in the case of Prudential PLC v Special Commissioner of Income Tax. It was pointed out, with a majority of 5:2, that legal privilege applies to information that comes from the legal profession. That being the case, do you agree that legal privilege does not apply to information that you would have received from your permanent secretaries and other officials?

Mr Kennedy: With respect, the answer is no. I am not here to trade political or personal insults with members. I say with some modesty that I am capable of that. It is reasonably accepted that that is the case, but that is not what we are about. As I said, I did not sit on the tribunal. I was not part of the

tribunal; it was none of my business. I had to deal with the subsequent decision of the tribunal. I had to act in the public interest, and I did that on a basis that is consistent with my Pledge of Office and the ministerial code.

Mrs D Kelly: I welcome the Minister to the meeting. Minister, you have been at pains to point out that you made the decision in the absence of any political axe to grind. I take that as confirmation that you would have taken the same actions regardless of who your predecessor was or whichever political party he or she belonged to.

Mr Kennedy: Yes.

Mrs D Kelly: How does your decision compare with the recent decision of OFMDFM to not respond to freedom of information requests about the business plan for Maze/Long Kesh?

Mr Kennedy: I thank the member for her question. It is another very good attempt to lead me into another discussion. I am not here to discuss that. It is unwise —

The Chairperson: That was a lowball, Dolores. The Minister made it very clear that he was here to discuss only the —

Mr McNarry: For God's sake, do not mention Arsenal or we will have had it. *[Laughter.]*

The Chairperson: I was going to issue the invitation to the trip to Chelsea that you were suggesting.

Mrs D Kelly: I cannot recall the intricacies of the case, but did the Commissioner for Public Appointments have some concerns at that time about the non-appointment?

Mr Kennedy: I confirm that, when the Public Appointments Commissioner undertook an audit of the appointment, she found no fault.

Mr Ó hOisín: Thanks, Minister. This is perhaps a question for the permanent secretary about the nature of advice that was given to the Minister on the tribunal verdict: does the Department believe that it was guilty of discrimination per se? I suppose that this could be asked of the Minister as well: what, if any, changes have been made in the appointment process following the case?

Mr Orr: As the Minister said, the advice of officials is normally a private matter between officials and the Minister. He has chosen not to disclose that.

After the tribunal case, the first thing that I did was fulfil a promise that had been made at the tribunal, which was to meet the Equality Commission and the Public Appointments Commissioner. I did that once the settlement had been concluded before Christmas. We had a good meeting with them. The outcome of that was that the Office of the First Minister and deputy First Minister will formulate wider guidance on public appointments, and there will be an ongoing and constructive relationship with the Public Appointments Commissioner and the Equality Commission.

Mr Ó hOisín: Was the permanent secretary directed not to appeal and to pay the damages? Was the Department of Finance and Personnel (DFP) informed?

Mr Orr: The Minister made his decision. As you know, officials advise and Ministers decide. The Minister is the head, and the Department operates under his direction. Approval was required because the settlement was over the delegated limit. That approval was sought and received from DFP.

Mr Ó hOisín: Has other legal action been taken and not acted on at any point? Are you aware of any situation where that may have occurred?

Mr Kennedy: I think it is important that we focus on this case, and that is what we have attempted to do today. That is why I was happy to come here today.

Mr Dickson: Minister, thank you for coming today and for answering our questions.

The tribunal, in its decision, said:

"The tribunal carefully considered DRD's explanation for the treatment of the claimant. In doing so it took into account that merit is a matter for the Minister and at the material time the Code did not require him to record reasons for his decision. However, the tribunal is satisfied, having weighed its findings of fact on the credibility issues attaching to the evidence of the Minister and Sean Hogan, in the context of its other findings of fact, (which include findings relating to a breach of the Code and the Procedures by the Minister in adding further essential criteria to the established criteria in order to secure the appointment of Sean Hogan)".

You said in your opening statement, Minister, that you found no reason to wish to appeal the decision, and yet, in this decision, we are told that, at the material time, the code did not require the Minister to record the reasons for his decision. Has that changed since that point in time? I note the reference in the decision to "at the material time". Can you now assure us that, on the basis of the outcome of that Fair Employment Tribunal, full cognisance has been taken of all the recommendations, backed by the decision of the tribunal?

Mr Kennedy: The code has actually changed.

Mr Dickson: The code has now changed.

Mr Kennedy: The material difference, of course, is that the new code becomes more appropriate.

Mr Dickson: And it is a code that is applied by all Ministers in all public appointments?

Mr Kennedy: Where it is applicable.

Mr Dickson: Where it is applicable.

Mr Kennedy: Where it applies; yes.

Mr Dickson: Minister, I know that you are not answering questions about other issues, but will you undertake to come back and at least talk to us about this other issue in your Department — the procurement of road signs?

Mr Kennedy: I am happy to consider that request.

The Chairperson: That is another lowball, Stewart. *[Laughter.]* We will make a request to the Minister, if that is the will of the Committee, and I am sure that he will consider that in due course.

The Deputy Chair wants to come in very quickly for one last question.

Mr Lynch: Minister, did you seek legal advice when it emerged that one of the tribunal members was ineligible to sit on the panel?

Mr Kennedy: Let me say that I do not accept the premise of your question. The tribunal chair was pressed on that point, and he gave an assurance that the tribunal had already come to its decision before the retirement of the individual in question. I think that to suggest that that would have made any significant difference to the outcome of the case is, frankly, clutching at straws.

The Chairperson: OK. Minister, I do not have any other questions. Thank you for coming along to the Committee. David, thank you for coming. We do not see just as much of you this weather, but I am sure that we will on other issues in the not-too-distant future.

Mr Orr: I will be back next month.

The Chairperson: Thank you both very much for your presentation. We will maybe talk to you about road signs in due course.

Mr Kennedy: Yes. Thank you very much indeed.