

Mr H McInnes v Daily Record

Clauses noted: 3, 15, 16

Mr H McInnes of Bonnyrigg, Midlothian, complained to the Press Complaints Commission that the Daily Record obtained information by paying a man who was both a witness in a criminal trial and a criminal in breach of the former Clause 16 (Payment for articles) of the Code of Practice. He also complained that articles based on the interview with the man, published on 31 January, 1 February and 2 February 2003 were intrusive in breach of Clause 3 (Privacy) of the Code of Practice.

The complaint was made before the new provisions on witness payments were included in the Code and the Commission therefore considered the complaint under the Code that was in force at the time of the payment.

The complaint about the witness payment was rejected. The complaint under the clause dealing with payments to criminals was upheld, but the Commission did not censure the newspaper.

Background

The complainant's daughter, Arlene, disappeared several years ago and was widely assumed to have been murdered. Eventually – after what was described as 'Scotland's longest running murder inquiry' – the woman's husband, Nat Fraser, was charged with her murder, along with two other men, one of whom was a farmer called Hector Dick. During the course of the trial, however, Dick agreed to testify against Fraser in return for the charges against him being dropped. Dick was therefore formally acquitted of murder while Fraser was later convicted, despite the fact that his wife's body has never been found. However, Dick does have a criminal record in relation to the case, having been found guilty previously of attempting to pervert the course of justice after he refused to speak to the police about a car that he had obtained which was suspected of having been used in the disposal of Arlene Fraser's body. The articles complained about were the result of an interview with Hector Dick, for which the newspaper had paid.

Complaint

The complainant said that the articles had exposed no new information and that consequently there was no public interest in paying Hector Dick for the interview. He also said that the articles were intrusive and offensive to him and his family.

The newspaper – then under a former editor – said that although Nat Fraser had been convicted, there were many unanswered questions about the case, not least concerning the involvement of Hector Dick and the whereabouts of Mrs Fraser's body. It said that for many years justice had been delayed because of the deceit of those involved in covering up the murder, and contended that the trial had left many people with the view that the full story had not emerged. In these circumstances the newspaper had approached Mr Dick, through his solicitors, to ask for an interview which might shed light on the murder, but despite attempts to secure this in the normal way Mr Dick indicated that he would only consent to an interview if payment were made. The approach was only made after his acquittal and after he had given evidence, and the agreement was only reached, and payment agreed, after the case had been concluded. The newspaper maintained that the offer had therefore been made in accordance with the Code and could not conceivably have interfered with the outcome of the trial.

It said that its motivation in seeking the interview was to expose the truth and to highlight the deceit of both Nat Fraser and Hector Dick. The only way to do this was to pay for access to Mr Dick and to attempt to find out the truth through the use of 'robust interview techniques'. Money had to be offered before the interview took place in order to secure Mr Dick's co-operation. That the interview did not in fact yield any clues as to the whereabouts of Arlene Fraser's body was a matter of regret

to the editor. However, the fact that they did not emerge did not mean that the editor did not have real grounds for believing that they would. The newspaper argued that the circumstances facing the editor were virtually unique: in almost all cases an editor would be able to make an advance decision about the public interest value of material before agreeing to payment. In this case, no such decision could be made because, while there were genuine reasons to believe it could be obtained, the newspaper could not second guess whether Mr Dick would actually reveal the information that the newspaper understood him to have. The newspaper pointed to the fact that the Code and the Commission's case law provide no guidance to editors on how to proceed in circumstances such as these. Representatives of the newspaper had therefore contacted the Commission for advice about how the Code is interpreted. The newspaper also explained, following questioning about its approach from the Commission, that having conducted the interview it did not undertake a second assessment of the public interest value of the material before deciding to publish it. It explained that had either the Code or the Commission's case law required such a second assessment it would have made one.

The newspaper maintained that it was the role of investigative journalism to try to uncover information that may not otherwise emerge, and contended that the payment was made, in the public interest, in pursuit of this aim.

The complainant said that no new information had emerged as a result of the payment, and that the ensuing articles largely repeated material that was already in the public domain.

Adjudication

Before considering whether the payment had been made in accordance with the Code, the Commission examined the complainant's contention that the articles were intrusive. This part of the complaint was considered under Clause 3.

While the Commission understood that any further publicity was unwelcome to the complainant and his family in the immediate aftermath of the conviction of Nat Fraser, the Commission did not conclude, having reviewed the material contained in the articles, that they contained any private information that had not already been established in the public domain as a result of the court case. As the complainant himself had commented, the articles seemed to repeat what had already been published previously. Moreover, they were chiefly concerned with Dick's own views about Nat Fraser and the court case, rather than with any particularly private details about the complainant's daughter or family. For these reasons the Commission did not find a breach of Clause 3.

The Commission then turned to the complaint about the payment to Hector Dick. It acknowledged that the case was unusual in that Dick was both a witness in the trial and, by virtue of his conviction for perverting the course of justice, a criminal. His conviction related directly to the investigation into the disappearance of Arlene Fraser. The payment therefore fell for consideration under two parts of the Code – that dealing with payments to witnesses and that dealing with payments to criminals.

The Commission first considered the payment under the first part of the former Clause 16 which deals with payments to witnesses. The Code of Practice that was in effect at the time stated that there should be no payments to witnesses in current criminal proceedings unless there was a public interest in doing so. The newspaper had spoken to Mr Dick after his acquittal and after he had given evidence, but no deal had been reached or payment agreed with the newspaper until after the case was concluded. Having seen the chronology submitted by the newspaper, the complainant himself pointed out to the Commission that he had never 'implied that Mr Dick was approached until the trial was concluded, nor that the interview had any influence on the trial'. The Commission was therefore satisfied that the terms of the Code had been met on this point and that the payment could not conceivably have interfered with the administration of justice. However, it wished to point out to editors that the new clause on witness payments, which came into effect in March 2003, is more

tightly defined and makes clear that offers of payments must not be made until after the court has announced its verdict in cases where not guilty pleas have been entered.

The Commission then considered the payment under what is now Clause 17, which deals with payments to criminals and has not been changed since it was the second part of the former Clause 16. The clause says, *inter alia*, that payment or offers of payment for information must not be made to convicted criminals 'except where the material concerned ought to be published in the public interest and payment is necessary for this to be done'.

The terms of the Code are clear – there is a ban on payments to criminals unless the material concerned ought to be published. In this case, the Commission agreed with the complainant that the sort of material that was generated by the interview did not contain new information of the significance that was required to justify breaching the terms of the Code. The Commission understood – and strongly sympathised with – the complainant's revulsion that the man who had a criminal conviction for perverting the course of justice in relation to the police inquiry into his daughter's disappearance had been paid by the newspaper. The Code does not allow editors to enter into contracts with criminals unless they can be satisfied that the 'material concerned ought to be published in the public interest'. That was not the case here and there was a breach of the Code.

However, the Commission decided not to censure the newspaper as it considered that there were a number of mitigating factors:

1. All parties to the complaint agreed that the court case had not been satisfactory in unearthing all the details of this case, not least the whereabouts of the complainant's daughter's body. It seemed clear to the Commission that there was a general view at the time – not confined to the then editor of the Daily Record – that Hector Dick may have had further information about this case. This was an important factor for the Commission to take into account because it showed that such a view was not simply an excuse that the editor had settled on retrospectively. The Commission accepted that there were grounds for the editor to believe that access to Mr Dick might provide new information which would be in the public interest. It had been necessary to pay him as he would not agree to be interviewed otherwise. However, the Code of Practice does not permit the Commission to consider whether the payment was in the public interest, only whether the 'material concerned' was in the public interest. The Commission was not convinced that the Code of Practice, as currently drafted, is entirely satisfactory in rare cases such as these – particularly as it was perfectly feasible that significant new material might have emerged. It will therefore ask the Code Committee to consider whether the clause might be amended in light of the issues raised by this complaint.

2. The editor had not rushed into making the payment without first attempting to secure the interview for free. When it became apparent that payment was necessary, the editor's representatives had telephoned the PCC for advice about the application of the Code. While the PCC gives advice in such circumstances about the Code and about its case law, it is not the responsibility of the PCC to sanction editorial decisions, and the payment and publication were matters for the then editor alone. Nonetheless, the Commission believed that the approach that he had taken in asking for advice from legal advisers and from the PCC demonstrated his anxiety to make the right decision under the Code. The Commission has no hesitation in censuring other editors whose regard for the Code is less rigorous.

This was a complicated case and the Commission appreciated that there were a number of factors which influenced why the wrong decision under the Code had been made. It decided, therefore, not formally to censure the newspaper under the terms of Clause 17, which relates to the payment itself. However, the Commission wished to put on record that it did not believe that the articles – which were unacceptably distressing to the complainant – should have been published. It hopes that the Code Committee will be able to redraft the Code to ensure that in future there is no ambiguity in cases such as these.

Relevant rulings

A reader v News of the World / Sunday People / Mail on Sunday / Daily Mail / Sunday Mirror, 2002
Various v The Times / The Mirror / Daily Express / The Daily Telegraph, 1998

Adjudication issued 2003