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16 November 2015

By Post and Email

BBC Complaints  
PO Box 1922  
Darlington  
DL3 0UR

and

andrew.head@**GRO**

Your ref CAS-3485119-74B6PG  
Our ref SCB/THRE/MIT/111850.00038

Dear Sirs

**NOT FOR BROADCAST**

**Panorama - Post Office Limited**

We write further to the letter from Andrew Head, Executive Producer for BBC Panorama, dated 19 October 2015, in response to our complaint of 15 September 2015.

Our client is not satisfied with the response that it has received, for the reasons set out in more detail below, and therefore wishes to invoke your Stage 1b complaints procedure.

For ease of reference, we enclose copies of: (i) Mr Head's letter of 19 October 2015; (ii) our letter of 15 September 2015; and (iii) our letter of 10 August 2015.

Level of response

Key issues

- No response to letter of 10 August 2015

Our letter of 15 September included reference to our pre-broadcast letter of 10 August 2015. The points raised in our letter of 10 August were to be incorporated in our letter of 15 September, as was clearly set out in the letter. This was intended to avoid the need to repeat points already made in correspondence with the BBC.

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Mr Head's letter states that the reason for not addressing points made in this letter was because the BBC has already provided a response to the letter of 10 August. In fact, our client has received no substantive response to its letter of 10 August and, therefore, the response to our client's complaint is deficient in this manner.

Our client's letter of 10 August relates to the BBC's conduct prior to the broadcast of the programme. It is important to recognise that our client's complaint extends to the BBC's conduct in making the programme and in seeking our client's contribution. The complaint is not limited to the presentation and contents of the programme itself, which Mr Head's letter largely focuses on.

### Right of Reply

#### *Key issues*

- No valid justification for failing to provide adequate information to Post Office
- No valid justification for withholding 'whistleblower's' identity
- Failure to make clear that Mr Roll was not employed at the relevant time

Under the heading "Right to Reply" in his letter, Mr Head responds to a number of points raised in our letter of 15 September. However, in doing so he appears to be basing many of his conclusions on a particular interpretation of the BBC Editorial Guidelines (the "Guidelines") which we cannot accept.

Mr Head's letter states "[Paragraph 6.4.1] of the [Guidelines] refers to the informed consent of contributors who take part in the programme. Since Post Office declined an interview this does not apply...". This statement is relied upon at various points in the letter, including as a justification for refusing to disclose the details of your 'whistleblower'. However, this interpretation of the Guidelines does not make any logical sense.

No valid distinction can be drawn between a party that provides a recorded interview and a party that provides a statement for broadcast. Both must constitute "contributors" to the programme. Furthermore, our client provided a detailed on-the-record briefing to the Panorama team. This alone should be sufficient to make our client a "contributor" to the programme.

More fundamentally, paragraph 6.4.1 of the Guidelines states that "*contributors should be in possession of the knowledge that is necessary for a reasoned decision to take part in our content*" and further that "*Before they participate, contributors should normally know...*". This Guideline clearly applies before parties asked to contribute have reached a decision about whether and/or how to participate in the programme.

Nevertheless, if the definition of a "contributor" is limited to parties that provide an interview for broadcast, it must be incumbent upon the BBC to comply fully with paragraph 6.4.1, in regard to all parties that it asks to contribute, up until the point where the decision over whether to grant an interview is given. We fail to understand how it can legitimately be argued that the BBC can retrospectively justify a failure to comply with this Guideline based on a decision taken by our client after the date of the breach.

Indeed, our client's decision not to put someone forward for interview was, in large part, reached because of concerns over the lack of information that the BBC was providing regarding the allegations to be raised and the evidence relied upon to support them. If the BBC had complied fully with paragraph 6.4.1 of the Guidelines, there is a strong likelihood that our client would have provided an interviewee.

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In this context, your suggestion that our client's decision to decline an interview justified the decision to withhold Mr Roll's details is illogical. Our client's repeated requests for the names of the contributors significantly predated its decision regarding an interview.

Mr Head further justifies the decision to not reveal the name of Mr Roll, in contravention of paragraph 6.4.1 of the Guidelines, on the basis that the BBC was "*keen to ensure that his testimony was not unduly affected by external pressure*". This statement also is not borne out by the facts. The involvement of the whistleblower was revealed in Mr Bardo's email of 17 June 2015. By an email of 23 June 2015, Mr Bardo explained that "*we wish to protect [the whistleblower's] identity*".

However, it was not until 23 July 2015 that our client wrote to Professor Button. To suggest that our client's letter to Professor Button was part of the circumstances that justified the BBC's decision to withhold Mr Roll's identity is clearly untrue. This appears to be an attempt, once again, to use a circumstance arising after a decision has been reached by the BBC to justify that decision retrospectively. Furthermore, our client's letter to Professor Button simply sought disclosure of any evidence that he may have had in his possession which suggested that there had been any miscarriage of justice. This request was made to ensure that our client complied with its ongoing legal obligation of disclosure and not, as suggested, to place "*external pressure*" on him.

While our client acknowledges that it corresponded with Mr Ian Henderson in advance of his interview with the BBC, this correspondence was initiated by Mr Henderson who notified our client of the BBC's request for an interview. Our client did not exert any undue external pressure on Mr Henderson. Furthermore, our client has a direct contractual relationship with Second Sight including obligations of confidentiality imposed on Second Sight that our client was entitled to discuss with Mr Henderson.

In any event, after your interview with Mr Roll was recorded, there would have been no reason to continue to withhold his identity. Revealing this information would have allowed our client the opportunity to comment on Mr Roll's capacity to provide meaningful evidence. It would have further allowed our client the opportunity to provide comment on the status of the Horizon system at the time of his employment and to highlight to the BBC (and potentially the viewers) that Mr Roll's knowledge and experience pertained only to a time period that was irrelevant for the three cases featured in the programme. Indeed, providing our client with the opportunity to make such comment would have assisted the BBC to achieve the "*due accuracy*" to which it is required to aspire.

The only detail that the BBC provided regarding Mr Roll was that he was employed prior to 2010. In fact, Mr Roll left Fujitsu's employment in 2004. We fail to see why the BBC chose misleadingly to characterise the timing of his employment which suggested that it was contemporaneous with the featured cases.

Furthermore, Mr Head's letter states that "*the dates of [Mr Roll's] employment at Fujitsu were written on the screen during his interview so this information was made available to viewers anyway*" and that "*Each postmaster also had the years of their tenure clearly presented in on-screen text. The extent of the overlap was therefore clear*". With the greatest respect for the viewing public, this line of argument assumes too high a level of attention to detail for the average viewer. It is unreasonable to suggest and highly unlikely that the vast majority of viewers would have paid much attention to the dates of the postmasters' tenures, much less remembered them and then compared them to the dates of Mr Roll's employment. Viewers would rightly assume, in the absence of any express statement to the contrary, that

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the individual being presented as a whistleblower would have been providing directly relevant information and, indeed, that he would have knowledge of the computer system as it was at the time of the specific incidents being featured in the programme. If our client had been provided with details of the Fujitsu employee that was contributing to the programme, then it could have made suitable comment to provide viewers with the necessary context to avoid them being misled.

Our client disagrees strongly with the suggestion that the Panorama team complied with paragraph 6.4.25 of the Guidelines. Providing information on the "*broad question areas for an interview*" does not constitute describing the allegations "*in sufficient detail to enable an informed response*". Our arguments on this point have been repeatedly rehearsed in correspondence. To date, we have received no satisfactory response to adequately explain why our client was not provided with more detail on the allegations to be made and provided with next to no details of the evidence upon which such allegations were to be based. As previously stated, it was essential that our client was provided with this evidence to ensure that it had the necessary information to enable an informed response.

As an aside, we note that Mr Head's letter states that the BBC was "*repeatedly in contact*" over a period of 12 weeks from 19 May 2015. This omits to mention that there was a four week 'hiatus' between the end of June and 22 July 2015 during which no further substantive correspondence was received from the BBC.

### Proposed Meeting

#### *Key issues*

- **No valid justification for declining offer to review further evidence**

At paragraph 3 under the heading "The Right of Reply Process", Mr Head refers to our client's offer of a meeting to share confidential documents with the BBC that would have disproved the allegation that our client brought charges of theft in the absence of supporting evidence and that theft charges were used to put pressure to plead guilty to false accounting. This offer of a meeting was declined.

In justifying this decision to decline our client's offer, Mr Head cites two "*fundamental editorial reasons*".

Mr Head's first argument is that the fact that our client required any disclosed documents to be kept confidential would have "*prevented the BBC* from verifying its accuracy" and hence put it in breach of paragraph 3.4.2 of the Guidelines.

This argument is illogical. The fact that the BBC could not have disclosed the materials to any third party is not a justification for refusing to review them. First, in applying this logic, the BBC is making the assumption that the BBC would need to take further steps to verify the accuracy of the information, facts and documents being presented to it or that to do so would require their disclosure to third parties. It is perfectly possible that the review could have led to independent lines of enquiry without the need to disclose such materials. Indeed, situations akin to this must arise in a large number of BBC investigations



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and therefore BBC staff should be perfectly capable of handling such confidentiality. Secondly, it is illogical, and contrary to the principles of good journalism, to suggest that the BBC should avoid an open and important line of enquiry simply due to the concern that it may open up other lines of enquiry.

As stated previously, if the BBC had taken our client up on its offer to review documents that would have demonstrated that the allegations being made were false, then it would have been left with little material to broadcast. Mr Head's reference to the BBC's inability to refer to or attribute it in the broadcast would be irrelevant in the context of an allegation proved to be false and, hence, not broadcast at all.

As stated in our initial letter of 15 September, it would appear that the BBC would prefer to 'bury its head in the sand' and deny the inconvenient truth that Post Office has evidence to demonstrate that the allegations being broadcast were untrue, rather than check and verify the information and facts presented to the BBC by individuals with an axe to grind.

The second argument made by Mr Head in this respect is that the arrangement proposed by our client would have "[compromised] the BBC's editorial integrity (see Editorial Guidelines 1.2.4 and 14.1)". Paragraph 1.2.4 of the Guidelines states "*The BBC is independent of outside interests and arrangements that could undermine our editorial integrity. Our audiences should be confident that our decisions are not influenced by outside interests, political or commercial pressures, or any personal interests*". Paragraph 14.1 of the Guidelines similarly states that "*Our audiences must be able to trust the BBC and be confident that our editorial decisions are not influenced by outside interests, political or commercial pressures, or any personal interests*". Reviewing our client's evidence would not have constituted "*outside interests, political or commercial pressures, or any personal interests*". We do not accept Mr Head's argument here. The BBC regularly receives information, including from those who might be considered to be partisan and is perfectly capable of reviewing this information without undermining its "editorial integrity". At the very least, this information would have simply been more information for the BBC to consider when producing the programme. Hiding behind the nebulous defence of maintaining "editorial integrity" does not justify the decision to ignore valid concerns about the truth of the allegations to be broadcast.

#### Reflection of Statement

##### *Key issues*

- Failure to include elements of Post Office's statement relating to the CCRC
- Misrepresenting the involvement of the CCRC
- Failure to include key elements of Post Office's statement relating to the manner in which Post Office conducts private prosecutions

Despite the points raised by Mr Head, our clients maintain that the BBC failed fairly and accurately to reflect its response.

Without contradiction to the generality of the statement above, we would make the following points:

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- Mr Head's letter justifies the exclusion of our client's statements regarding the Criminal Cases Review Commission ("CCRC") on the basis that the programme "*did not suggest that Post Office was failing to co-operate [with the CCRC]*" and furthermore that that programme did not expressly state that the CCRC would not have access to all of the relevant materials in respect of the cases referred to it. This justification assumes a level of knowledge on the part of the average viewer regarding the work of the CCRC which is clearly unrealistic. Presenting the reference to the CCRC alongside the statement "*the sense of injustice is growing*" suggests to the uninformed viewer that in accepting a reference the CCRC is presuming some level of injustice when, in fact, applying to the CCRC is a right open to any person convicted of an offence in England, Wales or Northern Ireland. It would have been fair for these aspects of our client's response to be presented alongside this statement.
- Similarly, Mr Head states that our client's statement that Post Office follows the Code for Crown Prosecutors was not included because the programme did not expressly state otherwise. However, the programme did clearly state that "*[Post Office] doesn't have to go through the police or the Crown Prosecution Service*" and then went on to immediately feature statements from Professor Button to suggest that this "*creates potential risks of miscarriages of justice*". In this context, our client's statement that it follows the Code for Crown Prosecutors was entirely relevant and it was only fair that this be accurately reflected in the programme to avoid viewers being misled into believing that our client conducts its prosecutions in a manner contrary to that which is adopted by the Police and the CPS.

Mr Head's letter further states that Mr Roll told the Panorama team that "*he and his colleagues could make changes under the postmaster's log in*" and that "*this process left no record that anybody else had been on the system*". This allegation is likely to have coloured the BBC's decision to run its programme and yet this allegation was not put to our client. Mr Bardo's email of 17 June 2015 at 19:41 stated that "*a former employee at Fujitsu...savs it was possible to remotely access data held on branch terminals and to amend that data*". Post Office provided a response to this allegation. However, this is a fundamentally different allegation to the allegation that changes could be made "*under the postmaster's log in*" and that this "*left no record*". For the record, this allegation is strongly denied. If Post Office had been informed about allegations such as this in advance of the programme being broadcast, then it could have provided a technical response explaining what could, and, more importantly, what could not, be done with the Horizon system remotely.

#### Presentation of facts

#### Key issues

- Leading question asked to Mr Roll
- Misleading viewers into believing that Mr Roll had personal knowledge of the featured cases



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- Failure to include elements of Post Office's statement relating to allegations raised against Ms Vennells

Our letter of 15 September raised concerns that a highly leading question was asked by Mr Sweeney to Mr Roll ("*It is possible that suffering could have been caused because there are problems in the Horizon system?*"). Such question was asked to Mr Roll despite him having no knowledge of the individual cases presented in the programme. Mr Head states that, contrary to our complaint, this does not constitute a breach of paragraph 3.2.3 of the Guidelines which requires the BBC to "*not knowingly and materially mislead its audiences [and to] not distort known facts*" because, according to Mr Head, "*the relevant guideline in this case is 3.4.12*". Paragraph 3.4.12 of the Guidelines state that "*[the BBC] should normally identify on-air and online sources of information and significant contributors, and provide their credentials, so that [its] audiences can judge their status*".

There is no reason why two guidelines cannot apply to the same issue. Mr Head offers no explanation for this argument. Indeed, he himself cites two paragraphs (1.2.4 and 14.1) in respect of a single issue earlier in his letter.

Paragraph 3.2.3 remains relevant to this point. No evidence is presented by Mr Roll or during the programme to suggest that any problem with the Horizon system has resulted in a loss for which any postmaster was prosecuted. However, the manner in which this question is asked is likely to have misled viewers into believing that Mr Roll had this level of knowledge. This is a clear breach of paragraph 3.2.3 of the Guidelines.

The fact that Mr Roll's job title was revealed on-screen does not mean that viewers would be aware of the fact that he lacked any personal knowledge of the featured cases or of the fact that he had not been provided with details of the individual cases to review in advance of his contribution. Indeed, to the contrary, his job title would have suggested that he was directly qualified to comment on the three cases featured in the programme. We fail to see how compliance with paragraph 3.4.12 serves to defend a breach of paragraph 3.2.3 of the Guidelines.

Mr Head's letter includes reference to the statement made by Mr Arbuthnot that "*some people are now calling for Paula Vennells to resign*". While the BBC's response denies that there is any inference that Ms Vennells is personally implicated in any alleged miscarriage of justice, it does not adequately explain why the actions taken by Ms Vennells, such as initiating the independent inquiry, as mentioned in our client's statement, were not reflected in the programme. This information was entirely relevant and its inclusion would have afforded our client some, albeit limited, form of "fair opportunity to respond" to this very serious allegation, as required by paragraph 6.4.25 of the Guidelines.

Under paragraph 5 of the section headed "Presentation of facts in the programme" in Mr Head's letter, he states that what was reported "*was...an accurate account of the facts*". We would repeat that this was only an account of the facts as purportedly held by the BBC. If, as mentioned previously, the BBC had taken up our client's offer to review relevant documents, subject to a duty of confidence, then the BBC would have noted that the internal documents being relied upon by the BBC had been taken out of context so as to present an inaccurate reflection of the facts.

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**How experts were presented in the film***Key issues*

- Misleading viewers into believing that Mr McLachlan was questioning the sufficiency of Post Office's investigations
- Misleading viewers into believing that Second Sight were experts on the sufficiency of Post Office's criminal investigations
- Misleading viewers into believing that Mr Head had personal knowledge of the featured cases
- Misleading viewers by presenting contributions from a narrow subset of relevant parties

Under paragraph 1 of the section headed "How experts were presented in the film", Mr Head states that because the statement made by Mr McLachlan (namely "*Any computer system can go wrong. What's important is the way that you deal with things when they do go wrong*") appears early in the programme it would not be perceived as an allegation that Post Office failed to investigate the Horizon system or to deal with problems as they arose in the system. We disagree with this conclusion. In the context of the programme and where such comments follow allegations that there were "*errors with the system*", viewers will inevitably conclude that Mr McLachlan is opining directly on Post Office's response to complaints about the system and any identified problems.

Our client would acknowledge that in a different context "*Mr McLachlan's view matches Post Office's own view*" but, in that context, we fail to see why Mr McLachlan's comments in this regard were necessary.

Regarding Second Sight, Mr Head's letter states that "*Second Sight were not presented as experts in criminal law*". In the programme, Mr Henderson is presented as having been appointed to "*investigate*" problems with Horizon. Following his remarks, Mr Sweeney then refers to the Post Office having "*its own investigators*" and bringing private prosecutions. It is perfectly possible, and indeed highly likely, that viewers would not appreciate the distinction between an "investigator" of problems with the Horizon system and an "investigator" of the individual cases. We maintain that viewers would therefore have been misled into believing that Mr Henderson was in a position to comment on the adequacy of the investigation and evidence for the prosecutions, and that his reference to "*institutional blindness*" would be taken to refer to the prosecutions themselves. As stated previously, in these circumstances it would have been fair to have provided details in the programme of the Complaint Review and Mediation Scheme, the work of the Scheme's working group more generally and the involvement of the Centre for Effective Dispute Resolution. No explanation for these omissions was provided in Mr Head's letter.

Regarding Professor Button's contribution, Mr Head's letter states that his comments were borne of the fact that "*he believes the way private prosecutions are conducted at Post Office increases the risk of potential miscarriages of justice when compared with prosecution [sic] emanating from the Police*". The suggestion here is that the manner in which Post Office conducts its private prosecutions increases the likelihood of a miscarriage of justice in comparison with private prosecutions brought by other organisations. Please can you explain the basis for this statement. Our client takes its responsibilities as a

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private prosecutor very seriously and, at all times, acts in accordance with the Code for Crown Prosecutors. As stated previously, Professor Button would not have the requisite knowledge of or involvement in the three featured cases to make such a statement. If Mr Head's statement is intended to be a general comment that private prosecutions, regardless of who is bringing them, carry a greater risk of a miscarriage of justice than prosecutions brought by the Police, then our suggestion that Professor Button's statement is "entirely meaningless" is wholly valid. We maintain that the comments made by Professor Button were broadcast in a manner that would mislead viewers into believing that he was speaking specifically about the three cases featured in the programme.

Our letter of 15 September 2015 also made reference to the fact that, in compiling the programme, the BBC appeared to have targeted contributions from a narrow subset of relevant parties. For example, the BBC failed to include any contribution from the National Federation of Subpostmasters which supports and represents some 5,000 postmasters across the UK. This omission was not addressed in Mr Head's letter and Post Office maintains that, by including a contribution from such a neutral body, the programme would have been fairer, more balanced and less likely to mislead viewers.

#### Next Steps

Our client is disappointed in the conclusions reached by the BBC in respect of its complaint. We strongly dispute the suggestion that Post Office does not have grounds to complain about the programme.

Our client has valid concerns that the Guidelines were breached both in the making of the programme and in its broadcast; breaches that the BBC appears to be seeking to justify retrospectively. Furthermore, for the reasons stated above, in many cases, the justifications given by Mr Head are illogical or simply do not marry up with the facts regarding the correspondence between the parties and the manner in which the programme was created.

Our client therefore wishes to escalate its complaint to Stage 1b. If no satisfactory response is received our client reserves its right to further escalate its complaint to the Editorial Complaints Unit and the BBC Trust.

Furthermore, as stated in our letter of 15 September, our client is considering its options in respect of more formal action, including an action against the BBC for defamation. These options remain under review by our client pending the conclusion of the BBC complaints procedure. The manner in which the complaint is handled will have a bearing on our client's decision of what further actions to take against the BBC.

We note that your response to our Stage 1a complaint took significantly longer than the 10 working day target that the BBC aspires towards. We would request that your response to this Stage 1b complaint be provided within the 20 working day estimate or that you promptly provide us with an anticipated date for your response.

Yours faithfully

*CMS Cameron McKenna LLP*

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