

FEDERAL APPEALS PANEL

APPEAL AGAINST A DECISION OF A COMPLAINTS PANEL BETWEEN:

MR DAVID WALSH

Appellant

-and-

MR PAUL YOUNG (on behalf of the Complaints Panel)

First Respondent

-and-

Mr NEIL CHRISTIAN (Lead Adjudicator)

Second Respondent

-and-

MR GEORGE POTTER (complainant)

Third Respondent

FINAL RULING

DAVID GRAHAM

Chair of the Federal Appeals Panel

(Case Manager)

5 March 2021

Ruling

1. The Appellant's appeal is hereby allowed without a hearing pursuant to paragraph 3.6(d) of the FAP's Published Procedures.
2. The decision notice in Case 234 dated 13 and 14 January 2021 is hereby set aside. The case is remitted back with a direction to take no action on the Third Respondent's complaint for lack of jurisdiction and record the case closed.
3. The parties have until 4pm on 12 March 2021 to make any representations about the publication of this ruling and the reasons for it on the Party website.

Reasons

Introduction

1. An appeal will be allowed where there has been a serious failure of process or reasoning that was likely to render the determination of a complaint unsatisfactory or unsafe. I am empowered by paragraph 3.6(d) of the Published Procedures to allow an appeal without a hearing where the result is inevitable, which this one is.
2. This appeal arises as a result of basic failings in the operation of the Party's disciplinary system.
3. Neither the First nor the Second Respondents complied with my Directions dated 10 February 2021 to indicate whether they contested the appeal and if so, on what grounds. No explanation has been given. This is a discourtesy to the Federal Appeals Panel and it prevents us from discharging our functions as swiftly and effectively as Members are entitled to expect. If a Respondent does not oppose an appeal, they must indicate this to the FAP in accordance with the Directions they have been given. If they have difficulties complying with a direction, they must explain why and request an alternative direction on Form 3.

Serious failures of process

4. The Appellant states that he had not been a member of the Party for 2 years – implicitly neither at the time of the social media posts, nor at any subsequent point in the process. Further, he states that he was not at any point notified of the complaint, and that the first he had heard about it was when he received an e-mail with the decision notice. The Standards Office has investigated the Party's membership records which corroborate the Appellant's evidence, and cannot find any record of e-mails to the Appellant prior to the decision under appeal.

5. The appeal has not been opposed by the First and Second Respondents. The Third Respondent accepts that 'if David Walsh was not a party member at the time he made his comments, and is not currently a party member, then there cannot possibly be a valid case to be investigated'. He contends that to the best of his knowledge the Appellant 'was in fact kept informed', but he has provided no evidence of e-mails having been sent to the Appellant, only to himself. For these reasons, on the balance of probabilities I must accept the Appellant's case on that issue.

6. I find the following facts:

- a. The Appellant had cancelled his direct debit to the Party on 19 September 2018. A grace period began at the start of the next quarter following his renewal date which was 1 October 2018. His membership lapsed owing to non-renewal on 31 March 2019. This information was evidenced by inquiries by the Standards Officer with Membership.
- b. A complaint was made by the Third Respondent on 11 February 2020 about certain posts on social media which were made by the Appellant in December 2019, when he was not a member of the Party.
- c. On 1 December 2020, the Second Respondent decided that the complaint should proceed to an online expedited hearing of the Complaints Panel chaired by the First Respondent. At no point did they check the assertion made in the Third respondent's complaint that the Appellant was a member of the Party.
- d. The Standards Office did not at any point notify the Appellant by e-mail about the case against him, send him copies of the Third Respondent's representations or send him notice of the virtual hearing.
- e. A Standards Officer contacted the Appellant for the first time via Facebook Messenger on or about 17 December 2020. On 21 December 2020, the Officer sent stating 'There was a complaint lodged against you in February of this year regarding a social media post. We are trying to get in touch with you about it.' The Appellant responded 'I already [sic] quit anyway...I left the party... Ap[ologies on your time being wasted...Despite this, could I have the full detail

of the complaint...as I'm the content [sic] of the complaint and this is held on me'.

- f. Notwithstanding this exchange, no checks were made about the Appellant's membership, no details or notice of hearing were sent to the Appellant, and the First Respondent was asked to convene a Complaints Panel to consider the case against him.
- g. The hearing, to which the Appellant was never invited, took place by way of a Zoom tele-conference on 10 January 2021. The Appellant had not at any point in the process made representations and did not appear at the hearing, which was held in his absence.
- h. The Complaints Panel had no records before it of any e-mails or other communications with the Appellant, not even the Facebook exchange. Nevertheless, it proceeded in absence.
- i. The Third Respondent appeared at the hearing and was asked to present his case against the Appellant. Only after hearing the Third Respondent, more than half an hour into the hearing, did the question of the non-appearance of the Appellant trouble the panel. At approximately 34:20 in the recording of the hearing, the First Respondent says (after hearing the case against the Appellant), 'he's not provided us with his contact details, so...er...we have to proceed on the basis that he doesn't want to be heard'.
- j. Paragraph 3 of the decision notice states:

'The chair confirmed that (1) he had checked that Notice of the hearing had been provided by the Standards Officer and (2) he had received nothing from the Respondent indicating a wish to attend or otherwise.'

Whilst a copy of the Notice of Hearing had been provided to the Panel, there was no evidence before them that it had been served on the Appellant. In fact it had only been e-mailed to the Third Respondent.
- k. The Complaints Panel made findings against the Appellant.
- l. The Appellant was notified of the decision by e-mail on 15 January 2021 (proving that the Standards Office had in fact been in possession of his e-mail address all along) and appealed on 18 January 2021.

Non-membership

7. Article 23.1 of the Federal Party Constitution begins, 'If a complaint is brought *against a member of the Party...*' (my emphasis). The Adjudicators have no standing to conduct Article 23 Complaints Procedure investigations into a non-member of the Party who was neither a member at the time of the complaint nor at the time of the conduct complained of, and nor does any Complaints Panel have authority to make findings or impose any sanctions in such a case.
8. Accordingly, the disciplinary case was a waste of time for all those involved and the decision must be set aside.

Breach of natural justice

9. Even if the Complaints Panel had jurisdiction to consider this complaint, its decision was vitiated by the complete and abject failure to follow fair process. The Appellant was never informed of the detailed case against him, and was not given an opportunity to defend his reputation at the hearing.
10. The Complaints Panel should not have proceeded in absence without being satisfied on the basis of evidence that the Notice of Hearing had been sent to the Appellant at the correct address. No evidence of postage or electronic transmission of the Notice of Hearing to the Appellant's e-mail address was placed before them.