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8 Deputy M.R. Higgins of St. Helier of the Chairman of the States Employment Board regarding the advice provided by officers to the Board during the ‘Alwitry case’: [OQ.44/2019]

Is it the chairman’s assessment that the officers’ advice given throughout the ‘Alwitry case’ to the States Employment Board was correct and was not affected by any personal views they may have held?

[10:45]

Senator J.A.N. Le Fondré:

The Deputy of St. Ouen is answering this question.

Connétable R.A. Buchanan of St. Ouen (Vice-Chairman, States Employment Board - rapporteur):

I think the Chief Minister meant Connétable of St. Ouen, my apologies to the Deputy. I think I thank the Deputy for this question. The chair is satisfied that officers’ advice to the S.E.B. was correct and was not affected by any personal views they held for the following reasons. As advised by officials, the S.E.B. commissioned 3 independent reports by Beal and Haste and the former S.G. (Solicitor General) Howard Sharp, so it was not a simple acceptance by the S.E.B. of the hospital management view. No officer is criticised in the judgment for incorrect advice or providing advice that was affected by personal views. On the contrary, having heard live evidence at the trial of 6 senior managers and clinicians of the hospital, the court found that the hospital management had acted in good faith and in the best long-term interests of the hospital. The court also found that Mr. Alwitry was not dismissed for raising patient safety concerns or because he was a whistle-blower. Mr. Alwitry abandoned his claim that there was a tortious conspiracy among senior managers in the hospital. He also abandoned his claim in defamation and his claim for punitive exemplary damages were dismissed by the Royal Court.

3.8.1 Deputy M.R. Higgins:

If that is the case why did the Royal Court find in Mr. Alwitry’s favour?

The Connétable of St. Ouen:

Sorry, it was not quite the supplementary that I was expecting because the Deputy had not sent me a supplementary before, but he has clearly changed his mind. I just preface this by saying that Alwitry case is *sub judice* in 2 respects. First, the judgment of the Royal Court handed down last year is being appealed to the Royal Court of Appeal. Second, the judgment of the Royal Court was in respect of liability only and did not deal with the quantum of the amount of damages which is the subject of further proceedings. So at this juncture I would like to ask the S.G. whether I can respond to that question.

The Bailiff:

It is not really a matter for the Solicitor General but if it is not going to cause any difficulty ...

Mr. M.H. Temple Q.C., H.M. Solicitor General:

I think the answer is Deputy Higgins can read the judgment and the reasons are set out in the judgment.

Deputy M.R. Higgins:

With respect, I was asking the Minister because he gave an answer which tried to confuse people's views as to the actual judgment. What I am trying to say is why did the Royal Court rule in favour of Mr. Alwitry, which is now the subject of an appeal from the S.E.B.? A simple question.

The Bailiff:

Deputy, my reaction to that was that the reason for the Royal Court's judgment is in the public domain, I am not sure the Minister in any event can speak for the Royal Court. The Royal Court says what it thinks through its judgment and if you wish to know the answer to why the Royal Court thought the way it did then the Solicitor General's comment, read the judgment, is the right answer.

Deputy M.R. Higgins:

I have, Sir, but other Members may not have.

The Bailiff:

Well, it is up to them. Even in this free society that we have, we cannot make people read things.

3.8.2 Deputy R. Labey:

I would just like to say that I think some of what the Assistant Chief Minister has just read out is highly selective, one-sided and ill-advisable. The world of the hospital consultant is a small world, is there evidence to suggest that the Alwitry case is doing harm to recruitment at the hospital and is an appeal not just prolonging that agony and making things worse?

The Connétable of St. Ouen:

I am slightly struggling with this answer but, as far as I am aware, the outcome of the Alwitry judgment is not having an impact on the recruitment of further consultants. I am not sure about answering the second part of the question and perhaps the S.G. might like to guide me in that respect.

The Bailiff:

As far as I understand it, no appeal has yet been entered so while it is still possible for an appeal to be entered - the time has not expired - but it is difficult to say that the matter is *sub judice* because the case is not going anywhere as far as liability is concerned because no appeal has been entered. Of course if the question were to go into the amount of damages, that would be a completely different issue and therefore that would be out of order, as potentially affecting the court case.

The Connétable of St. Ouen:

Thank you for that clarification. If I could just ask the Deputy to repeat the second part of his question, that would be helpful.

Deputy R. Labey:

Is appealing the decision, the recent decision, not prolonging the agony, futile and a waste of public funds?

The Connétable of St. Ouen:

In the opinion of the States Employment Board, the answer to that is no, we feel that we have a good case to appeal it and that we disagree with the judgment of the court. That is the basis of our appeal, that we are unhappy with the outcome, which is why we will be submitting an appeal.

3.8.3 Deputy J.H. Young:

Is the spokesman for the States Employment Board aware of the posts on social media that show this case being circulated by the British Medical Association and does he not think that such a case - and in great detail - would reflect well on the Island?

The Connétable of St. Ouen:

I thank the Deputy for his comments. I am afraid I try not to follow social media. The repetition of these comments outside of the Island is unfortunate and is potentially damaging, but nevertheless, we do feel we have got a strong case and as such we have been advised that an appeal has a good chance of success. We feel it is right to do so.

3.8.4 Deputy M. Tadier:

In order to convince the Assembly that an appeal is the best course of action and is in the public interest, would the Assistant Chief Minister be able to say what likelihood of success he expects for the appeal versus the potential cost that would be incurred if it loses?

The Connétable of St. Ouen:

I thank the Deputy for his question. As I am sure he will understand, any matter that goes to court is never an absolute certainty, but we have been advised by our legal advisers that we have a good case and that we have every prospect of being successful. In relation to the costs, while I cannot comment specifically, they certainly would be substantially less than any potential award that might be awarded against us.

3.8.5 Senator S.C. Ferguson:

Does the Assistant Chief Minister not think that sacking somebody a week before they start work is grossly unfair and not the sort of example that this Island wishes to set in its employment of people? Does he not realise that there is a time when discretion is the better part of valour and that this thing is put to bed properly, and having ruined somebody's career, we try to make some sort of amends?

The Connétable of St. Ouen:

All I can say in response to that question is that that is one side of the argument, which I accept the Senator holds as an opinion. Clearly the S.E.B. have looked at both sides of the argument and feel that an appeal is a worthwhile and right way to go forward.

3.8.6 Deputy K.F. Morel:

Given that the S.E.B. has been found wrong once already, if the S.E.B. were to appeal and were to lose that appeal, then hence being found wrong twice, would the Assistant Chief Minister agree that therefore his position would no longer be tenable on the States Employment... in fact, the S.E.B., the positions there would no longer be tenable, having been proven twice wrong?

The Connétable of St. Ouen:

I think the answer to that is no, I would not see our position as being untenable. We are following legal advice on a case that we inherited from the previous S.E.B. We feel it is the right way forward, but as with all legal advice, there is no guarantee that we are going to be successful. We are putting the best interests, we feel, of the States first and pursuing this appeal.

3.8.7 Deputy M.R. Higgins:

Can the Constable tell the States how much has been spent to date on the pursuit of this claim? It has not gone to appeal yet, so therefore I am just wanting to know what the costs have been to the States to this point in time.

The Bailiff:

You do not mean on the pursuit of the claim, because that is what Dr. Alwitry has spent money on, you mean on the defence of the claim?

Deputy M.R. Higgins:

On the defence of the claim, Sir, yes. I stand corrected.

The Connétable of St. Ouen:

Can I just check that the S.G. is happy for me to answer that question?

The Solicitor General:

I think part of those costs would be in relation to the claim generally and they would include, for example, quantum of damages, which is still an ongoing issue. As I understood it, you make a distinction between the appeal and then the ongoing claim as regards quantum in relation to whether or not this question was *sub judice* so it ...

The Bailiff:

I understood the Deputy's question to relate to the costs and not the liability in damages.

Deputy M.R. Higgins:

That is correct, Sir. Thank you.

The Solicitor General:

In that case, I am not sure whether the Constable has the information, but to the extent he has the information then ...

The Bailiff:

Very well. Connétable.

The Connétable of St. Ouen:

Yes, I am afraid I do not have the information. I am more than happy to supply the Deputy with it after the sitting.

Deputy M.R. Higgins:

If I could say, I gave the Constable advance notice of the question I was going to be asking about costs. I am disappointed he does not have them available and I hope he will publish them to all Members and to the public.

Deputy M. Tadier:

Can I raise a point of order? It sets a strange precedent when someone who is being questioned asks the permission from the law officer, Crown Officer, to ask whether he can answer the question. I understand what is going on, but it sets a strange precedent, given the fact that in future we may not have an S.G. or A.G. (Attorney General) at the time. It is also strange that a Minister asks permission to answer a question and when he is given permission, he says: "I do not have the information."

The Bailiff:

Deputy, I think your point of order is really a rebuke of me in the Chair and that is right, because I should not have allowed the reference to the S.G. Either it breaches Standing Orders, which is a matter for the Chair, or not. I think probably I should not have done so and I accept that.

Deputy M. Tadier:

The word "rebuke" is far too strong. I just wanted clarification, but thank you for that.

The Bailiff:

I have just said I think I should not have done that. It was the most delightfully rendered rebuke, if I may say so. **[Laughter]**