

FEDERAL APPEALS PANEL

IN THE MATTER OF AN APPEAL BETWEEN:

ELIZABETH WEBSTER

Appellant

–and–

**(1) DAVID CROWTHER
(RETURNING OFFICER)**

(2) MARK PACK

(3) LUCY NETHSINGA

Respondents

FINAL RULING

RULING

1. The appeal is dismissed.
2. Parties are to make any submissions about publication of this ruling by 4pm on Friday 14 July.

REASONS

Introduction

1. The Appellant appeals against the decisions of Returning Officer Mr Crowther not to suspend or re-run the election for Party President, following applications to him in November 2022. The FAP has an appeal jurisdiction pursuant to regulation 24 of the Federal Election Regulations.
2. The matter was due to be heard on an expedited basis in December 2022 but resignations from the FAP, combined with existing vacancies and conflicts of interest, have prevented a final hearing being held for many months.
3. The matter eventually came before a Case Panel comprising William Charnley, Bridget Fox and David Graham, on the evening of 7 July 2023, and occupied our time for approximately 4 hours.
4. Ms Webster was assisted by Mr Paul Brennan, and brought along her agent Mr Rain Welham-Cobb and her IT consultant Mr Martyn Cattermole, both of whom we briefly heard from. Dr Pack was in attendance accompanied by Ms Janet Grauberg. We carefully considered the copious written evidence and submissions that had been exchanged, as well as the representations made to us. We made clear that we did not

consider it fair or appropriate to hear new oral evidence on matters not raised with the Returning Officer or in the appeal form. After retiring to deliberate, we determined that the appeal should be dismissed and gave a summary of our reasons orally. This ruling represents our full reasons for dismissing the appeal.

Grounds of appeal

5. The principal grounds of appeal related to the following issues:
 - (a) Alleged defamation on social media by or on behalf of a candidate in contravention of regulation 17, and breaches of neutrality by party staff contrary to regulation 13;
 - (b) Delay in provision of members' data owing to allegedly unfair data protection requirements such as insistence that Ms Webster appoint a Data Protection Officer, and not being provided with e-mail addresses of members, contrary to regulation 37;
 - (c) Alleged fundamental deficiencies in the system for electronic voting such as to render the count unsafe (regulation 20 appears to be broad enough to cover this ground).

Facts

6. A number of elections for internal office took place simultaneously, including for the Presidency, Federal Board, Federal Policy Committee, Federal Council, Federal Conference Committee and Federal International Relations Committee. In total, there were 177 candidates. The decision had been taken that the voting would be done electronically using a third-party system called Mi-Voice, using a single combined ballot process. This was provided for by regulation 10 of the Federal Election Regulations. Postal ballots would only be issued if requested by members (reg.11).
7. Candidates for the presidential election were permitted access to members' data for the purposes of canvassing, on conditions that they nominated a data protection officer who was a different person to the candidate's agent ('DPO'), that they signed a data protection statement, and the DPO undertook training and satisfactorily passed a test on data protection. These requirements were set out in the *Presidential Election 2022 Guide*. This represented that candidates would get access to Connect, and that 'The party will support candidates by enabling the use of Mailjet is [sic] used by candidates as a marketing platform'. Ms Webster initially informed the Party on 14 October 2022 that a Mr Ahmed would be her DPO. Subsequently, she indicated that Mr Welham-Cobb would be her DPO. Mr Ahmed eventually submitted a signed form and proof of training at 7.57am on 25 October 2022. Access was then provided to the data at 11:49am. The data provided comprised names, postal addresses and telephone numbers. It did not include e-mail addresses or access to Connect.
8. During the run-up to the election, a number of adverse and/or hostile comments were made about Ms Webster on social media. Some of these were expressed within a private Facebook group of which Dr Pack, but not Ms Webster, was a member. Some

of the persons posting these comments were themselves candidates for other federal offices. One of them, a Mr Robertson, was initially alleged by the Appellant to be on the campaign team of Dr Pack. Mr Robertson's posts did not purport to be made on behalf of Dr Pack. Dr Pack's evidence was that he was not an official officer on his campaign, but had been closely involved in supporting Dr Pack. Another had been a member of the Returning Officer's staff although he had ceased to be in the employ of the Party at the time he made the relevant comment. Dr Pack's unchallenged evidence (conceded in Mr Brennan's closing submissions) was that he had not instructed or authorised Mr Robertson to make the relevant comments about Ms Webster, and that he had on several occasions told his supporters that he wanted them to stay positive in their campaigning.

9. We were provided with the details as to e-mails sent with communications about the elections. The Party allowed each candidate to provide a 400 word manifesto. These were issued to around 47,000 members, in 3 batches on 18, 20 and 23 October 2022. The precise numbers of emails sent varied across the election period because members were joining, renewing, lapsing, opting in or out of e-mail communications. Not all members had provided e-mail addresses, and some of those who had done so had opted out of receiving communications. This meant that it was possible that many members would be unaware of the elections because they were not receiving e-mails, and so would not request a postal ballot. Some members in their own right (such as spouses) shared a single e-mail address. Some errors were made in circulating messages to the wrong lists, which were spotted and corrected.
10. Members were sent an e-mail with a unique identifiable voting URL link to their notified e-mail address (if any) held on the Party's records, where they had opted in to receive e-mails. A total of 57,791 members were sent voting links. Staff received 257 complaints that people had not been sent voting links. The Appellant's friend Mrs Hopkins did not receive a ballot and upon investigation this was found to be because she was not opted in to receive e-mails. The Appellant raised 4 other cases of persons not receiving ballots. Two of these were issued with a voting code and the other 2 were unidentified (as they had not supplied details). The Appellant had concerns about the system being used, so she copied her link to a friend in Sweden in order that he could investigate the website used. She was concerned that he was able to use the system to vote on her behalf, despite logging in from abroad. The system was designed to allow anyone to use the unique URL to vote regardless of geographical location, without any further identity check. However, the system only allowed each link to be used once. The Mi-Voice system randomised the order of names of the candidates on the ballot. There were some glitches such as the system 'freezing out', and the ballots 'resetting', notably during a period of about 3 or 4 hours on 1 November 2022 when their server was updating, affecting 48 people.
11. The final tally of first-preference votes was: Dr Pack 4,969; Ms Nethsinga 2,194; and the Appellant 1936.

Main Issue One

12. Regulation 17 provides:
No material published or circulated by or on behalf of a candidate shall defame by name or implication any other candidate and no candidate shall so defame any other candidate in the course of personal canvassing.
13. We consider that the Election Regulations only make sense if 'any other candidate' here means a candidate running as a competitor for election to the same office, because the regulations are designed to ensure a level playing-field. It cannot be right that whether a comment is actionable depends on whether elections to other committees happen to be held at the same time as the presidential election. The fact that Mr Robertson was a candidate for another office does not bring him within scope of reg.17 in relation to Ms Webster.
14. We are not satisfied on the balance of probabilities that Mr Robertson's hostile social media posts were 'published or circulated by or on behalf of' Dr Pack. It is not proven that he instructed or authorised the relevant posts. Accordingly, we did not consider it necessary to determine whether the particular disobliging social media posts or tweets were defamatory.
15. We have no doubt that Ms Webster was subject to unpleasant attacks on social media. Sadly this is not uncommon, although that does not mean libel, abuse or harassment is to be accepted. We note that if libellous statements are published by members, candidates may where warranted make a disciplinary complaint and/or pursue remedies under the general law of defamation. However, it is not the Returning Officer's role to police the language used by members at large in relation to candidates.

Main Issue Two

16. Ms Webster complains that Dr Pack had an unfair advantage insofar as he had his own database of members' email addresses through his private site and newsletter called 'Lib Dem Newswire'. However, she was not given access to members' e-mail addresses by the Party. She had wanted to send bulk emails to them. Ms Webster was under the belief that she would be provided with e-mail addresses, notably following an e-mail exchange with the Party's chief executive.
17. Ms Webster also complained that it was unfair that she had suffered a delay in being granted access to telephone numbers because of the insistence on having a dedicated DPO who had passed a test on training. She stated that when canvassing local members to be their prospective parliamentary candidate, she had been trusted with their data to call them without having to appoint a DPO. She had also been told that it was okay to give data to volunteers to canvass members, so in her view having a DPO was pointless bureaucracy, particularly if no e-mail addresses were being supplied.
18. Mr Crowther made clear that none of the candidates were permitted access to members' e-mail addresses held by the Party. This was principally because members complained about the quantity of Party e-mails and they wanted to guard against 'spam'. It was also to encourage telephone conversations with members. He

represented that the risk of a serious data breach was materially increased in Federal level elections involving about 60,000 electors compared to local ballots where there might be 300 to 500 electors. He had told Dr Pack that he would permit 'business as usual' in terms of the Newswire publication but would expect Dr Pack not to mention the presidential election or his candidacy in the election as part of his presidential role.

19. Dr Pack represented that he had not mentioned his candidacy in the relevant Newswire issue so as to infringe the Returning Officer's ruling; this was disputed.

20. Regulation 37 provides (our emphasis):

'The sections of the membership register containing the names, addresses and telephone numbers of members will be released in electronic version to each candidate subject to the candidate signing a data protection statement agreeing to abide by the party's data protection policies and providing evidence to the Returning Officer's satisfaction that they are able to ensure compliance with them. Any candidate or supporter of a candidate facilitating a breach of this clause will be deemed to be in breach of the party's data protection policies. Candidates should also have due regard to their own data protection responsibilities when collecting and using any data of their own in the election.'

21. The Regulations use the term 'full postal address' at paragraph 35 in the context of imprints. Elsewhere they refer to 'email messages' and 'email communications'. Whilst it is arguable that 'addresses' in regulation 37 could include e-mail addresses, we do not consider that to be the natural and ordinary meaning of the phrase 'names, addresses and telephone numbers of members'. Most people if asked their name and address would not reflexively give their e-mail address as opposed to a postal address.

22. We consider that it was understandable that Ms Webster thought she would get access to e-mail data and Connect, given the guidance to that effect in the *Presidential Election 2022 Guide*. However, we note that the Regulations did not require this, and that all candidates were in fact treated the same by the Party in not getting access to its e-mail addresses. Ms Webster did have the same opportunity as other candidates to provide a manifesto which was circulated to members by official e-mail. A complaint was made that manifestoes were published online only 5 days before the election but again, all candidates were treated the same.

23. We are satisfied that the Returning Officer was reasonably entitled under the terms of reg.37 to require evidence of the designation of a suitably trained DPO independent from the agent and candidate, who would be responsible for the handling of members' personal data on behalf of the candidate. Names, addresses and telephone numbers of identifiable individuals are personal data for the purpose of relevant data legislation. The Party has a duty to ensure that any data processor who handles such data will comply with the data protection principles laid down by the GPDR. Loss or misuse of tens of thousands of personal addresses or telephone numbers would be a serious breach of the law and expose the Party and its members to considerable risk. We are satisfied that Ms Webster was informed in good time of the Returning Officer's

expectations, and had every opportunity to comply. We are satisfied that all candidates were required to abide by the same expectations. The delay in accessing data was attributable to Ms Webster's team not providing proof of compliance until 25 October 2022.

24. The Regulations do not make special provision preventing candidates contacting members by e-mail through their own contact lists or social media. Regulation 37 arguably contemplates that they may do so if lawful, referring to 'using data of their own' (canvassing records of voting intention are also sensitive personal data, as well as contact details). Inevitably some candidates will have a greater name recognition, popularity or 'reach' than others before the election period. It is a matter for Federal Conference whether to approve Regulations that seek to level the playing-field by banning private written election communications by or on behalf of candidates. We are satisfied that the existing rules are not necessarily and intrinsically illegitimate by not making such provision. The Returning Officer did have a power to make 'necessary' decisions where the Regulations were silent (reg.20), but he was entitled not to consider such prohibition to be necessary. We do note the direction he gave about Newswire and consider that to have been reasonable. No complaint about breach of that direction was made to him at the time, and as we are an appellate body it would be wrong for us to receive fresh evidence about the content of Newswire at this late stage.
25. For the reasons given above, we are not satisfied that the Appellant has proved any breach of the Regulations in respect of access to data, or that the Returning Officer's approach was unfair.

Main Issue Three

26. Mr Cattermole asserted that he had spoken to 'ethical hackers' who had been able to hack into the online voting system. He asserted that there were numerous software bugs and vulnerabilities which were 'exploitable'. However, he said he would not provide detailed evidence in support of these claims because he did not trust us with it. He provided no evidence that anyone had actually interfered with the election process. As such, we could not give any weight to his evidence.
27. We are not persuaded that the voting system was intrinsically unreliable insofar as the unique voting URLs could only be accessed if a malicious actor was able to access the ballot e-mail addressed to the relevant member, or that member shared their own URL which they were expressly instructed not to do. We are satisfied that it is perfectly proper for Party members to reside abroad, or for members residing in the UK to vote electronically whilst overseas and do not consider the fact it was possible to cast a ballot from Sweden using Ms Webster's own URL to be intrinsically problematic.
28. We acknowledge the clear evidence that the system could be 'buggy' or glitchy, probably owing to the length of the ballot, the number of candidates to be ranked, and the inadequate capacity of the computer system. We note that a significant proportion of the membership had not opted into receiving e-mails. The ballot was so lengthy as

to be off-putting, particularly where it required large numbers of candidates to be laboriously ranked in order of preference. This may well have harmed participation. The staff have accepted that treatment of shared e-mail addresses was unsatisfactory.

29. However, Ms Webster has not proven that the cumulative glitches or defects in process systematically disadvantaged one candidate compared to another, let alone demonstrated a real likelihood that the outcome would otherwise have been in her favour. The context here is that over 57,000 voting links were sent but less than 60% of the e-mails were opened and only 8,679 first-preference votes were cast in the presidential election. The total number of members not sent a link will have been significantly smaller than the number of members who were sent a link but did not cast a vote. We note that only a tiny percentage of electors complained that they were having problems voting, and none of the candidates in the concurrent Federal committee elections have complained about the system. Dr Pack received more first-preference votes than the other candidates combined, and the Appellant came in third place.

OVERALL CONCLUSIONS

30. We are not satisfied that the Appellant has proved that the matters complained of, separately or cumulatively, vitiated the election result. Accordingly, we dismiss the appeal and uphold the refusal of the Returning Officer to stop or re-run the presidential election.
31. We recommend that guidance for candidates be reviewed; it should not give rise to false hopes about access to Connect or to e-mail addresses if that is not in practice the Party's policy.
32. We recommend that the relevant Party bodies consider carefully what is to blame for the low 'turnout'/voting even among addressees of the e-mail communications, and how to encourage participation of members who are not currently signed up to receive e-mails.
33. Technical security of the voting system should be challenged and kept under review, and lessons learned from the issues encountered. The Board and Federal Conference may wish to give consideration to whether candidates and their campaign teams ought to be forbidden from campaigning outside official Party channels (such as on social media, private blogs or websites, or private e-mail circulation lists like *Newswire*), by provision in the Regulations. Allowing private spending on internal campaigning does itself tend to favour candidates who are wealthier or better-connected at the start of the campaign. It may also be necessary to consider, for the purposes of campaign spending limits, what the deemed monetary value of social media impressions or private emails should be. Those are policy matters which are not for us to determine.

7 July 2022