

FEDERAL APPEALS PANEL

IN THE MATTER OF AN APPEAL BETWEEN:

MR JON SHELLER

Appellant

-and-

COMPLAINTS PANEL

Respondent

RULING OF THE FEDERAL APPEALS PANEL

David Graham and Jennie Rigg

Date: 29 June 2021

Introduction

1. This is the ruling of the Federal Appeals Panel, comprising David Graham (Chair) and Jennie Rigg.
2. The hearing was held by videoconferencing software over the course of approximately 5 hours on Saturday 19 June 2021. The hearing was attended by the Appellant, the Chair of the Complaints Panel, and the Lead Adjudicator.
3. Our colleague Ms Anood Al-Samerai informed us that morning that she was unable to attend, and we explained at the start of the hearing that pursuant to article 22.4B of the Federal Party Constitution, the Appellant was entitled to object to the hearing proceeding unless 3 members were present, and to request that the hearing be rescheduled. The Appellant indicated that he would prefer the hearing to go ahead.
4. We have determined to allow the appeal, direct that the decision of the Complaints Panel be set aside, and to remit the matter back to the Senior Adjudicators' Team with directions to consider whether to reopen disciplinary proceedings and if so, to follow the Standard Formal Process pursuant to paragraph 5.2 of the Complaints Procedure.

Facts and findings of the Complaints Panel

5. The background to this matter is that in August 2020, the Appellant participated in a Zoom video-call with a number of Liberal Democrat activists, and on that call made certain statements which were interpreted by the complainant as having brought the Party into disrepute.
6. The call took place in the aftermath of an alleged course of behaviour by a third party ('X') which was the subject of a complaint to the police, and which allegedly harmed victims who were members of the Party. We are told that X has subsequently been charged and criminal proceedings are underway in respect of their alleged behaviour. Other relevant background is that the call took place during the Party's leadership election, in which the 2 candidates were Sir Ed Davey MP and Layla Moran MP.
7. The initial complaint was lodged on or about 26 August 2020. It called for the Appellant's suspension and -subject to any representations – expulsion from the Party. It was accompanied by an e-mailed statement dated 25 August said to have been agreed by 5 participants but the complainant was not on the call. The complainant stated: 'when I was first told of the call, I asked them to provide the statement that is included'. The concerns initially raised by the complainant on the basis of this hearsay account of what had been said were (summarising):
 - that the Appellant had falsely claimed to work 'on behalf of the Party's leadership candidates';
 - that the Appellant had falsely represented that he, an unqualified, untrained and unsupervised layperson, had been appointed by Liberal Democrat Headquarters to 'work with victims of bullying and harassment' and 'on pastoral care matters', which would reflect badly on the Party;
 - that the Appellant had represented he had a status and authority within the Party that he did not have, which might mislead victims of alleged criminal wrongdoing into contacting him rather than the responsible officers of the Party or the police in connection with the alleged wrongdoing by X or others.
8. The complaint that had been made would require factual investigation into exactly what had been said, by whom and in what context. At that point, it was not clear

whether the Appellant disputed the factual claims made. The Party's Complaints Procedure provides at paragraphs 4.3.4 and 5.3 that the expedited complaints procedure is for cases 'submitted with sufficient evidence to make a determination without a separate investigation'. In other cases, where formal disciplinary investigation is considered to be warranted, the Standard Formal Process applies which requires referral to an Investigator (paragraphs 4.3.3 and 5.2).

9. The initial complaint was considered by an Adjudicator who issued a decision notice on 9 September 2020 referring the matter to the Expedited Complaints Procedure. He considered (para 9) that 2 alleged representations sufficiently serious to warrant this were 'falsely claimed to be working with LDHQ on pastoral matters' and 'falsely claimed that he has been asked by LDHQ to work with victims of harassment and or [sic] bullying'. There is no record of the Appellant having been notified of the complaint against him or being asked to comment on the evidence against him prior to this decision. The Adjudicator's decision stated (paragraph 12):

'I have decided that a separate investigation is not required, and I have reached this decision because there is sufficient evidence and witness account of the behaviour which is the subject of the complaint and notwithstanding there having been no response from the Respondent'.

Incongruously, the Adjudicator stated (paragraph 15): 'My recommendation is that the matter of upholding the complaint can only be determined through the hearing of live evidence and the questioning of witnesses.'

10. It was not appropriate in those circumstances to proceed by way of the Expedited Complaints Procedure because this did not provide for further investigation, the gathering of live evidence or an adversarial process with sufficient safeguards to ensure a fair hearing in a case involving a substantial dispute of fact.
11. It appears that the initial adjudicator's decision was notified to the Appellant by e-mail on or about 10 September 2020. On 6 November, a further e-mail stated that the Lead Adjudicator had reviewed the decision and determined that the case should proceed to a panel under the Standard Formal Process because 'based on the knowledge that

the accounts given are not accepted by the respondent it is determined that there is a need for oral evidence at a Panel hearing in this complaint’.

12. The case was sent to a volunteer Complaints Panel, which was chaired by Mr David Brynmor Thomas QC, who kindly agreed to appear before us from Australia, to explain the decision-making. We are grateful to him for his time and candour with us.
13. The Complaints Panel properly recognised that the factual allegations required to be proved by evidence. It issued a ‘procedure notice’ dated 16 November 2020. This stated, inter alia:

[6] As the Original Adjudicator recommended that the Complaint should follow the Expedited Complaints Procedure, no Investigator was appointed pursuant to Paragraph 4.3.3 of the Procedure. The Panel will therefore proceed to a Hearing but will use the Original Adjudicator’s Decision dated 9 September 2020 instead of an Investigator’s Report. References in the Procedure to “Investigator” and/or “Investigator’s report” shall therefore be read instead to be to the “Original Adjudicator” and/or the “Original Adjudicator’s Report” as the context requires.

[7] Should any Party object to such approach they should do so, with reasons and submissions as to how the Complaint should be addressed and explanation why they have not raised any concern since 6 November 2020, by email to the Convenor by 16.00 on Friday 20 November 2020.

[...]

[14] The Panel hearing (“Hearing”) will take place at:

14.1. 10.00 am on Saturday 12 December 2020

14.2. By Zoom call, of which the Convenor shall be ‘host’.

[...]

[16] The Hearing shall only be postponed if the Panel considers there are exceptional circumstances.

[17] Any request to postpone the Hearing shall be sent to the Convenor before the time fixed for the start of the Hearing.

[19] The Complainant and the Respondent have until 16.00 on Friday 27 November 2020 to supply any further material that they consider necessary to address the Complaint.

[20] The Panel will consider who it may wish to hear oral evidence from. Should a Party wish to suggest to the Panel that oral evidence should be heard from a particular person, that Party should give notice to the Panel, sent to the Convenor, by 16.00 on Friday 27 November 2020.

[...]

[22] It will then be for the Panel to decide, in its absolute discretion, whether to hear evidence from the person or people suggested.

[23] The Convenor will arrange for any material to be considered at the Hearing to be made available to other Parties and witnesses at least one week before the hearing.

[24] No further evidence may then be presented to the Panel or at the Hearing, except at the discretion of the Panel.'

14. The Appellant said that the Procedure Notice was not sent to the Appellant by the Standards Office until after the 20 November 2020 deadline in paragraph 7 of the Panel's directions had already lapsed¹. However, we found that he must have received it before 27 November and at no point prior to the hearing did he object to the procedure or provide notice of an intention to call live witnesses.
15. There had been an exchange of correspondence about whether the Appellant would provide a recording of the Zoom call which he claimed to possess, but had refused to hand over to the Party because he did not trust the Standards Office to keep the recording confidential, and because he asserted that the release of the recording could prejudice ongoing police inquiries or criminal proceedings.
16. At the Complaints Panel's hearing, the first part of the Zoom teleconference was not recorded. There is some dispute between the Appellant and Mr Brynmor Thomas about what the Appellant said at the start of the hearing. It is common ground that he objected to the procedure adopted, said that the hearing should not go ahead, and requested that the matter be referred to an Investigator in accordance with the published procedure. It is disputed whether he requested to be permitted to call live witnesses on his own behalf, although he had not brought such witnesses along nor given written notice that he wished to do so. He refused to supply his recording of the Zoom call through the Standards Office to all parties, although he said he would provide it privately to an independent Investigator.

¹ We have since been told that Standards Office have a record of its having been sent on 17 November. As we found in the Appellant's favour on other grounds, we have not re-opened our hearing for him to comment and have not made any finding on this point.

17. The Complaints Panel hearing lasted many hours. Following the hearing, a decision notice ('the Decision') was drawn up, dated 12 March 2021 and running to some 38 pages.
18. The main findings of the Decision are set out at paragraphs 93 to 107 of the Decision, and are summarised at paragraph 111.
19. Importantly, the Decision repeatedly states that the Panel do not consider it necessary to investigate certain matters, assume that the Appellant's evidence to them was true and do not make any adverse findings about his motives or honesty. For instance, at paragraph 95 they state:

'The Panel... sets out its analysis of the Respondent's conduct on the basis that the evidence that he gave or accepted and the positions that he adopted are true or correct'.

At paragraph 117 they state:

'... the Panel's view is that Respondent's motives in making the statements he made on the Zoom Call are irrelevant to his conduct being likely to bring the Party into disrepute. No finding of improper or sinister motive on the part of the Respondent is necessary for the Panel to reach its decision in relation to the Complaint and none is made.'

20. Paragraphs 110 to 115 contain the key reasoning of the Complaints Panel and are set out below:

'[110] The findings set out at paragraphs 93 to 107 above are based on the Panel's acceptance of the Respondent's case and evidence as to:

- a. the police investigation into [X];
- b. the Respondent's role in that investigation and in any future prosecution;
- c. the Respondent's contact with the leadership campaigns, the Respondent's contact with Party HQ (in particular [name redacted]);
- d. the Respondent's contact with a Guido Fawkes journalist.

111. Taking those findings in turn, a fair-minded and informed observer who heard the Respondent's statements during the Zoom Call would conclude, if the Respondent's statements on the Zoom Call were true:

- a. Although the Party has an individual at HQ responsible for matters of pastoral care and although the Respondent has no training or qualification in the support or counselling of victims of crime, nonetheless the Respondent was associated in some capacity with a shadow or parallel victim support group at the Party's request and with the Party's knowledge and acquiescence [...] the Party "cooperating" with the Respondent in an activity for which he was unqualified.
- b. Although the Respondent was a witness or other key figure in the investigation and prosecution of serious criminal activity the Party nonetheless sought to have him involved in dealing with the issues arising from the [X] matter.
- c. Although the Respondent was a witness or other key figure in the investigation and prosecution of serious criminal activity both of the leadership campaigns in 2020 nonetheless sought to have him involved in dealing with the issues arising from the [X] matter.
- d. Although the Respondent was a witness or other key figure in the investigation and prosecution of serious criminal activity the Party nonetheless involved him in dealing with a journalist from the [News Organisation] website in relation to the X matter and keeping the story out of, at least, the [News Organisation] website.
- e. Although the Respondent was a witness or other key figure in the investigation and prosecution of serious criminal activity, the Party nonetheless permitted him to disseminate sensitive information in relation to the X matter, which could prejudice the investigation or prosecution of serious criminal offences, to individuals who he did not know, over a video conferencing platform (Zoom) whose security has been questioned for matters of significant sensitivity.

112. In the Panel's view, a fair-minded and informed observer hearing those matters would conclude that the Party's conduct was disreputable, were the statements true. As the various statements made by the Respondent on the Zoom Call were inaccurate or untrue, even if only because he was trying to inflate his importance or to suggest that he had an importance that he did not in fact have, they therefore constitute conduct likely to bring the Party into disrepute.

113. If the Respondent's statements were deliberate lies on his part that would in the Panel's view immediately constitute conduct likely to bring the Party into disrepute.

114. In the light of the findings set out above and specifically finding that the Respondent's conduct on the Zoom Call on 23 [sic] August 2020 was likely to bring the Party into disrepute, the Panel is required to decide what Sanction should apply to the Respondent. The Standards Officer provided the Panel with a list of possible sanctions. The Panel has decided to impose the sanction of expulsion from the Party.

115. The Panel has chosen to impose this sanction because, taking the Respondent's evidence and submissions at face value, the conduct complained of constitutes actions by the Respondent that could prejudice a serious criminal investigation and/or prejudice the welfare and wellbeing of victims of allegedly serious criminal offences. Alternatively, if the Respondent's evidence was in fact deliberately untrue that would constitute a breach of the obligation Party members owe to treat others with respect, which would constitute a breach of Article 3.1(b) of the Federal Constitution and engage Article 3.8(e) of the Federal Constitution. In the Panel's view the appropriate sanction for such a breach would also be expulsion.'

Test to be applied by the Federal Appeals Panel

21. The test applied by us is set out at paragraph 3.6 of our Published Procedures, namely to determine whether:
- 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;
 - relevant evidence not available at the time of the determination...has since come to light which is likely to render the determination of the complaint unsafe or unsatisfactory in all the circumstances; or
 - the sanction determined was manifestly excessive or lenient in all the circumstances.

In this case, it is the first limb of the test which is of relevance.

Failure to appoint an investigator

22. It is admitted that the published complaints procedure was not followed.
23. In our judgment, the original decision to follow the Expedited Procedure was clearly seriously wrong. It was inappropriate, having recognised this mistake, for the Lead Adjudicator and Complaints Panel to fail to follow the published Complaints Procedure and skip the investigation stage altogether. As a matter of good governance, Party officers and bodies must follow rules that have been duly adopted by the relevant Party bodies and, in this case, confirmed by Federal Conference. No good reason has been put forward for failing to refer the matter to an Investigator.

24. The question arises whether the outcome would have been likely to be different had the correct process been followed. At the hearing before us, the Appellant states that he would have wished an investigator or the Panel to hear from a number of witnesses on his behalf. He said he did not have enough time before the hearing to gather together statements from witnesses. We do have doubts whether the investigatory stage of the procedure would have altered the outcome. The Appellant notably repeatedly refused to hand over the Zoom recording that he said exonerated him to the Standards Office, and despite being offered the opportunity to call live witnesses he had not given notice of an intention to do so at any point prior to the hearing. Ultimately, we do not need to decide whether the outcome would have been different, although it might have been, since we conclude that in any event, the reasoning of the Decision is so defective that the decision to expel the Appellant was unreasonable.

Failures of reasoning

25. We have carefully considered whether it was reasonable on the factual findings actually made by the Complaints Panel (recited at paragraph 111 of the Decision) to conclude that the Appellant had brought the Party into disrepute and to expel him. We conclude that their factual findings were too vague to support their conclusions.

Prejudice to criminal investigations

26. Mr Brynmor Thomas acknowledged before us that the Complaints Panel did not attempt to go behind the Appellant's claims to make any findings as to the nature and extent of his role in any particular investigation or criminal case (such as what testimony he would give), nor did they make any factual findings about the details of the X matter, nor as to any sensitive details disclosed on the call. In the Decision, it is repeatedly stated that the Panel did not consider this to have been necessary (paras 44, 50 and 96). They also made no finding that he had either expressly or impliedly stated in the Zoom call that the Party was at that point corporately aware of the nature or extent of his role. They implicitly found (paragraphs 84–5) only that he had said on

the Zoom call that he had given evidence to a senior member of the judiciary and the police, as an expert witness, regarding the ongoing investigation. In the light of this, it was not reasonable for them to jump to the conclusion (paras 111(c), (d) and (e)) that ‘the Respondent was a witness or other *key figure* [emphasis added] in the investigation and prosecution of *serious criminal activity*’, nor that both of the leadership ‘nonetheless’ [i.e. knowingly] sought to have him involved in dealing with the issues arising from that matter and permitted him to disseminate sensitive information.

27. The extent of any prejudice to criminal proceedings, or impropriety by the Party, would depend critically on what his role in the proceedings was, and what links he had with any relevant persons involved, as well as what precisely he said on the Zoom call.² The context would be critically important. The notional fair-minded and informed bystander hearing a general statement by the Appellant would be slow to rush to judgment and jump to conclusions.

28. Another troubling point is that the Complaints Panel’s unsupported conclusions about supposed prejudice to the investigation arising from the Appellant’s activities in speaking to the media had not formed part of the original complaint against the Appellant. It seems to have been a point taken against him for the first time by the Complaints Panel itself. Complaints Panels are supposed to be independent adjudicative bodies, rather than investigatory organs preferring charges – it is for that reason that there is an investigatory stage to the procedure. It will rarely be appropriate for an adjudicatory body to add disciplinary charges of its own motion, although that will not necessarily be unfair if a party has adequate opportunity to meet the new case against them. In the circumstances, insufficient factual findings were in

² Before us, the Appellant stated that he was not a witness of fact nor of expert opinion in the X criminal proceedings. He told us that his expertise related to how one could detect (through observation of patterns) whether a social media account was one of a number of ‘bot’ accounts run by a single person. The Panel, however, found that he represented on the Zoom call that he was ‘an expert witness’.

any event made to support a conclusion that the Appellant was a 'key figure' in an investigation or brought the party into disrepute with his statements on the Zoom call.

Involvement with pastoral care or anti-bullying and anti-harassment arrangements

29. The next set of conclusions was that the Appellant had brought the Party into disrepute by representing the following (para 111(b)):

'although the Respondent has no training or qualification in the support or counselling of victims of crime, nonetheless the Respondent was associated in some capacity with a shadow or parallel victim support group at the Party's request and with the Party's knowledge and acquiescence ... "cooperating" with the Respondent in an activity for which he was unqualified.'

It was this allegation that formed the basis of the original complaint.

30. As to this, the Panel found that he represented on the Zoom call that he had a 'support role' in working with victims (paragraph 56). It recorded (paras 87 to 89) that the Appellant had told them he was 'working with' the person responsible for pastoral care matters but had taken issue with the suggestion that he had said on the Zoom call that he was working in pastoral care himself. The Panel had before it an e-mail from the responsible person dated 2 November 2020 wherein they had stated that 'Jon and others set up a whatsapp [sic] group and victims were corresponding with him through that', and another e-mail dated 10 September which stated, 'Jon Sheller never had any direct contact with any victim. Jon was there to help give advice and be a link through [the relevant Police Force] and [the person responsible for pastoral care]'. At paragraph 97, they record the Appellant's own evidence as being that 'he supported the WhatsApp group but was not a member of it. *The Panel has no reason to doubt that evidence on his part*'. The Complaints Panel had made no finding that the Appellant represented he had improperly engaged in activities that required training, such as counselling sessions. The Panel considered that since [the responsible person's] role at HQ was 'in relation to pastoral care matters', 'in the Panel's view any reference to "working" with [them] would be understood to be as to pastoral matters, even if not put in express terms' (para 92).

31. It does not follow from the Panel's finding that the Appellant represented he worked with the person responsible for pastoral care 'in some capacity' that his statements on the Zoom call brought the Party into disrepute. If his only involvement was in assisting others to set up and run a WhatsApp support group, of which he was not a member, then it is very hard to see why he would need to hold any particular qualifications or have completed any particular training. Once again, the details and context were critically important, and a fair-minded impartial person, who was not unduly suspicious, would not jump to the conclusion that the Party had been at fault in co-operating with his efforts to assist victims. The reasoning of the Complaints Panel was accordingly defective.

Reasoning on sanction

32. The only reasoning justifying why the sanction of expulsion was selected is found at paragraph 115 of the Decision. For the reasons we have stated, insufficiently clear, precise and detailed factual findings were made to support the conclusion that the Appellant's statements on the Zoom call 'could prejudice a serious criminal investigation and/or prejudice the welfare and wellbeing of victims'. This statement is nothing more than speculation or conjecture in the absence of such factual findings.

Non sequitur and the approach to truth or falsehood and motives

33. Paragraph 112 of the Decision unfortunately also contains a *non sequitur*. The second sentence therein does not follow from the first.
34. For the reasons given above, we do not accept the premise of the first sentence that were the misstatements true, an informed and fair-minded observer would conclude that the Party's conduct was disreputable. We consider that a fair-minded observer would not have jumped to such a conclusion based on the vague representations found to have been made.

35. The second sentence in paragraph 112 suggests that the statements brought the Party into disrepute *because* they were untrue. Mr Brynmor Thomas at the hearing said it would *make no difference* whether the representations were false because they were found to have taken place and were defamatory of the Party (we disagree that they were defamatory - see previous paragraph). Mr Brynmor Thomas also said that with hindsight he should have deleted the first sentence in paragraph 112. These positions are irreconcilable.
36. The notional fair-minded, impartial and informed observer personifies the tribunal after it has heard all the relevant evidence. They are 'informed' precisely because they are aware of the relevant context. A complaints panel must make reasonable inquiries and make factual findings sufficient to found its conclusions.
37. The truth or falsity of any statements -even if defamatory to the Party - must be a highly relevant contextual factor informing any decision whether the Party has been brought into disrepute, as must the motives of the accused member, the audience of the statements, and the other surrounding context. These matters may also be highly relevant to the choice of sanction. It will rarely if ever be appropriate for a complaints panel to sit on the fence and fail to make any factual findings about such matters.
38. Falsehood may not always point in the same direction of the accused's guilt or innocence of the charge of bringing the Party into disrepute. A member may make an apparently defamatory statement about the Party, but that may not bring the Party into disrepute if it is clearly untrue, or not intended to be taken seriously. True or untrue, the allegation may not reflect any discredit on the Party or the individual if made reasonably, in a particular context, or with good and constructive aims (e.g. in whistleblowing about wrongdoing, or advocating reform). However, if a member knowingly or recklessly makes untrue and defamatory representations with the aim of damaging the Party's standing, or repeats true defamatory statements in a manner that amounts to harassment of an individual or deliberate undermining of the Party's work, that conduct may bring the Party into disrepute (by reason of its motives and/or context) and may justify expulsion, irrespective of whether as a matter of fact the statement itself has brought or was likely to bring the Party into disrepute.

39. In this case, the representations were found to be untrue and arguably made for the purposes of self-aggrandisement, although no explicit finding to this effect was made (para 112). It was wrong to treat the untruth of the statements as irrelevant, although whether this made the conduct more or less likely to bring the Party into disrepute in the particular circumstances would have been a matter for the informed judgment of the Complaints Panel had they been properly found to be defamatory in isolation.
40. The Complaints Panel repeatedly referred to what would have been the case if the Appellant were deliberately lying (e.g. at their paragraphs 113 and 115) but made no findings of dishonesty. At best, on their own findings these points were irrelevant hypotheticals, and at worst their inclusion suggests the Panel's approach may have been coloured by irrelevant considerations.

Conclusions and directions

41. In the light of the above, the Decision was unfortunately vitiated by serious errors of reasoning, cannot stand and must be set aside. We accordingly allow the appeal. The matter is remitted back to the Lead Adjudicator who shall determine, in accordance with this ruling, whether any further disciplinary action is merited, and if so he shall appoint an Investigator in accordance with the published Complaints Procedure.