

**FEDERAL APPEALS PANEL**

**APPEAL BY**

**MR LEMBIT ÖPIK**

**Appellant**

**-AND-**

**(1) COMPLAINTS PANEL  
(2) LEAD ADJUDICATOR  
(3) Mr SIMON MCGRATH**

**Respondents**

**FINAL RULING**

David Graham  
Chair of the Federal Appeals Panel  
12 November 2021

**Directions**

1. The Decision of the Expedited Complaints Panel shall be set aside and the matter remitted for any investigation considered to be warranted, as well as a fresh hearing before a different Complaints Panel at which both parties may be permitted to resent evidence.
2. Any objections to the publication of this ruling should be made by 4pm on Friday 26 November 2021. In the absence of objections within that timeframe, this ruling may be published on the Party website.

**Reasons**

3. I consider that no hearing is required here as a matter of fairness, as the e-mail correspondence and the extent of evidence submitted with the original complaint are not in dispute (although the facts of the alleged misconduct very much are). The

original complainant has indicated that he is content for the matter to proceed by way of written representations.

#### Decision under appeal

4. This appeal was brought by Mr Öpik against a decision ('the Decision') to expel him from the Liberal Democrats by an Expedited Complaints Panel dated 21 May 2021 in case no.862 following a complaint by a Mr McGrath. The Appellant did not attend the online panel hearing held on 18 May 2021.
5. The Complaints Panel found as facts that the Appellant was 'the headlining guest speaker at a ticketed Conservative Party online event on 19 March 2021, billed as "How to Stop the Lib Dems: An insider's guide on how Lib Dems plan their campaigns'. They found that 'The blurb for the event contained several quotes from [the Appellant] which criticized [sic] and ridiculed the party.' They found that the Appellant must have chosen to speak at an event intended to damage the Liberal Democrats, been aware of the damage this would cause and intended to cause such damage (paras 12-13). This conduct was found to be incompatible with continued membership of the Party (para 14).
6. The evidence relied upon was (i) 'pre-publicity' and (ii) a report the next day in Nation.Cymru that the event had taken place (para 12). The Panel stated that the Appellant had 'not engaged in any meaningful way at any stage of the complaints process'. They considered that the public attack on the Party they had found to have taken place required their decision to be publicised.

#### Grounds of appeal

7. In his appeal form, the Appellant states that he had not been 'continuously scanning [his] emails' and was unaware that 'there was a trial where I could put my case'. He states

that 'to this day I have not been aware of' the time and date of 'my trial' (para

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9). He states that he has been dealing with a recent death of a close friend, near-death of a family member and his own hospitalisation with Covid-19.

8. The Appellant has not denied and implicitly appears to accept that he attended an event 'predominantly attended by Conservative Party Members' (grounds para 4). However, he states that 'the event was not designed to damage the Liberal Democrat Party – or if it was I was unaware of this'. He states that he was not aware that the event had been called 'How to stop the Liberal Democrats' by third parties (grounds para 5). He says he did not ridicule the Party in his 'commentary', which I take to mean remarks made at the event (para 6). He says:

'Ironically, I actually made the case for what the Lib Dems need to do to recover their position when I was talking to the conservatives, and this led to an interesting and enlightening debate. If that is considered unacceptable, then the party no longer believes in freedom of speech or the right to exchange views with others.' (grounds para 8).

9. The Appellant says, 'it is obviously incongruous to believe I would seek to wreck what I have helped to build across over half of my life', and he considers the findings of the Complaints Panel to be libellous. He requests an oral hearing to dispute the case made against him.

#### Test for the FAP

10. The question for the FAP is whether the decision of the Complaints Panel was vitiated by a serious failure of process or reasoning that was likely to render the determination of the complaint unsafe or unsatisfactory, relevant evidence not available at the time of the determination has since come to light which is likely to render the determination unsafe or unsatisfactory, or the sanction was manifestly excessive.

## Failure of process

### *Investigation*

11. There was a factual claim made that required investigation by an Investigator under the Standard Formal Process unless there was already sufficient evidence to make a determination in the reasonable judgment of the adjudicator (paragraph 4.3.4 of the Complaints Procedures).
12. On 12 April 2021, the initial Adjudicator determined that no factual investigation was required on the basis that the Eventbrite advertisement for the event and the Nation.Cymru screenshot 'support the contention...' of the Complainant, and on the basis that this material had not been responded to by the Appellant. He therefore allocated the complaint to the Expedited Hearing process.
13. I have seen the Nation.Cymru piece and it refers to a 'promo piece for the event', such that it is unclear whether the piece was based on anything other than the publicity material. There was a *prima facie* case to answer given the materials seen on the internet, but given that the factual accusations were not necessarily proved by the material (this not being a case where there was any direct video or witness testimony documenting the Appellant's involvement at the event, nor a case founded on communication from his own social media account which 'proved itself'), the matter plainly called for investigation and it would not have been fair to proceed to a determination without any opportunity for the Appellant to submit evidence.
14. Relying on the absence of a response from the Appellant at this stage as proof that he was not contesting the charge was unreasonable and failed to reflect the published

procedure. By paragraph 4.3, the Adjudicator must be appointed 'within 3 working days of receipt of the Complaint' to determine which of the 4 complaints paths to allocate the matter to. There is no step in the published Complaints Procedure

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providing for the accused member to even be notified or provided with the evidence before the initial adjudicator's decision, let alone to respond at that stage. Three days would rarely be a reasonable period of time in which to do so. There is no evidence in the case folder provided to me that the Appellant had been notified by 12 April.

15. I can see that following the initial Adjudicator's decision, there was correspondence in April 2021 between Ms Amy Westcott and the Appellant, such that it was clear that the Appellant was subsequently made aware of the accusation against him.

16. I have not been provided with any record of the review by the Senior Adjudicators' Team which was supposed to take place pursuant to paragraph 5.3 of the Complaints Procedures. An e-mail from the Appellant dated 16 April 2021 failed to explicitly deny the accusation but stated that he was 'appalled' by the 'extraordinary claims' made and demanded to see the evidence for them. It was in my view implicit from the e-mail that the Appellant contested the allegation, and moreover his correspondence expressing outrage at his treatment was inconsistent with the allegation that he had wilfully sought to damage the Party, for had he intended to publicly damage the Party as alleged, he would surely have expected expulsion. Following receipt of this e-mail, the Senior Adjudicators' Team should, when reviewing the case, have referred the matter down the Standard Formal Process track. On 19 April 2021, Standards asked, 'If you deny the allegation, please do so explicitly', but in the absence of an admission it should not have been assumed that the allegations were admitted.

17. Had there been an investigation, Mr Öpik and organisers and attendees at the event would have been contacted, and it would have been determined what he was likely to have known about the Eventbrite pre-publicity for the event, and what he had said

at the event.

18. The Lead Adjudicator resists this appeal on the basis that no Investigation was required.

They say:

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‘It is farcical to suggest that an event organised by an opposing political party where you are asked to share inside information about their campaign tactics is not designed to damage the Party... I find the idea that the appellant was not aware of the topic or title of the event to be so unlikely that it is unbelievable ...[the Appellant was] making publicly critical remarks to publicise an event aimed at your opposition...I think the argument raised here to be so unlikely that an investigation is unnecessary’.

This prejudices the very facts that required investigation and determination by a Panel: was he asked to share insider information, did he do so, what did he know about the publicity, did he make the alleged remarks, and did he do so in order to publicise the event?

19. The Complaints Procedure changed on 20 September 2021, so that investigations are no longer a mandatory part of the standard process, which may be more adversarial and rely more on complainants to substantiate their complaints. The new procedures do not change the standard of conduct expected, and do not contain any provision for the old procedures to continue to apply to pending complaints. It is arguable that once the previous decision is set aside, the new procedures would apply so that prior investigation by the Party is not required. The absence of an investigation also would not have prejudiced the Appellant if he had been able to present his own evidence at the hearing. It is for this reason that the new evidence about the Appellant’s awareness of the hearing is important.

*Ignorance of hearing date*

20. The complainant has provided the FAP with proof that notice of the hearing was sent to the Appellant at the correct e-mail address, from which he had been corresponding with Standards. Any panel was therefore entitled to assume that Mr Öpik was aware of the hearing, and to proceed in absence, because he had a fair opportunity to

defend himself.

21. The Appellant has now in his appeal form stated that he had not seen the notice of hearing even if it was sent. His conduct in launching the appeal and the contents of

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the appeal form are inconsistent with the allegation that he wished to damage the Party, and also tend to suggest that he would have attended or asked for an alternative hearing date if he had seen the e-mail notifying him of the hearing date. He denies that he knew how the online event was promoted, and denies ridiculing the Party at the event. All of this constitutes fresh evidence indicating that the original determination of the complaint was unsatisfactory.

22. If a judgment in a quasi-judicial disciplinary process is made in absence, and the party concerned was genuinely unaware of the date and time appointed for the hearing, or had some other exceptional good reason for not attending, it will generally be appropriate to set aside the decision and re-open the matter.

23. The complainant argues on the basis of his online research that the misfortunes referred to by the Appellant to justify not checking his e-mails had taken place many months earlier in 2020, and that the Appellant was engaging in other activities on the internet, so cannot have been too incapacitated by these. However, it is only too easy to overlook e-mails, especially if one has many activities and commitments. The complainant is not in a position to gainsay whether the Appellant subjectively was aware of the e-mail.

### *Summary*

24. The Standard Formal Process should have been followed when there was a case involving alleged facts that required investigation, although I would not have allowed the appeal on this ground alone if the Appellant had received a fair hearing on the merits. The Appellant has, however, also submitted fresh evidence that he was unaware of the date and time of the hearing, and has an arguable case on the merits. For these reasons, the matter should be remitted back for redetermination.

