

FEDERAL APPEALS PANEL

IN THE MATTER OF AN APPEAL BETWEEN:

SENIOR ADJUDICATORS' TEAM

Appellants

-AND

**(1) COMPLAINTS PANEL
(2) ORIGINAL COMPLAINANT
(3) ORIGINAL RESPONDENT**

Respondents

PRELIMINARY RULING

David Graham
Chair of the Federal Appeals Panel
28 July 2021

Ruling

1. The Decision of the Complaints Panel is set aside.
2. The matter shall be remitted to a fresh Complaints Panel, who are directed to dismiss the complaint without a further hearing.

Reasons

Background facts

1. This appeal was brought by the Senior Adjudicators' Team against a decision of the Complaints Panel dated 24 June 2021 in Case 64 ('the Decision').
2. The original complaint related to comments made on Facebook by the Third Respondent which were said to be transphobic.
3. A dispute had arisen in response to the complainant having published on Facebook a manifesto for election to a committee. They had stated that they would push for 'pronouns on conference passes', guidance for speakers to 'stop using gendered language' and 'gender neutral bathrooms at the venues'. The Third Respondent had commented to the effect that the complainant was unduly sensitive and 'out of touch with reality' in their choice of manifesto priorities, that everyone had to put up with

things that they found 'very unpleasant', and that in the scheme of things pronouns on badges seemed a 'trivial, first world concern of an indulgent minority' which was not a big issue in the world outside student politics. Later on in the thread, the Third Respondent said, 'I am not demanding that you speak a whole new version of...english [sic]...Your wish to help people is admirable. I am not convinced that changing pronouns will have the dramatic impact you suggest...'

4. The complainant told the Investigator who reported on the affair in January 2021 that they were offended but did not wish to see the Third Respondent dismissed or suspended from the Party; they hoped for some positive outcome in terms of awareness. The Investigator and reviewing Adjudicator had recommended an informal resolution. The Third Respondent failed to engage with the mediation process arguing that the whole approach was illiberal and vexatious, and the Second Respondent thereafter represented that he should be expelled from the Party

Decision under appeal

5. The Decision was that the Third Respondent had brought the Party into disrepute by these comments made on Facebook (DN paras 12 and 15), and the Panel imposed a sanction as follows:
 'permanently banning the Respondent from being considered as a candidate for election or to be an official or leader of any nature within the Party'.
6. The Panel said (DN para 23):
 'The underlying view of the [Third] Respondent was found to be denying of the existence of gender and specifically of the existence of any gender beyond male and female as determined by biological sex. Although the specific proposal made by the Complainant could be discussed and disagreed with, the panel were of the view that the way in which this was done by the Respondent was dismissive, patronising and insulting to the Complainant. ...The approach of the Respondent's Representative during the hearing appeared to be to disagree completely with the concept of non-binary identities in terms and to an extent which made the panel uncomfortable and may have been extremely insulting, upsetting and undermining to the Complainant who had to listen to them. The Panel considered that the comments complained of did represent transphobia by any definition. The panel also considered that it was inappropriate for the Respondent to have been dismissive of the Complainant's proposal on the basis of their age and position in life.'
7. At DN paragraph 25, the Panel justified its choice of sanction as follows:
 'The Panel decided to impose a sanction of recommending that the Respondent should be permanently banned from being considered as a candidate for election or as an official or leader of any nature within the Party. The sanction was agreed to be permanent due to what the Panel perceived to be the lack of understanding on the part of the Respondent as to the reason why his behaviour was inappropriate and his complete non-acceptance of the issue of trans rights. The Panel did not consider that there was a reasonable

likelihood that the Respondent would be changed in his behaviour within any timescale....’

Grounds of appeal

8. The SAT consider that the Complaints Panel decision requires review on the basis that the sanction was excessive and the reasoning was flawed for these reasons (regrouped from their Grounds):
- (a) Any complaint of bullying by transphobia was unfounded. This was an isolated exchange on Facebook and there was no evidence that the Third Respondent otherwise knew or had exhibited any personal animus against the complainant. This was not a case where the Third Respondent had sought out a complainant in order to continually disagree with them.
 - (b) The views expressed about gender expressed by the Third Respondent or his representative at the hearing were elicited by the Panel rather than having been expressed previously, and should not be used against him.
 - (c) Gender-critical beliefs are protected pursuant to the Equality Act 2010 and should not in themselves form the basis of a disciplinary charge or sanction.
 - (d) The complaints process does not exist to police the thoughts of members.

Test to be applied

9. The FAP may interfere with a decision where:
- 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; or,
 - Relevant evidence which was not available at the time of the determination of the complaint, 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 manifestly lenient in all the circumstances.’

(paragraph 3.6(a) of our Published Procedures)

At this stage, I have a discretion whether to permit an appeal to go to a FAP hearing, or to determine it without one. The remedy on a successful appeal is to set aside the Decision and remit the matter for reconsideration by a fresh panel, in accordance with such directions as we consider appropriate.

General principles

10. A Liberal party cannot be in the business of policing the thoughts or beliefs of its members.

11. The Preamble to the Federal Party Constitution states that the Liberal Democrats believe in a 'free, fair and open society',
 'in which no-one shall be enslaved by...conformity. We champion the freedom, dignity and well-being of individuals, [and] their right to freedom of conscience....We will at all times defend the right to...write...freely'.
 No person has a right never to be offended by other people's speech, or to have others agree with their point of view.
12. Compelled speech is an affront to freedom of conscience and expression, and contrary to the European Convention on Human Rights (see *Lee v Asher's Bakery* [2018] UKSC 49 at [49]-[52] per Lady Hale). The Party may not compel its members to express beliefs (including about gender) that they do not hold, nor to use language or grammar that they do not wish to use (including newly-coined third-party pronouns such as 'zer')
13. A belief in the (im)mutability or (non-)binary nature of biological sex, and/or (lack of) belief in multiple genders or sexual categories, is a philosophical belief (or lack of belief) entitled to respect in a democratic society and protected by articles 9 and 10 of the European Convention on Human Rights, as well as by the Equality Act 2010. See *Forstater v CGD Europe* (EAT, 10 June 2021) per Choudhury J at [45]-[119].¹
14. The Liberal Democrats' formal disciplinary process is not set up to punish people for being unsympathetic or unkind characters. Nor is it designed to deal with 'political' policy disagreements, personality clashes, inadequate job performance or skills, or minor slights or discourtesies.
15. What the Party can do is police behaviour (including the use of language) which constitutes unlawful discrimination; is intimidatory, demeaning, degrading, bullying or seriously insulting; otherwise brings the Party into disrepute; supports rival political parties; or which is inconsistent with fundamental liberal values and objectives.

Alleged excessiveness of sanction

16. The Guidance to the Complaints Procedure purports at paragraph 11 to allow as a sanction a permanent ban from standing for or holding internal or external office. By its nature a permanent and un-reviewable penalty does not admit of any future change of attitudes, repentance and reform. It is questionable whether such sanctions are truly compatible with fundamental Liberal values and authorised pursuant to the Federal Constitution. We have long been the party of penal reform, for instance campaigning to make prisons places of rehabilitation in the 2019 manifesto, and previously campaigning for prisoners to be able to vote and against mandatory life sentences. In the appeal of Mr Lock (FAP decision, 14 June 2021), the FAP 'read down'

¹ Whether a human being is to be treated as having a 'gender', and how such a category is to be defined, is a metaphysical question. Some may define gender by privileging one or more aspects of biological physiology (e.g. natal genotype; self-identification in the operation of the brain; or some aspect of physical appearance) as determinative of the 'gender' of a person.

a ban on readmission to membership that had been imposed by a Complaints Panel to be reviewable after 18 months.

17. In what follows, I nevertheless assume in the Complaints Panel's favour that the sanction was one that could in a commensurately grave case be validly imposed.
18. On any view, the sanction imposed was one of the most draconian sanctions available, short of expulsion from the Party. In my view, the sanction of a permanent ban on standing for or holding leadership positions within the Party or as a Lib Dem candidate for external office for the Facebook comments was clearly well outside the range of reasonably proportionate penalties for slightly rude comments.
19. In the Facebook posts, the Third Respondent did not express any dislike, hostility or hatred towards transgender or non-gender-conforming individuals. He did not express any view about gender at all. The comments did not purport to advocate, justify or excuse misgendering.
20. The most objectionable aspect of the comments is that they came across as dismissive of the offence felt at 'misgendering', and appeared to expect those affected to have to put up with such experiences within the Party at least until the other more extreme unpleasanties referred to, such as wars and starvation, were dealt with. In other words, it treated tackling misgendering as a low-order priority.
21. Liberal Democrats are, of course, entitled to be treated with courtesy and regard for their feelings at Party conferences irrespective of the existence of wars or famines.
22. Insensitivity in the abstract about offence caused by misgendering, or mental tolerance of this by treating its elimination as a low priority, may be worthy of moral censure, but is not in itself misconduct.²
23. The Third Respondent belittled the importance of putting pronouns on name badges, but disagreement on the importance of a matter such as conference name badges and of the impact that changing name badges would have cannot reasonably be characterised as a disciplinary matter.
24. The Third Respondent's comments were arguably discourteous and personally directed at the complainant, insofar as it characterised them as delicate / unduly sensitive and 'out of touch with reality'.
25. Persons with protected characteristics may suffer a large number of individually small or even trivial slights or disbelief about their sensitivities that cumulatively have a significant detrimental impact on their wellbeing and self-esteem.

² If a member in position of power and responsibility within the party (e.g. a chair of a meeting) were to knowingly comport themselves so as to tolerate specific discrimination against transgender or gender-non-conforming individuals by third parties that they had power to stop, that would amount to misconduct. That is not this case.

26. In the context of an internal election campaign though, some degree of personal criticism about the judgment and character of the candidates is to be expected. Accusing a political candidate of being over-sensitive or out of touch is not in itself grounds for a disciplinary complaint.
27. The mild rudeness in tone here is worthy of censure, but I would not normally expect an isolated, slightly rude or patronising comment on social media to justify any formal disciplinary process. These occupy many hours of volunteer and staff time. It could be – and apparently was – dealt with by statements on the same forum explaining why the language used was inappropriate and the sentiments uncompassionate and illogical (given the minimal effort required to change the format of name badges within the Party which would be produced in any event, in comparison to ending hunger and achieving world peace).
28. We are not dealing with alleged discrimination in terms of action or inaction in the performance of functions within the Party that treats analogous grievances of persons with one protected characteristic less favourably than those without that characteristic.
29. There will be cases where the belittling of experiences of transphobia may form part of an alleged pattern of discriminatory behaviour, perhaps amounting to bullying, harassment, or victimisation. The isolated comments here complained of were not alleged to form part of such behaviour.
30. At most, I would expect this sort of minor incident, not forming part of an alleged pattern of discriminatory behaviour, to result in a reprimand. It follows that the appeal must be allowed on this ground.

Was it permissible or appropriate to increase the sanction based on comments made during the proceedings?

31. It is important for Complaints Panels to appreciate that they are adjudicating on a particular disciplinary charge, not standing in moral judgment on the respondent's wider overall behaviour or attitudes. The penalty imposed must be reasonably commensurate to the misconduct forming the subject of the complaint.
32. A 'lack of acceptance of the Complainant's point of view' or disagreement 'with the concept of non-binary identities' (DN para 23) cannot convert the wording of the Facebook comments which were the subject of the disciplinary complaint (construed objectively) into transphobia. They cannot reasonably be construed in that way.
33. Where, as in this case, a respondent to a disciplinary case has deeply-held sincere philosophical or religious beliefs that are protected by law, it will be unlawful to impose or increase a penalty because they hold those beliefs. It will also be unlawful to prevent or deter them from expressing those beliefs in a civil, non-disruptive manner which does not have the intention or objective effect of harassing, trolling or bullying others. Repression of such self-expression would be inconsistent with our

commitment to resist the imposition of conformity as set out in the preamble to the Federal Party constitution.

34. It will be permissible to impose a sanction imposed for misconduct harming others (e.g. threatening or demeaning behaviour, or behaviour inconsistent with the Party's objects) that was subjectively motivated by such beliefs, and to treat a clearly evidenced lack of contrition or propensity to continue with such behaviour as a factor relevant to sanction. It is therefore legitimate in the abstract to have regard to submissions made during the course of proceedings when setting the penalty for proved misconduct.
35. If comments evincing a lack of repentance are made by a representative of a respondent who is not present, the Complaints Panel must be sure that they were authorised by the respondent themselves before treating them as an aggravating factor.
36. In this case, the Complaints Panel mentioned 'lack of understanding on the part of the Respondent as to the reason why his behaviour was inappropriate **and his complete non-acceptance of the issue of trans rights.**' They then stated, 'The Panel did not consider that there was a reasonable likelihood that the Respondent would be changed in his behaviour within any timescale.' It is not clear from the decision exactly what 'complete non-acceptance of the issue of trans rights' was supposed to mean. The failure to recognise wrongdoing, and the likelihood of change in behaviour, were relevant factors in relation to sanction. A set of 'gender-critical' beliefs was not itself a relevant factor.
37. In this case, the relatively minor misconduct – essentially, an isolated slightly rude and patronising comment – could never be commensurate with such a hefty sanction as was imposed regardless of the lack of contrition.

Disposal of the appeal

38. The question arises whether this case should be re-heard or simply dismissed. We should all deplore a lack of sympathy or rudeness by Party members, but this is not a matter that should have met the threshold for a formal disciplinary process and occupied substantial resources over a 2 year period. It would be disproportionate to further engage the time of another panel of volunteers determining whether or not to reprimand the Third Respondent. The matter should be remitted with a direction to dismiss the complaint.