

**FEDERAL APPEALS PANEL**

**APPLICATION IN RESPECT OF A DECISION OF AN EXPEDITED COMPLAINTS PANEL**

**BETWEEN:**

**MR ADAM PAYNTER**

**Applicant**

**-and**

**1. DR JANE SHAW (ON BEHALF OF THE EXPEDITED COMPLAINTS PANEL)**

**2. LEAD ADJUDICATOR**

**3. MS DULCIE TUDOR (COMPLAINANT)**

**Respondents**

**FINAL RULING**

**INTRODUCTION**

1. This matter was heard by way of virtual hearing by Zoom in front of a Case Panel comprising William Charnley, Jennie Rigg, and David Graham on Wednesday 8 December 2021. We heard representations from Cllr Joanna Kenny on behalf of the Applicant Cllr Paynter (who also attended and was asked whether he had anything further or different to say); from the Lead Adjudicator; and from Cllr Tudor the original complainant. In advance of the hearing, we were informed that Dr Shaw who had chaired the Expedited Complaints Panel would be unable to attend. Mr Graham asked Dr Shaw a number of questions in writing and her responses were circulated to the Parties by e-mail in advance of the hearing. Dr Shaw did not request that the hearing be postponed, and so the Panel proceeded in her absence.

**DECISION OF THE EXPEDITED COMPLAINTS PANEL**

2. The Expedited Complaints Panel ('ECP') had held a virtual hearing on 30 January 2021. The facts found by the ECP in its Decision Notice ('DN') dated 3 February 2021 were that Cllr Paynter had forwarded a private e-mail sent to him by Cllr Tudor (who was then a fellow member of the Lib Dem group on Cornwall Council) on Wednesday 9<sup>th</sup> October 2019. This e-mail related to an item of Cabinet business that the e-mail assumed would be dealt with at a meeting of the Council's Cabinet on 13 November 2019. This made allegations that a senior officer was showing favouritism to another councillor from the Conservative Party, had engaged in an underhand bargain or arrangement with that councillor; that 'the Officers have an agenda'; and that she had been misled and strung along by officers. Without asking or even informing the complainant, Cllr Paynter was found (consistently with the timestamp at the top of his e-mail) to have forwarded this e-mail at 18:13hrs on 9 October 2019 to the very officer who had been named and criticised in Cllr Tudor's e-mail, as well as to the Chief Executive of the Council, along with the text 'See below. For information, you didn't get it from me!'. The Panel found that by abusing the trust of a fellow councillor in this way, Cllr Paynter had brought the Party into disrepute.

3. The ECP decided by a majority (see DN paras 10 and 26-27) to impose as sanctions: (i) a ban on standing for or holding external office as a Liberal Democrat for 12 months from the date of the Panel Hearing; (ii) a ban on holding office within the Party for 12 months from the same date and (iii) a recommendation that he be removed from the approved list of candidates for 12 months from that date.

4. At paragraph 27 of the DN, the ECP stated:

‘27.The Panel has chosen to impose this sanction because:

- In the view of the Panel, a lesser sanction would not prevent the Respondent from continuing to treat more junior and less experienced colleagues poorly if it seemed expedient to do so;
- The actions in forwarding a sensitive email to council officers caused a good deal of harm, distress and damage to a Councillor colleague. This almost certainly contributed to her feeling she had to leave the Liberal Democrat Council group and then had to resign her Party membership.’

#### **PROCEDURAL HISTORY**

5. The Applicant was notified of the outcome of the ECP by an e-mail on 4 February 2021, which attached the DN. On 18 February 2021, the Applicant submitted an appeal to the FAP by e-mail on grounds set out in 55 numbered paragraphs in his Appeal Form dated 17 February. Among other things, these alleged that the ECP had misunderstood its role as being to determine sanction rather than find facts; that the standard formal investigatory procedure should have been followed rather than the expedited procedure; that the e-mail ‘could not be confidential’ and Cllr Paynter had not accepted it had been (appeal form grounds paras 18, 21-23). Permission to proceed to a hearing was refused on 5 March 2021 because whilst various procedural errors took place, these were not likely to have affected the eventual outcome. At that stage, no complaint had been made about the fairness of the ECP’s hearing itself. The submissions to the effect that the ECP had misunderstood its role and accepted dictation from the original Adjudicator, and that the e-mail was not confidential, were found to be totally without merit. Cllr Paynter had in fact at the hearing accepted ‘I should have, obviously, contacted Dulcie at the time and said, look, can I share it or at least share excerpts of it or speak about it...’

6. On 15 March 2021 and outside the 14 day period for appeals provided for at the time by the Complaints Procedures established under article 23.3 of the Constitution, the Applicant sent an e-mail complaining that his appeal should be re-opened, alleging bias against him and threatening an application for judicial review. This e-mail raised new points about the fairness of the ECP’s hearing held in January 2021. By rule 3.1 of the FAP’s Published Procedures in force at the time, any complaint that the rights under the Federal Party Constitution of a member have been infringed (art.22.3B) was to be made to the Registrar ‘within 6 weeks of the event, ruling or issue of to be determined [sic] subject [sic] the right of the Panel to extend this time in exceptional circumstances’. Article 22.5 of the Federal Party Constitution provides that the Panel shall decide whether or not a dispute or matter for adjudication falls within the jurisdiction conferred on it by Article 22. The rules permitted officers of the FAP to determine that a case falls outwith our jurisdiction where a case is untimely.

7. On 21 March 2021, permission was granted to proceed to a hearing on grounds that the Applicant's rights as a member had arguably been infringed, in relation to 2 novel points raised in his e-mail, but without prejudice to the Respondents being able to make submissions on jurisdiction and timeliness. In the meantime, Cllr Paynter's sanction was stayed, which permitted him to continue to run for and hold elected office as a Liberal Democrat.

#### **GROUNDINGS OF APPEAL**

8. The Applicant was granted permission to develop 2 arguable points on this application in support of the argument that there had been a serious failure of process at the hearing of his case which meant that the determination was unsafe or unsatisfactory in all the circumstances. These were that it had been unfair not to permit cross-examination of the complainant; and that Cllr Paynter had been unfairly ambushed by the complainant's oral evidence to the effect that her working relationships with officers at Cornwall Council had been seriously damaged.

#### **EVIDENCE AND SUBMISSIONS BEFORE THE FAP**

9. We had before us a copy of the documentary material that was before the ECP. We have also reviewed the video recording of the Expedited Complaints Panel's hearing. A document entitled 'timetable and structure for Panel Hearing' had been circulated in advance of the original Complaints Panel online hearing which stated that 'the Complainant and Respondent or their representatives may address and may be questioned by the Complaints Panel', but that 'they may not question the other party to the Complaint'. Dr Shaw stated at the outset of the virtual hearing (recording c.4:35 to 4:52) that the parties were not to address each other, but that 'there is an opportunity for you at the end to raise questions to be asked to the other'. Cllr Tudor was asked to make an opening statement, which had been prepared, and which she read out. The hearing continued for about a further hour. About 41 minutes in, Cllr Tudor said 'forwarding that e-mail...made life harder for me...the shutters came down, as far as the senior officers were concerned...I was told I "wasn't the client"...had a bad relationship after that'.
10. The Respondents were permitted to argue that the application had been brought out of time and should be dismissed for that reason. The Lead Adjudicator also submitted before us that the points raised did not make the decision unsafe because it would have been the same anyway. In his submission, the reasons at the bullet points of paragraph 27 of the DN were independent of each other.

#### **IMPACT ON THE OUTCOME**

11. We are unanimously of the opinion that the points raised on this application were not likely to have affected the outcome. We are persuaded by the submissions of the Lead Adjudicator that the 2 bullet points in paragraph 27 of the DN are to be read as independent reasons for the sanction imposed.

12. This is, as it happens, consistent with the representations of Dr Shaw to us on Form 2 wherein she stated:

‘The Appellant claims that it was unfair for the Expedited Complaints Panel to rely on complaints as to the impact on Cllr Tudor’s ongoing working relationships with officers without advance notice that this formed part of the case against Cllr Paynter. The Complaints Panel did not rely on any such complaints... At the hearing, Cllr Paynter maintained that he forwarded a confidential email... “in order to help Cllr Tudor.”... It was difficult for the Panel to see how this action, with the covering message of ‘See below. For information, you didn’t get it from me!!’ could in any way be helpful and so it needed to be explored in some detail...As part of its attempt to understand how and whether the action of forwarding the email might have been helpful to Cllr Tudor, the Panel asked Cllr Tudor about the effect it had had on her relationships with the Council’s Senior Officers, and was told that it had not helped in any way. However, the Panel did not rely on this information – the case against the Appellant was overwhelming without this extra corroboration of the damage he had intentionally caused...’

### **TIMING AND JURISDICTION**

13. The points raised in this application were made within time for an article 22.3B claim (less than 6 weeks after the date of the DN), but long after the 14 day time limit for appeals had expired. The FAP has no power to extend time in respect of an appeal brought under article 23 procedures, because its jurisdiction on appeals is determined by those procedures. The appeals process would have been an effective alternative remedy, had the appeal on the current grounds been lodged within time.

14. When questioned at our hearing as to what had prompted the e-mail on 15 March, Cllr Kenny stated that it had been prompted by reading a written version of the statement that had been read by Cllr Tudor to the ECP, on 11 March 2021. It could not reasonably be disputed that Applicant had heard this pre-prepared statement at his hearing, and would have been aware of its general content. He had also received the decision which referred to the issue of relationship with officers. There was no good reason for failing to appeal on the ground relating to Cllr Tudor’s comments about her relationship with officers within the 14-day time limit for such appeals. In the circumstances, we would have dismissed the application as untimely even though we otherwise had jurisdiction to hear it, because there was an alternative effective remedy available.

### **THE ISSUE AS TO LACK OF NOTICE OF THE ‘RELATIONSHIPS’ ISSUE**

15. We consider that whilst Cllr Tudor had not submitted evidence about the impact of the breach of confidentiality on her prior to the hearing, it would have been obvious in advance that this issue would have been at least potentially relevant to any decision by the ECP as to what disciplinary sanction to impose. Both parties should have expected the issue of the extent of any prejudice or harm caused by the forwarding of the e-mail to come up, and produced any evidence about that issue which they sought to rely upon.

16. We note in this regard that the Applicant devoted considerable time at the hearing to remarks about the relationship between Cllr Tudor, himself and other Lib Dems and whether the forwarding of the e-mail was what caused her to leave the political group.
17. It was obvious that forwarding an e-mail making serious defamatory accusations about an officer to the subject of the accusations was liable to undermine their relationship, and make Cllr Tudor feel betrayed and embarrassed. If Cllr Paynter wished to argue that no sanction, or only a lenient sanction, was merited because the negative impact of forwarding the e-mail was trivial, he could have done so. He could have approached the senior officers and requested that they make a written statement, as he subsequently did for this FAP application.
18. A large amount of material was submitted in support of this FAP application relating to the ability of Cllr Tudor to advance her agenda following the circulation of the e-mail, including minutes of the cabinet meeting on 13 November 2019, and a statement evidencing continued engagement by officers with her.
19. The relevant documentary material was available at the time of the ECP hearing, and the statements from the relevant officer could and should have been adduced and submitted for that hearing, in order to support any argument minimising the impact of the breach of confidentiality.
20. Moreover, at no point during the hearing did the Applicant object that he had been ambushed and request an adjournment in order to investigate or submit evidence about the impact of his action on officer relationships. At about 47 minutes in, he said that he had not seen any evidence and had nothing from officers saying they were ignoring Cllr Tudor. He gave evidence that officers were 'working closely' with her, and that she had still held meetings and been given training by the Council at public expense.
21. The FAP process allows for decisions to be reversed where new evidence comes to light which was not available at the time of the hearing, which does not apply here. However, it is otherwise geared at ensuring that the process was fair and regular, and the sanctions within a reasonable range. It is not an opportunity to re-argue the appeal on its merits.

#### **THE ISSUE AS TO CROSS-EXAMINATION**

22. The FAP has already had occasion to rule that the unavailability of cross-examination in the procedures for hearings is not in itself generally unfair (e.g. in *Lock v Complaints Panel*, 14 June 2021).
23. The Chair of the ECP told the parties that they would be able to raise questions to be asked by the Panel. There was accordingly an opportunity to raise any questions. The Applicant did not ask for any particular questions to be asked.
24. On these particular facts, the point is in any case parasitic on the issue of alleged lack of notice about the issue of the impact of the forwarding of the e-mail on Cllr Tudor's relationships with colleagues. Any cross-examination would have had to be based on evidence at variance with Cllr Tudor's statement that her relationship with officers had been undermined. The Applicant's complaint before us was that he had not had an opportunity to put together

evidence to rebut this claim.

25. For the reasons we have given, we consider that the impact of the breach of confidentiality was obviously a matter that would be canvassed, and that the Applicant could and should have put together any positive case he wished to make about that before the hearing.

**DISPOSAL OF THE APPLICATION**

26. For the reasons given above, we consider that this application should be dismissed. We direct that the stay on the sanction of the ECP now be lifted. It will take effect for 12 months from the date of this decision.

20 February 2022