

FEDERAL APPEALS PANEL

APPEAL AGAINST A DECISION OF AN EXPEDITED COMPLAINTS PANEL

BETWEEN:

MR ADAM PAYNTER

Appellant

-and-

1. DR JANE SHAW (ON BEHALF OF THE EXPEDITED COMPLAINTS PANEL)
2. LEAD ADJUDICATOR
3. MS DULCIE TUDOR (COMPLAINANT)

Respondents

---

**RULING ON PERMISSION TO PROCEED**

---

DAVID GRAHAM

Chair of the Federal Appeals Panel

(Case Manager)

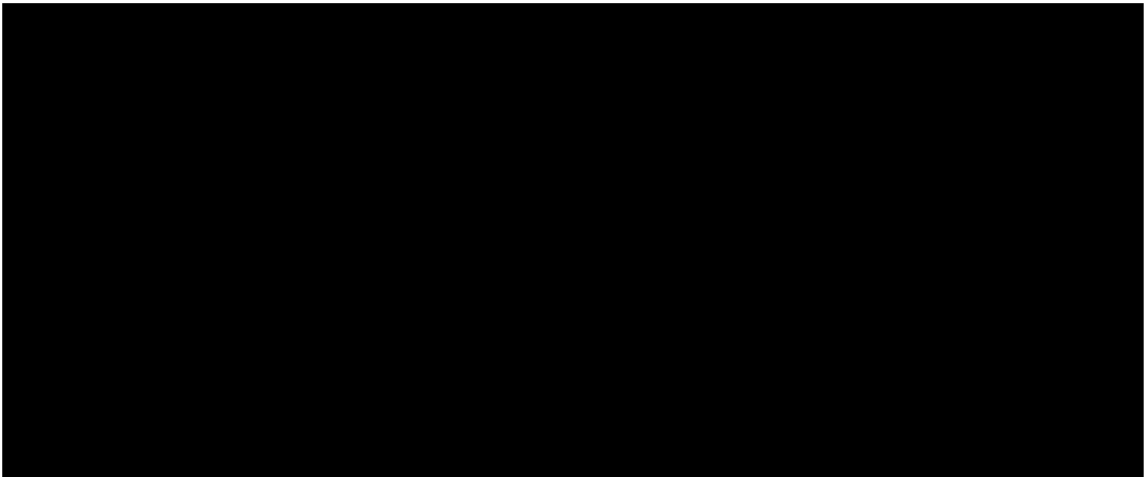
Dated 5 March 2021.

**Ruling**

1.

2.

3.





**Reasons**

4. This appeal arises out of a decision by an Expedited Complaints Panel on a complaint by the Third Respondent against the Appellant that he sent her confidential e-mail dated 9 October 2019 ('the e-mail'), of which he was a co-addressee, on to third parties without her consent. The Third Respondent and Appellant were both Liberal Democrat councillors on Cornwall Council at the time. The Appellant was at the relevant time Deputy Leader of the Council and sat in the Council's Cabinet. It was found that the disclosure had caused distress to the Third Respondent and prejudiced her working relationships at the Council, and had contributed to her resignation from the Party.
  
5. In summary, the appeal form does not disclose an arguable case that the Complaints Panel's factual findings were unsupported by evidence or unsafe as a result of procedural or logical failings, that material new evidence has become available which was not reasonably available to be adduced at the hearing, or that the sanction imposed was outside the reasonable range of options.

6. 

7.



8. The Appellant has stated in his appeal form that he wishes to appeal on all available grounds, and I treat each in turn.

Ground 1: defective process and/or reasoning

9. At this stage I must determine whether it is arguable that there was a serious failure of process or reasoning that was likely to render the determination of the complaint unsafe or unsatisfactory in all the circumstances.

*Criticisms of the Adjudicator*

10. Under this head, the Appellant criticises the reasoning of the initial Adjudicator Mr Paul Young, who first determined on 7 May 2020 that informal resolution should be attempted, and then referred the matter for an expedited hearing on 23 November 2020. The Appellant argues that an investigatory process should have taken place. He says the 'most egregious procedural error is the failure to refer the matter to a Senior Adjudicators team' after determining that no investigation was merited.
11. It appears to me that there were a number of failings in the process prior to the hearing, but the key questions are whether it is properly arguable that those were both serious and were likely to have affected the outcome.

12. The following failings appear to have taken place:

- a. The overall length of time taken to determine the complaint was excessive.
- b. Following a report by the Independent Person that the complaint cannot be resolved by informal resolution, paragraph 5.1.5 of the Complaints Procedure provides that 'the complaints procedure from paragraph 5.2 onwards shall apply'. This means that the 'Standard Formal Process' must apply rather than the expedited procedure, as was adopted here.
- c. Moreover, even in a case where an adjudicator acts to refer a matter to the Expedited Complaints Procedure under paragraph 4.3.4 as Mr Young purported to do, this reference should be to the Senior Adjudicators' Team who collectively make the decision, not the adjudicator himself (see also paragraph 5.3). Paragraph 1.11 of the Complaints Procedure requires that 'Where the Senior Adjudicators' Team is required to make a decision they should aim to do so by majority vote. Where a majority cannot be achieved, the Lead Adjudicator shall have the deciding vote'. Mr Young purported to make the decision himself (paragraphs 11-12 of his addendum decision notice dated 23 November 2020 are headed 'decision' and say, 'I have decided that the Complaint should now be referred to the Expedited Complaints Procedure and I direct that the Standards Officer shall proceed accordingly. The Standards Officer is directed to...inform the respondents and complainant of my decision'.)
- d. Mr Young appears to have taken the view that the test of whether there is a risk that the Party would be brought into disrepute depends on whether the alleged misconduct would be brought into the public domain (e.g. paragraphs 11 and 14 of his decision of May 2020 and paragraph 2 of his Addendum dated 23 November 2020). That is an erroneous approach. As is explained at paragraph 1.3 of the Complaints Procedure glossary, 'any course of conduct, act or omission on the part of a member that would substantially lower the Party's reputation in the mind of a fair, objective and right-thinking observer' brings the party into disrepute regardless of whether the public are or will

become aware of it. The conduct does not become more serious just because there is a public fuss (although an outcry may in some cases be an indication of seriousness), and nor is it less serious just because it is not common knowledge. The decision on the procedure to adopt should not change just because the likelihood of disclosure has increased.

13. On the particular facts here, there is no evidence that the failings are likely to have affected the outcome at least in relation to the eventual upholding of the complaint:
  - a. The fundamental fact that the e-mail was forwarded was not disputed, and the documentary evidence was not affected by passage of time. The parties were still able to make representations about the contents despite the delay.
  - b. Had there been an investigatory phase to the procedure, it is difficult to see what further light that could have shed on the underlying complaint that the e-mail had been forwarded on by the Appellant. This fact was never in dispute.
  - c. Had this been a case where an expedited hearing was allowed for under the Complaints Procedure, the Senior Adjudicators' Team would inevitably have considered that the undisputed facts about the e-mail amounted to sufficient evidence generating a 'case to answer', such that there was no need to gather additional evidence before proceeding.
  
14. As an aside, it appears to me that the current Article 23 procedure is over-prescriptive, excessively complicated and inflexible. The facts that an adjudicator has failed to understand and apply the procedure, and that it requires an investigation in a case that would otherwise be considered not to merit one, are signs that it requires revisiting.
  
15. The Appellant says that it was unfair that he was not specifically notified of his right to appeal Mr Young's procedural decisions, but whilst it would have been better for him to have been specifically informed of this, the relevant procedure was published and available online. He did not raise any of his procedural complaints in his ten-page written response prepared for the Complaints Panel hearing.



### *Criticisms of the Panel*

16. The Appellant asserts that there were 'further procedural errors in the Panel hearing itself' but fails to particularise any. The Appellant did have an opportunity to meet the substance of the case against him at the online hearing of the Complaints Panel, which he was notified about and for which he prepared a lengthy written submission and attended in person (virtually through Zoom). No issue is taken in the Appeal Form with the overall fairness of the hearing itself.
  
17. The Appellant alleges that the Complaints Panel was misdirected that their 'only task was to decide the level of sanction...because Paul Young had decided that the only matter for them was the sanction and they followed his advice' (Grounds at para 46). If the Complaints Panel had misunderstood their role and failed to consider and find the facts for themselves, that would be an error requiring the matter to be sent back for redetermination. The Appellant also complains that 'they accepted that there was no dispute on facts and also that the email was confidential without proper analysis'. The Appellant even goes so far as to submit that the e-mail was 'not capable of being confidential' inter alia because it related to some matters that were in the public domain, and was sent to multiple people whom it asked to discuss the matters raised, and he asserts that 'there existed a situation of duty for the appellant to give, and a duty for the receivers of the forwarded email to receive, such information' namely the defamatory comments (Grounds at paras 15-18, 23, 47).
  
18. The complaints I have referred to in the paragraph above are totally without merit.
  - a. Mr Young stated:

*'My recommendation* is that the Complaint should be upheld. My reason for this is that the Respondent has admitted the breach of confidentiality and is simply of the view that the remedy sought by the Complainant, suspension, is too harsh in view of his expressed intentions. The task of the Complaints Panel will simply be to determine the appropriate level of sanction.'  
[emphasis added]

It was quite clear that he was making a recommendation and not purporting to usurp or cut down the fact-finding function of the Complaints Panel.

- b. I have listened carefully to the recording of the Zoom hearing. The Appellant himself told the Panel that he had received an apology about delays in transmitting the decision to him from 'central office' stating that Mr Young's decision 'was provisional and nothing had been decided yet' (approximately 58:30 on the recording). He said he had told other Cornwall Councillors that the proceedings were 'not concluded, going on to a panel, and nothing had been concluded' (approx.. 1hr:10-1hr:11). He was well aware at the time that nothing at been decided.
- c. The Panel found the facts for itself including finding that the e-mail was 'clearly confidential' (paragraphs 11 and 12 of their Decision Notice).
- d. The Appellant never disputed, either in writing or in oral submissions before the Panel, that the e-mail was confidential. To the contrary, he told the Panel repeatedly that he had apologised and stated in particular (approx.. 45 mins-46:40):

'...was something I shouldn't have done, that's something I apologised for, for forwarding it on...I should have, obviously, contacted Dulcie at the time and said, look, can I share it or at least share excerpts of it or speak about it....not a great thing to do, something I have apologised for and I acknowledged that when I had the first conversation about this complaint with the adjudicator'.
- e. It was entirely reasonable, indeed inevitable, for the Panel to treat the Appellant's remarks as an admission that the message was confidential.
- f. An appeal to the FAP is not an opportunity to re-argue the merits of an appeal after having already had a fair opportunity to argue a case to the fact-finding panel.
- g. In any event, the message was private correspondence on a sensitive subject and was unarguably confidential in the circumstances.   




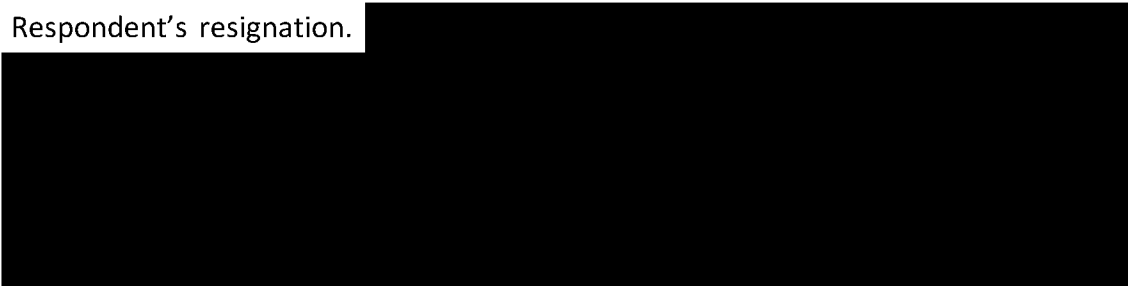
*Was the ruling manifestly against the weight of evidence?*

19. This is not a separate ground of appeal. The available grounds of appeal are set out in the FAP's Published Procedures at paragraph 3.6(a). Insofar as provisions of the Article 23 Complaints Procedure purports to dictate the procedures operated by the FAP, they are contrary to article 22.6 of the Federal Constitution.

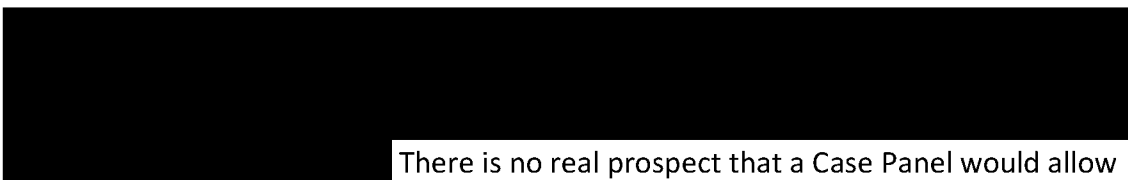
20. The FAP will not interfere with the weight given by a Complaints Panel to particular pieces of evidence so long as they act reasonably; it will however interfere with a Complaints Panel decision that no reasonable Complaints Panel would have made on that evidence.

21. The Appellant says that the Panel unfairly characterised him as a bully 'without evidence'. This is not properly arguable. There is no finding in the decision that he engaged in bullying.

22. The Appellant also says the Panel concluded 'against the weight of what they heard, and evidence presented by the Respondent that the email contributed to the Complainant leaving the Party'. The Panel had before it evidence capable of supporting a finding that the incident contributed, at least to some extent, to the Third Respondent's resignation.







There is no real prospect that a Case Panel would allow an appeal on this basis.

23. No other criticisms are made of the Panel's factual findings.

Has any new evidence come to light that was not previously available?

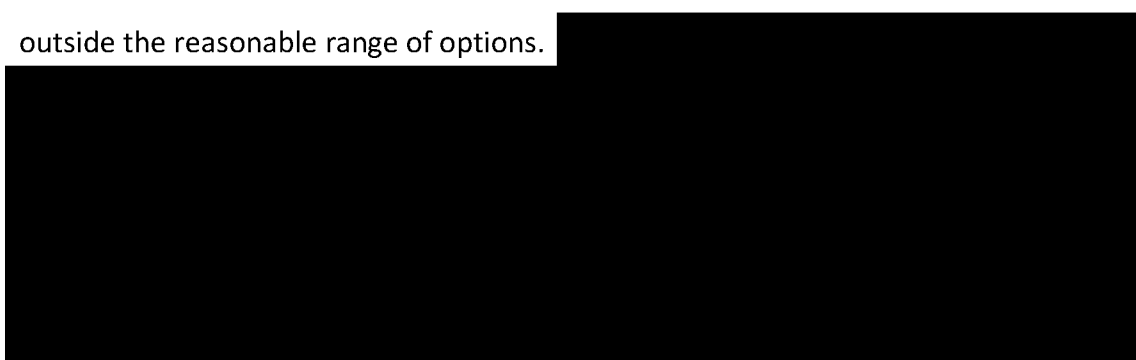
24. No new evidence appears to have been presented with the Appeal Form which could not have been adduced at the hearing; nor do the Grounds in Section 7 of the Form specifically refer to any particular evidence. Accordingly no basis of support for the appeal on this ground is disclosed.

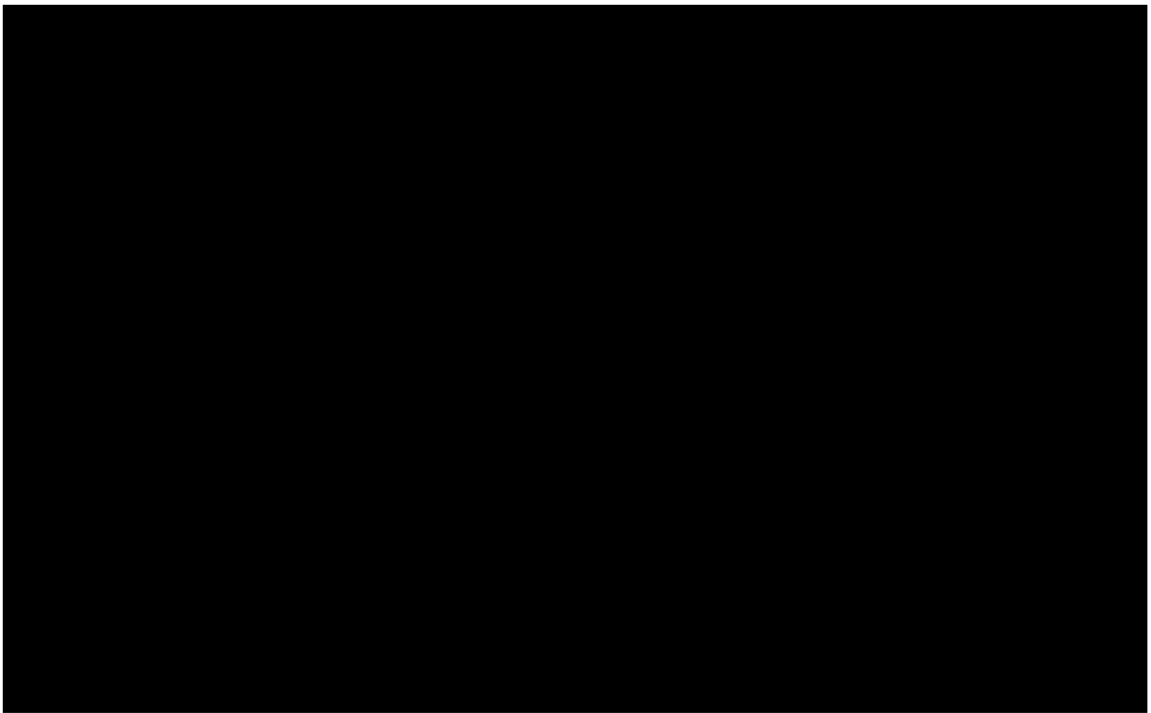
Was the sanction manifestly excessive?

25. The Appellant makes a bare assertion in his appeal form that the sanction was manifestly excessive, presenting no arguments in support of this assertion.

26. For a sanction to be manifestly excessive, it must be outside the range that a reasonable panel would have imposed. The FAP will not set aside a sanction just because they disagree with it.

27. The factual findings of the Complaints Panel cited at paragraphs 22 to 23 of the decision notice were supported by evidence. There is nothing in the Grounds that discloses any arguable case that the reasoning was irrational or the sanction was outside the reasonable range of options.





Conclusion

28. There is nothing in the Appeal Form disclosing an arguable case that might realistically persuade a FAP Case Panel to interfere with the Complaints Panel's ruling.