FEDERAL APPEALS PANEL

APPEAL BY
MS PRUE BRAY
AGAINST
A DECISION OF A FEDERAL PARTY COMPLAINTS PANEL

RULING

12 November 2021

David Graham (FAP Chair)

Case Manager

Ruling

1. The appeal is allowed and the matter remitted for reconsideration by the adjudicators.
2. The parties shall have until 4pm on Tuesday 23 November 2021 to make any representations about publication of this ruling, failing which it may be published on the Party website.

Reasons

1. This appeal is brought against a Decision Notice dated 7 May 2021 by an Expedited Complaints Panel dismissing a complaint by the Appellant about an individual whom I shall call X. X apparently stated in an e-mail that they had been 'communicating online' with someone 'pretending' to be under 16, and having sent 'inappropriate sexual comments', and 'sexual images'. In an e-mail to the Standards Office dated 16 March 2021, X states 'the case against me is slander'. No action was taken against X by the police. A decision was made by an Adjudicator that the matters should be sent to an Expedited Complaints Panel without further investigation, on the basis of the e-mail trail.

2. The Expedited Complaints Panel in its Decision Notice found (para 8) that 'Applying the appropriate standard of proof…the evidence…was insufficient to make any finding against the respondent'. It stated that there was no evidence as to precisely what X was alleged to have communicated to the purported young person (para 7),

that X might reasonably have expected that the e-mail would be treated in confidence (para 6) and X was a vulnerable adult who did not appear to understand the seriousness of the allegations (para 10). The Panel determined to dismiss the Complaint without holding a formal hearing on the basis that 'insufficient evidence had been provided to support the allegation' (para 10) and 'it would be procedurally unfair to hold a hearing in circumstances where it could only rely upon statements made by the respondent in order to reach a finding to uphold'.

3. The Appellant's grounds are that the Expedited Complaints Panel wrongly appeared to have considered that they were conducting a quasi-criminal process, applying an unduly high standard of proof and a privilege against self-incrimination, and expecting that admissions not made under caution should not be admissible. She argues that they should have taken steps to acquire additional evidence, 'have held the hearing and then made a decision based on what did or did not arise out of it, rather than prejudge it in this way'.

4. I consider that this is an appeal which does not require an oral hearing. It is not contested by the panel, and is supported by the Lead Adjudicator.

5. The 2019 Complaints Procedure does not allow for the matter to be prejudged in the absence of a hearing, in advance of the disciplinary case having been argued there. Paragraph 5.3 provides:

> 'a Complaints Panel hearing **shall** be convened as soon as practicable'. [emphasis added].

There was a serious error of procedure, because the holding of a hearing was mandatory.

6. The Appellant as complainant ought as a matter of fairness to have been given an opportunity to address the Complaints Panel to persuade it that the evidence was sufficient, or indeed to submit additional evidence. This is not provided for expressly in the Expedited Complaints Procedure (Complaints Procedure para 5.3). However, in principle a party contending that there was wrongdoing ought to have had the opportunity to be heard and make its case before a ruling of 'no case to answer' was made.

7. The Complaints Panel should have been considering on the balance of probabilities whether conduct had taken place which was likely to bring the Party into disrepute. It is unclear from the reasoning on the face of the decision notice what standard was being applied, although in their response the panel state that they were applying a civil standard.

8. There are no strict rules of evidence in domestic disciplinary proceedings. The e-mail was relevant evidence and, subject to any argument about its degree of particularity, did constitute a voluntary admission of self-described 'inappropriate' language, and

sexual imagery, having been sent to someone pretending to be under 16. The extent

to which the Expedited Complaints Panel could infer misconduct from all the circumstances was a matter for its reasonable judgment. However, the evidence was reasonably capable of supporting an adverse finding on the balance of probabilities. The outcome may have been different had a hearing been held. Even if the conduct purportedly described in the e-mail had not taken place, the sending of such an e mail itself was potentially capable of bringing the Party into disrepute.

9. The question whether there is any privilege against self-incrimination in a purely 'domestic' private context, rather than in court proceedings, was considered in *R v Institute of Chartered Accountants of England and Wales ex parte Nawaz* [1997] PNLR 433, where Mr Justice Sedley as he then was ruled that privilege does apply to professional disciplinary proceedings, but that it may be waived – for instance by members of an association signing up to disciplinary rules compelling them to answer questions or provide information. This judgment was upheld by the Court of Appeal. This means the Expedited Complaints Panel could not have compelled X to answer any questions or co-operate with any investigation against their will if that would tend to expose them to a real risk of prosecution, as there was no rule compelling this in the Complaints Procedure. However, there was already pre-existing inculpatory evidence, and they could have asked questions and asked X to co operate voluntarily.