

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



**Applicant**

**AND**

**FOSTER, AS FEDERAL RETURNING OFFICER**

**Respondent**

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**CASE MANAGEMENT RULING**

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1. I am a member of the Federal Appeals Panel.
2. I was appointed Case Manager on 23 December 2022 under r 3.3 of the FAP Rules of Procedure (“The Procedure Rules”) with regards to FAP Case 56.
3. The role of the Case Manager is set out in r 3.4 of the Procedure Rules and is, amongst other things, to grant or refuse permission to proceed with the application(s) in accordance with r 4 (specifically in this case r 4.5).
4. In addition, r 4.7 provides that “The Permission Stage is intended solely to sieve out and swiftly determine cases that do not merit a full Case Panel hearing.”
5. By virtue of r 4.8, a determination by the Case Manager at the Permission Stage is final and binding; it is not subject to a further appeal. It must be accompanied by reasons, which may be brief.
6. On receipt of the papers for I checked that I do not have a personal connection to any of the relevant individuals.
7. I have performed my role entirely on the basis of the materials supplied:
  - a) By the Standards Office, which comprised the case files for the FAP Case 56; and
  - b) From the Federal Party Website (Constitution, Election Regulations, the Procedure Rules, the results of the election to Federal Council).

**Background**

8. Case 56 is a request for a Ruling, relating to the dismissal by the Federal Elections Returning Officer of a complaint.
9. On 13 November 2022 the Applicant raised a complaint through the Federal Elections Returning Officer Complaints process arguing a breach of reg 17 of the Election

Regulations (annexed to Federal Party Constitution) by another candidate (“Candidate X”) owing to statements made within a Facebook group.

10. Reg 17 provides as follows:

*“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.”*

11. On 16 November 2022, the Returning Officer in the Federal Elections dismissed a complaint made by the Applicant on grounds that the “complaint does not meet the threshold for him to take action under either rule 17” [Sic].

12. The Applicant states “It is this decision I wish to appeal.”

13. The particulars of the appeal are that:

- a) The Applicant had a legitimate expectation “that the deliberations leading to that decision would be shared with me along with the outcome; and
- b) There was a “failure to give any or any adequate reasons where those are required”.

### **Ruling**

14. As a Case Manager exercising the powers under r 3.4(c) to determine whether the appeal is within jurisdiction and should be granted permission to proceed I am asked to consider a number of matters under r 4. With regards to these I find the following:

- a) It is arguable that the application is “insubstantial or academic” (r 4.5(a)(ii));
- b) There appear to be alternative remedies available (r 4.5(a)(iii));
- c) It is arguable that the application is not “properly arguable on the evidence with a realistic prospect of success” (r 4.5(a)(iv)); and
- d) If the points on the appeal were taken, it is extremely unlikely that the ultimate outcome for the Applicant would have been different (r 4.4, 4.5(a)(v)).

For the reasons I set out in paras 16-21 below.

15. In the light of the above, and given the overriding objective in para 1.1 and the powers in para 1.4 of the Procedural Rules, **I refuse permission** for the appeal to be heard at a full Case Panel hearing.

16. It would be possible to raise a complaint about Candidate X under the Federal Complaints Process, where a number of alternative remedies would be available.

17. Whilst I can offer no definitive view on this, from the Applicant’s complaint to the Returning Officer, it seems to me that the Applicant is keen to use Party process to advance arguments in relation to Gender Critical beliefs and disputes between members on this issue, and this appeal can be seen in this vein.

18. Whilst I can offer no definitive view on this, it seems to me arguable that the Applicant’s appeal has no realistic prospect of success because he will not be able to prove that he has been “defamed” pursuant to reg 17 of the Election Regulations. I find the phrase in the Election Regulations unclear and troubling, as defamation is a legal construct (one possible interpretation of reg 17 is that a defamation claim must be brought in the courts

and proved before the finding could be made, another could be that the requirements of the Defamation Act 2013 should be met). I doubt that any Returning Officer would be in a good position to determine breach of this regulation effectively.

19. Neither the Applicant nor Candidate X were elected. The powers the Returning Officer has under the Election Regulations are set out in reg 21 thereto:

*“The Returning Officer shall have the power to disqualify before declaration of the result, or unseat if declared elected any candidate who ... is found to be in breach of any of these regulations”.*

20. On the face of reg 21 the Returning Officer has no powers in relation to candidates who are not elected.

21. Arguably the Returning Officer has further and wider powers under Rule 20, but subject to suspending the entire election, it's unclear that any finding or order of the Returning Officer to this complaint made 3 days before the declaration of the result would have led to the Applicant's election. As such the application is academic and unlikely to lead to a different outcome for the Applicant.

22. Under para 4.5(b) of the Procedural Rules I further direct:

- a) The Standards Officer to add this email to the records for these appeals, and to inform the Applicant of my decisions; and
- b) Recommend that the wording of reg 17 to the Election Regulations is re-considered.

Anthony Fairclough  
24 December 2022