

## **FEDERAL APPEALS PANEL**

### **IN THE MATTER OF AN APPLICATION BETWEEN:**

**JOSEPHINE HAYES**

**Applicant**

**-AND**

**FEDERAL BOARD**

**Respondents**

### **RULING OF THE FEDERAL APPEALS PANEL**

#### **INTRODUCTION**

1. This is the ruling of the Federal Appeals Panel's case panel comprising Carole Ford, David Graham and Jennie Rigg, following a remote hearing on 24 August 2022 which occupied approximately 2 hours. The Party President Dr Pack appeared on behalf of the Federal Board along with Mr Neil Fawcett. The Applicant appeared in person. We gave an outline of our decision following brief deliberations at the end of the hearing and this written ruling comprises our full reasons.
2. The Applicant is a member of the Federal Board. In this application, she challenges the decision of the Federal Board to exclude her from most of its Zoom meeting on 4 September 2021 ('the Meeting'), following comments that she had made during the course of the meeting. The relevant item of business under discussion was an update by a member of staff ('Z') as to the status of a complaint against the Party to the Information Commissioner's Office ('ICO') by a third party ('Y') alleging mishandling of their personal data. Dr Pack had chaired the Meeting.
3. Dr Pack also raised the question whether the application should be dismissed on the procedural ground that the Applicant had failed to sign the box on her application form undertaking to maintain the confidentiality of information received for purpose of the FAP's proceedings.

#### **EVIDENCE IN THE CASE**

##### **Documents**

4. We had before us the following written material:
  - (a) application forms, the Respondent's response, procedural applications, previous procedural rulings and correspondence about the application to Standards Office;
  - (b) Statement from Dr Pack with appendices including:

- (i) E-mail from the ICO dated 1 September 2021 ('the Email')
- (ii) Minutes of the Meeting;
- (iii) Standing Orders of the Federal Board adopted February 2020;
- (iv) Extracts from *Robert's Rules of Order Newly Revised* (12<sup>th</sup> Edition); (v) Extracts from a WhatsApp Chat group for Federal Board members; (vi) A log of a Zoom chat conducted during the Meeting;
- (c) Statement from the member of staff Z and appendices including e-mails of support from the Party's Chief Operating Officer (15/11/21), All-Staff Rep (15/11/21) and from another member of the Federal Board Caron Lindsay dated 6 September 2021;
- (d) Statements from the Applicant and Lord Strasburger submitted late in August 2022, which we admitted into evidence (this having been resisted by the Respondents).

We also heard from Dr Pack and Mr Fawcett for the Federal Board, and Ms Hayes, and questioned them on points of fact as well as receiving submissions from them.

### Main dispute

5. There was a good deal of common ground in this case. The Applicant accepted that *Robert's Rules* applied in this case, as they were incorporated into the Standing Orders by article 4(v) thereof. The relevant extracts of Robert's Rules included the following:

[61:10] **Breaches of Order by Members in a Meeting.** If a Member commits only a slight breach of order – such as addressing another member instead of the chair in debate...the chair simply raps lightly, points out the fault, and advises the member to avoid it... More formal procedures can be used in the case of serious offenses [sic] as follows:

[61:11] If the offense [sic] is more serious than in the case above – as when a member repeatedly questions the motives of other members whom he mentions by name...the chair should normally first warn the member; but with or without such a warning, the chair or any other member can "call the member to order" ....

[61:12] ...In the case of obstinate or grave breach of order by a member, the chair can, after repeated warnings, "name" the offender, which amounts to preferring charges and should be resorted to only in extreme circumstances. Before taking such action, when it begins to appear that it may become necessary, the chair directs the secretary to take down objectionable or disorderly words used by the member...

[61:13] Although the chair has no authority to impose a penalty or to order the offending member removed from the hall, the assembly has that power. It should be noted in this connection that in any case of an offense [sic] against the assembly occurring in a meeting, there is no need for a formal trial provided that any penalty is imposed promptly after the breach, since all witnesses are present and make up the body that is to determine the penalty.

[61:14] The declaration made by the chair in naming a member is addressed to the offender by name...

[61:15] If the member obeys at this point, the matter can be dropped or not, as the assembly chooses. The case may be resolved by an apology or

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withdrawal of objectionable statements or remarks by the offender; but, if not, any member can move to a penalty... A motion offered in a case of this kind can propose, for example, that the offender be required to make an apology, that he be censured, that he be required to leave the hall during the remainder of the meeting...

[61:16] The offender...must be allowed to present his defence briefly first...

[61:17] If the member denies having said anything improper, the words recorded by the secretary can be read to him and, if necessary, the assembly can decide by vote whether he was heard to say them. On the demand of a single member...the vote on imposing a penalty must be taken by ballot, unless the penalty proposed is only that the offender be required to leave the hall for all or part of the remainder of the meeting.'

6. The accuracy of the WhatsApp chat transcript was not disputed. This showed that the Applicant had on 24 August 2021 stated in the group as follows: 'I am reliably informed that unless the party resolves [Y's] complaint of a Data Protection breach to his satisfaction (presumably including a public apology) by 5pm today the ICO will fine the Party at least £10k. I gather that the ruling will be published on their website in a day or two.' On the same date, the transcript indicates that Dr Pack stated that he had checked and the ICO had not set any deadline.
7. At the hearing, the Applicant stated that in her recollection she had not said that the Party *would* be fined *at least* £10,000 but that it '*could* be fined *up to* £10,000' [emphasis added].
8. The following background was not disputed:
  - (a) At the time of the Meeting, no ICO decision had been published on their website, and the Party had not been fined at all in connection with the Y case. (b) The executive had concerns about sharing e-mail correspondence relating to the ICO case with the Applicant because there was believed to be a risk that this might leak or be passed to the complainant Y, who was also litigating against the Party.
  - (c) On 1 September 2021, the ICO case officer had sent the Email to another member of Party staff, which stated:

'...it appears the Liberal Democrats are complying with their data protection obligations...Thanks for your co-operation in his matter and I am now happy to close the case.'
  - (d) Z had shown the Email to Dr Pack.
  - (e) At the Meeting, Z indicated that they had been informed by e-mail that the case would be closed and had shown the e-mail to Dr Pack, but had received advice that it should not be shared with the Board to preserve confidentiality.
9. It was common ground that the Applicant indicated, both orally during spoken proceedings at the Meeting and in the Zoom chat, that she disbelieved what the Meeting had been told by Z that the ICO had informed the Party it was satisfied and it

would close the data protection case. The Minutes record that she 'said that the information provided by staff and the President was inaccurate and requested access

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to the Party's correspondence with the ICO'. The Applicant had insisted that she knew better, and that in fact the complaint was still open. The Applicant accepted that she had not formally proposed a motion that all relevant correspondence be shown to the Board, but had informally requested this. It was common ground that other members of the Federal Board had questioned whether the Applicant was implying that Z was lying to them, and criticised this as being unacceptable. It was common ground that Dr Pack had referred to, and read extracts from, the relevant *Robert's Rules*. It was common ground that Dr Pack as chair put the substance of the allegation to the Appellant that she was accusing Z of dishonesty, and that she then had an opportunity to apologise, retract, correct, clarify or defend her remarks as she chose. He then put a motion proposed by another member that the Applicant be removed from the Meeting to a vote, which was carried.

10. The supporting statements appended to Z's statement included the following:

- (a) [on 6 September] 'horrified and ashamed...you should never have had to go through that in the workplace'
- (b) [from the staff rep] 'I have worked for the Liberal Democrats...for over 14 years...This incident is by far the worst behaviour from a member of our party, directed at a member of staff, that I have witnessed...Having been given the opportunity to clarify her comments and apologise the chair was left with no other alternative';
- (c) [from the COO] 'inappropriate behaviour...Even when others on the zoom call were encouraging the Applicant to do the right thing by apologising to[Z] for her behaviour she stubbornly kept to her belief that until she saw evidence to the contrary she would not accept what had been presented to the Board'.

11. There were some discrepancies between the evidence of Dr Pack and of the Applicant. The Applicant stated before us that she had 'denied' that she was accusing Z of lying. She told us that she thought she had made clear that 'I was saying I hadn't accused her of lying'. Through a process of repetition, she said that the other members of the Board had acquired a false 'received wisdom' that she had accused Z of lying. Dr Pack on the other hand said that he raised the question whether she was accusing Z of lying or gross incompetence but that the Applicant "dodged" that question and refused to apologise for anything.

12. The Applicant stated at the hearing that the source of her information about the ICO case both in her comments in August and at the Meeting was Y themselves, that she thought she had told the Meeting this; and she had 'no reason to doubt' what she was told by Y. Dr Pack's evidence (his statement at para 15 and oral statements) was that the Applicant had not formally declared an interest in relation to the agenda item and had not made clear that she was being fed information by Y (which he had presumed or suspected to be the case).

13. The Minutes record that 28 members including the Applicant were present at the Meeting, but that the motion passed with 20 votes in favour, nil votes against and 2

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abstentions. The Applicant's recollection at the hearing was that about 30 people had attended the Meeting and that the motion was passed by 18 votes. Nineteen people typed "for" in the Zoom chat and no-one typed 'against'. At 11:14 in the Zoom chat, the secretary stated, 'I do, so you know, already have an accurate vote count minuted'.

14. The Zoom chat log recorded the Applicant as stating *inter alia* the following:

[10:41] I do not accept that [Z]'s statements are accurate. We must see the ICO correspondence.

[...]

[10:43] I will not be lectured. We cannot verify what was said without seeing the correspondence.

[...]

[10:58] Remember I am directly elected.

[...]

[11:00] I have a mandate to see good governance.'

It was not contested that this was a true and accurate verbatim record of what the Applicant typed.

15. The chat log also records that 13 members of Federal Board expressed contemporaneous written views (between 10:30 and 11:14am) to the effect that the Applicant's behaviour was unacceptable and/or that she should apologise. Words used included "appalled"/"appalling"; "unsubstantiated"; "horrified"; "attack [on] staff"; and "deeply inappropriate".
16. The Applicant's statement is dated 3<sup>rd</sup> July 2022 but was not submitted to the FAP until last week. She says in this, 'I was falsely accused of using words I did not use'. She says there were 'hostile verbal attacks' on her amounting to 'bullying'.
17. Lord Strasburger's statement was undated but was submitted to us in August 2022. He attended the Zoom call. He states that the Applicant 'politely challenged the accuracy of what the Board was erroneously being told and repeatedly asked for the Party's correspondence with the ICO to be disclosed in order to settle the matter...there was a sudden attack on Jo Hayes by several Board members including the President on the basis that she had called the member of staff a liar, which she definitely did not'. He said his impression was that the 'apparently spontaneous reaction to her challenging the facts...was organised in advance'. He says that she was 'bravely challenging authority'. He says that she generally has a 'direct and slightly abrasive style', and 'speaks out boldly whenever she observes misbehaviour'.
18. The uncontested evidence of the Applicant and of Lord Strasburger is that the Y matter

was subsequently reviewed by another officer at the ICO and revisited, and that a decision was published in February 2022 in favour of Y.

### Confidentiality

19. On the issue of not ticking the box on the application form as to confidentiality, Dr Pack submitted that this was a reason to dismiss the application. The Applicant initially represented to us that this was an oversight given the short timeframe for completing the form. She suggested this had been rectified in a revised version of the form that she had lodged. When we took her to that form, in fact she wrote 'NOT POSSIBLE ON THIS MATTER OF GOVERNANCE'. The Applicant then insisted that members had a right to know what was happening in terms of governance, and then said she meant that FAP decisions should be published. However, the rubric that the Applicant had been asked to acknowledge did not concern publication of the ruling but rather her own obligations. It read: 'I agree to keep the information of other parties confidential and not to use it for purposes other than FAP proceedings'. Only after some back-and-forth and an intervention from Ms Ford was the Applicant prepared to give an un-caveated undertaking to abide by this confidentiality requirement.

### SUBMISSIONS

20. At the hearing before us, the Applicant described the behaviour of the other Board members as 'mobbing' her, and as an 'attack'. The Applicant accepted before us that had she accused Z of lying to colleagues, that would have been grounds to remove her from the Meeting, had due process been followed. She said that she was not accusing Z of lying, and that this could only have been done by express language. She says that she merely meant that Z was mistaken and had been fed the wrong information by the Party's data protection officer, who had been the staff member dealing with the matter rather than Z. She drew a distinction between disputing what Z had been told (which she said she did not do) and disputing the accuracy of the substance of what she had been told (that there was no open complaint with the ICO).
21. The Applicant had 2 complaints about the process which she contended did not comply with *Robert's Rules*: her words were not written down by the secretary and recited to her, and there was no separate vote taken as to whether she had accused Z of lying before the penalty motion was put to members. Dr Pack acknowledged that there was no separate vote and no verbatim note put to her. He contended that it had been unnecessary to record the exact words used, and that there was no need for a separate vote. The Applicant would, he said, have been aware what she had said and the question was what had been meant and whether the comments had been acceptable.

22. Mr Fawcett submitted that as an employer, the Party cannot allow staff to be subjected to unsubstantiated implied allegations of dishonesty in front of a large group of Board members. He said any clear evidence of dishonesty could have been presented through appropriate employment channels. The fact that it was a member of staff on the receiving end was an aggravating factor.

## **FINDINGS**

23. The following factors tend to weigh against the reliability of the Applicant's evidence where it conflicts with that of others:

- (a) We prefer the evidence of contemporaneous and near-contemporaneous documents (such as the unimpeached chat transcripts, e-mails and minutes) and of the evidence deposited closest in time to the events in issue, as likely to be less affected by the passage of time or deterioration or corruption of memory in the minds of persons involved.
- (b) Dr Pack's and Z's written evidence was submitted in November 2021. (c) The Applicant's recollections as to the vote count on the motion to exclude her, whether she contested what Z had been told in correspondence, and what the Applicant had said about a fine, were at variance respectively with the minutes and transcripts.
- (d) We also note that the Applicant misremembered what she had done more recently on her FAP application form.
- (e) We note that her evidence and that of Lord Strasburger was almost entirely set out 10 months or more after the events of the meeting. Lord Strasburger was not present to be questioned by us, but his evidence appears to have been coloured by subsequent information relating to the ICO case (from February 2022), which he refers to and says is not now disputed. He sees this as vindication for the Applicant in correctly not believing that the case had been closed. We observe that he did not vote against removing the Applicant from the Meeting and consider that he would have been likely to do so if he had viewed this as outrageous and unreasonable at the time.
- (f) We note that the Applicant had not at any point in her evidence prior to the FAP hearing stated in terms that she disclaimed any accusation of dishonesty against Z at the Meeting. Had that happened, we would have expected her to mention it previously.
- (g) The Applicant was not prepared at the Meeting or subsequently to apologise for giving Z any such impression of an accusation of dishonesty, however unintentional. This would have been easy to do either in the text chat or orally.
- (h) It is common ground that the Applicant repeatedly requested disclosure of relevant correspondence with the ICO at the Meeting, indeed also in the course of these proceedings. This implies that she did not believe what she was told about its contents (as opposed to the accuracy of its contents).
- (i) We have admitted evidence from Lord Strasburger that volunteers that the Applicant can be abrasive, and she was unwilling to straightforwardly accept

before us that she owed an obligation of confidentiality to others involved in the case. The Applicant also did not accept even at our hearing that there was any reason to doubt the reliability of Y as a source despite the information received in late August about the deadline and fine having proven to be wrong. This is consistent with the statements from others that the Applicant stubbornly refused to accept the possibility that she might be mistaken.

- (j) The number of members of Federal Board expressing indignation, the margin of the ballot with no dissenting votes, and comments from the COO and staff rep all suggest that the Applicant's behaviour went beyond the bounds of

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'polite challenge' or a respectful suggestion that the status of the ICO complaint might be at variance with what Z had been told. We have not been presented with evidence demonstrating that their indignation was anything but spontaneous or genuinely held.

24. We have therefore made the following findings of fact on the balance of probabilities:

- (a) The Applicant repeatedly made clear that she did not believe what Z was telling the Board, both orally and in the text chat box, and that this was inaccurate. (b) The Applicant did not make clear that her source was Y at the meeting. (c) Z had received the Email and correctly interpreted it to mean that the case officer at the ICO was 'happy to close the case'. Z had shared it with Dr Pack. It had been made clear to the Meeting that the Party had been told in correspondence that the case would be shut, and that Dr Pack was satisfied this was an accurate account of the correspondence. (d) The Applicant was not prepared to countenance the possibility that Y might have misinformed her, even though he had been wrong before about the putative 5pm deadline and £10,000 fine. (e) The Applicant was so convinced of her own righteousness (and Y's) that she assumed Z must not be telling the truth. (f) The Applicant repeatedly and obstinately demanded the correspondence and indicated that she disbelieved what Z said they had read in the Email (as evidenced in the text chat: 'We cannot *verify what was said* without seeing the correspondence' [our emphasis]). This was despite the fact that she had been told Dr Pack had read it as well. (g) The careful distinction drawn at our hearing between the underlying facts and *what Z had been told* simply was not drawn at the time by the Applicant. On the contrary, she directly contested the accuracy of what Z represented the Party had been told. The imputation had to be that either Z and Dr Pack could not understand what was written in the Email, or that both of them were knowingly misrepresenting what the Party had been told by the ICO. (h) It was a reasonable and natural inference, albeit not the only possible inference, to conclude that the Applicant was in fact implicitly accusing Z of lying. (i) The Applicant's words were not recorded by the secretary and read back to her. They were, however, evidenced by the text in the Zoom chat box. (j) The relevant rules and the substance of the allegation were put to the Applicant by the chair. (k) The Applicant was given an opportunity to retract or clarify her remarks to make clear that she was not accusing Z of dishonesty in reporting what had been



said. She did not take this opportunity, but instead hedged or dodged. She did not believe that she had anything to apologise for. As she (and Lord Strasburger) saw it, she was 'speaking truth to power' and had a mandate to challenge the staff because she was directly elected.

- (l) No separate vote was taken as to whether the Applicant had implied Z lied, or as to the words said by the Applicant.

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- (m) The vote to exclude the Applicant was carried by 20 votes in favour to nil against. We are not satisfied that the number of abstentions was accurately recorded in the minutes given that the frontsheet of the minutes also recorded 28 members present. However, 19 people voted 'for' in the chat box so at least that number voted in favour, and we consider it most likely that a complete tally was taken. We are also satisfied that had there been any votes against – particularly a low number which would have been easy to count – they would have been recorded.

25. We find that the *Robert's Rules* were not intended to be drafted with the precision of a legal code, and were intended as a guide to effective decision-making rather than a straitjacket only to be read in a narrowly literal way.
26. The rules clearly were not narrowly literally applicable since among other reasons they refer to male persons and to a physical assembly taking place in a 'hall' rather than a remote meeting with accompanying text chat. It would be absurd to argue that if the meeting were held in a room that could not be described as a hall, the Standing Orders contemplated that the *Robert's Rules* would be of no application. Likewise, in a remote meeting with accompanying text chat, the rules had to be given effect to in that context.
27. The *Rules* have to be applied having regard to the particular circumstances, and are written to allow for judgment and discretion. For instance, they do not define what conduct or words are 'disorderly' or 'objectionable' but leave this to the judgment of the assembly. We know from rule 61:10 that the concept of disorder is broad enough to include addressing the wrong person, and does not literally mean disorder in the sense of physical disruption or violence. The rules likewise do not further define 'grave' or 'obstinate'.
28. We are satisfied that it was reasonable for the Board to consider that the provisions applicable to 'obstinate' or 'grave' use of objectionable language applied. The Applicant had repeatedly made statements that appeared to contest (at best) the competence or (at worst) honesty of Z, and had failed to disclaim such imputations or apologise. The facts that her statements were not substantiated with corroborating documentary evidence from the ICO, and were directed at a member of staff, could reasonably be considered aggravating factors.
29. Rule 61:17 states (our emphasis): 'If the member denies having said anything improper, the words recorded by the secretary *can* be read to him and, *if necessary*, the

assembly can decide by vote whether he was heard to say them'. Rule 61:12 only contemplates a chair directing a secretary 'when it begins to appear that it may become necessary' to 'take down objectionable or disorderly words'. These rules cannot sensibly be interpreted to mean that where the chair has not had such foresight to have the words taken down, the meeting is powerless to take commensurate action against grave or obstinate disorderly conduct taking place in the face of those present. That is why rule 61:13 makes clear that there is no need for a

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formal trial in such a case. The word 'can' is in any case permissive. We find that verbatim recitation of the Applicant's alleged words was not mandatory.

30. The caveat 'if necessary' leaves it to the discretion of the assembly whether to hold a separate vote to decide what was said. In our case, there was a contemporaneous text chat log in which the Applicant had evidenced her statements that she had also made orally, so that every member could check. The statements had also been made less than half an hour previously. In those circumstances, it was reasonable not to hold a separate vote. Even if that had been required so that there were a technical breach, we consider that the outcome would have been the same because it was clear from the members' comments and the unopposed overwhelming vote on penalty that that most members believed the integrity of Z had been impugned without due substantiation.
31. We find in the circumstances that it was reasonable for the Board to exclude the Applicant from the Meeting in reliance on *Robert's Rules*, and dismiss the application.
32. We wish to make some general observations. Firstly, we consider that the time and effort expended in bringing this FAP case and contesting it (including procedural applications by both parties) and in our then determining it, were disproportionate to the seriousness of the issue. The Applicant was reasonably considered to have acted inappropriately, asked to apologise and ejected from a single meeting when she refused to do so, with no ongoing sanction. Secondly, *Robert's Rules* is a lengthy, inaccessible and over-elaborate book which is not tailor-made for the Federal Board. We recommend that for the time being sufficient copies be provided to Federal Board members for use at meetings, and that a simpler code of conduct /calling-to-order procedure for committees might be both easier to administer and have a positive impact on behaviour.

### **DISPOSAL**

33. The application is dismissed.

26 August 2022