

JO HAYES
AND
THE FEDERAL BOARD

RULING

- I.1 I am asked by Jo Hayes (the appellant) and a member of the Federal Board to make a ruling in regard to the interpretation of the Federal Constitution in respect to the powers of the Federal Board (the Board) in regard to the calling and timetabling of the leadership elections. Specifically I am asked to rule whether the Federal Board had the power to revoke the election timetable it had published on 18th January and then publish a new timetable that defers the opening of nominations until May 2021.
- I.2 I have already accepted that the Federal Appeals Panel has jurisdiction in this matter. I issued directions to both parties and have read and taken fully into account all the submissions that have been made which I will not repeat in this ruling.
- I.3 Both parties have set out in their submissions the chronology of events, which for brevity again I will not repeat in this ruling. I have had regard to all this material.

Power to determine issues as to the interpretation of the Constitution

- I.4 Under 4.1 of the Federal Appeal Panels published procedure approved by Conference; I have power by myself as case manager to make definitive rulings on the interpretation of the constitution.

Background

- I.5 I write this appeal in lock down like most of the Nation due to the “exceptional circumstances” that have affected us due to the “Covid 19 pandemic” and the Government, and Scottish and Welsh Assemblies decisions on lock down and self-isolation. We are living through what can be described as a one in one hundred year event, a worldwide pandemic which has already killed many thousands of people and no one is sure when it will end and how many lives will be lost. Governments worldwide have taken unprecedented and drastic action on lockdowns and self-isolation. Travelling for non-essential work has been suspended. Elections have been

cancelled and sporting calendars suspended, theatres, centres of entertainment and restaurants closed, air travel in many countries curtailed, the list is endless.

- 1.6 The appellant argues that despite these facts the election having been called and timetable set, that the election must go ahead. It seems to me unarguable, that as a matter of common sense, that it would not be appropriate to conduct an election at this time. In that respect I agree with the Party President that the current situation amounts to “exceptional circumstances” which justified the Boards actions.
- 1.7 However, the question is although the Board may be justified in taking this action, do they have the power to do so? In that context I need to address the relevant Articles in the Constitution and in the Election Regulations.

Powers under the Constitution

- 1.8 It seems to me that the relevant Articles on this issue are as follows

Article 18.2

“An election for the Leader shall be called upon:

(a) the Leader asking for an election;

(b) the death or incapacity of the Leader;

(c) the Leader ceasing to be a Member of the House of Commons (other than a temporary cessation by reason of a dissolution);

(d) the receipt by the President of the resignation of the Leader or of a declaration of intent to resign upon the election of a new Leader;

(e) a vote of no confidence in the Leader being passed by a majority of all Members of the Parliamentary Party in the House of Commons;

(f) the receipt by the President of a requisition submitted by at least 75 Local Parties (including for this purpose, the Specified Associated Organisation or Organisations representing youth and/or students) following the decision of a quorate general meeting; or

(g) the first anniversary of the preceding general election being reached without an election being called under any of paragraphs (a) through (f), provided that:

(i) the Federal Board may postpone such an election for no more than one year by a two-thirds majority of those present and voting; and

(ii) this paragraph (g) shall not apply if the Leader is a member of the Government.”

Article 18.4

“Upon the calling of an election, the Federal Board shall publish a timetable for nominations, withdrawals, despatch and receipt of ballot papers and the holding of ballots and shall appoint a disinterested person or body to receive and count the ballot papers”.

Powers under the relevant leadership Election regulations made under the Constitution

1.9 It also seems to me that the most relevant regulations are the following

Regulation 1

“The Chair of the Federal Appeals Panel shall be the Returning Officer. The rules of the Federal Appeals Panel shall make provision for a process to replace the Chair in this role if necessary. The Chief Executive shall be the Acting Returning Officer. A Deputy Acting Returning Officer shall be appointed from the Compliance Department. Other Deputy Acting Returning Officers may be appointed if required by the Acting Returning Officer. “

Regulation 4

“ a) The timetable for the election shall be no shorter than 9 weeks and no longer than 13 weeks. It shall contain a minimum of 15 days for nominations to be collected which must be on the official forms provided by the Acting Returning Officer for the specific election and available from the day following the setting of the timetable by the Federal Board. It shall provide for at least 21 days between the close of nominations and the despatch of ballot papers and at least 21 days for the return of ballot papers.

(b) The Returning Officer may postpone or suspend these elections if it would conflict with a Parliamentary General Election or a Referendum covering England, Scotland, Wales or any combination thereof.”

1.10 No party has referred to me any other Articles or Regulations that are relevant. I have not found anything else in the Constitution or Regulations that is relevant.

Discussion

1.11 What is clear from the Articles is that the circumstances under Article 18 2 c applied. Sadly Jo Swinson having lost her seat at the December General Election meant that there was a vacancy and that the Board had to call an election under the provision of Article 18 2 (c). I agree with the Appellant that the reference to “shall call an election” is clear and mandatory. However I do not interpret that section as meaning that at the moment Jo Swinson lost her seat an election was deemed to have been called. The clear sensible interpretation is that the Board is required to meet and call an election, published the notice of election and set the election timetable.

1.12 I find that Article 18 (g) is not applicable in these circumstances. The Article only applies in circumstance where an election must be called within a year of a general election. It does not apply where an election must be called under Articles 18 2 (a to f); it follows that the powers under 18 2 g (i) and (ii) are not applicable in this situation. I find that the election cannot be extended for an extra year via a two thirds vote of the members of the Federal Executive.

1.13 However, neither the Constitution nor the Regulations set out, the period of time the Board have before meeting and formally calling the election. In my view it is only when the Board meet and call the election and published the notice of election that the time period specified in Regulation I comes into play. That time period doesn't start until the Board meet, call the election and finalise the timetable under Regulation 1.

1.14 Under the Constitution, only the Board can call the election and set the timetable. Setting the timetable doesn't start the election. The timetable will set out a date when the election process starts. Until the election process actually starts neither the Returning Officer nor the Election Team who serve under him have any role in the timetabling of the election. This is subject to one important caveat that if there was an undue delay in calling the election that infringes the rights of members, the Federal Appeals Panel would have the power (upon receipt of a complaint), to make a ruling that the election should be called.

- 1.15 It follows that since the Board are the only body that can call the election, they clearly have a window where they can delay the election for a short period of time for pragmatic reasons such as to await local elections or some other upcoming event that would make it desirable to delay the election. Clearly in normal times a delay to await local election may be justifiable but a delay of many months and certainly over a year would not.
- 1.16 Further, unfortunately nowhere in the Constitution or the Regulations do the rules set out what happened in “exceptional circumstances” such as the present situation. The last major pandemic was 1917 and the writers of the Constitution clearly did not plan for this event. I have already stated that it would not be appropriate to conduct an election at this time and have found that the current situation amounts to “exceptional circumstances” that clearly justify a postponement or suspension of the election. I should add that in my judgement that the Board acted totally logically and responsibly in suspending the election. To have done anything else would have been irresponsible and would have been seen as irresponsible generally. Now is not the time to do anything that adds to the day to day problems that everybody is experiencing and which could put further lives at risk.
- 1.17 Had the Board not called the election and published a timetable I would have taken the view that in these “exceptional circumstances” they were entitled to delay calling the election until an appropriate time when it was responsible to start the process. Had the election actually started and the role of the Returning Office been engaged, I would have taken the view that the Returning Officer was entitled in these “exceptional circumstances” to postpone or suspend the election. Indeed I made a ruling to that effect in the last committee elections. However we are in a situation where the Board did call the election, did publish a timetable, but the actual election had not started and therefore the role of the Returning Office was not engaged. The question that I must address is do the Board have power to suspend the election in this situation.
- 1.18 I find that the following two facts exist. One, we are in a unique situation where the “exceptional circumstances” clearly justify a suspension or postponement of the leadership election; and two, the Constitution and Regulations are silent as to what to do in this situation. In situations where the constitution is silent the Federal Appeal Panel has a unique role.

Unique Role of Federal Appeals Chair

1.19. In a recent appeal relating to the last committee election I set out the role of the Federal Appeal Panel, I said that

“It is my view that the reason why the authors of the Federal Constitution placed the conduct of elections in the hands of the Chair of the Federal Appeals Panel is because of the dual role that the Chair holds as both Chair and as Returning Officer. It seemed to me that this situation called upon me to exercise my unique powers as Chair of the Federal Appeals Panel to interpret the Constitution in circumstances such as this where the constitution is silent but a decision needs to be made for the best interests of the Party”.

I take the same approach in this case.

1.20 Both Paragraph 22.3 of the Federal Constitution and Paragraph 4.1 of our published procedure allow me as Chair of the Federal Appeals Panel to make rulings on the interpretation of the Constitution. Indeed there is ample precedent for that position, I did exactly the same thing when amending the election rules and timetables wholesale following the Conference vote on one person one vote a few years ago; and there are many other precedents for this action. I am often called upon to make an interpretation of the constitution where the Constitution is silent but a problem has arisen that’s needs to be addressed. Subject to important safeguards any such interpretation is binding.

1.21 The safeguards are that any ruling I make as Chair of the Federal Appeals Panel, as to the correct interpretation of the Constitution is subject to challenge to the full Appeals Panel under our published procedures and finally, if the ruling is upheld by a full Federal Appeals Panel or my ruling stands no further appeal having been made, then the ruling must be published and presented to Conference for approval and ratification. In my view the system works well, with these checks and balances in place.

1.22 This is an unprecedented situation clearly not anticipated by the authors of the Constitution or Regulations. It seems to me that it is clear as a matter of common sense and reasonable inference that the Constitution would give to the Board a

residuary power to suspend an election already called in “exceptional circumstances”. It will be for the Board to justify that such “exceptional circumstances exist” and in my view, in normal times this will be a very high hurdle to overcome. However I have no doubt that such circumstances clearly exist at present, and that the Board were entitled to suspend the election process.

- 1.23 So in answer to the first question. I rule that the Board did have power to revoke the election timetable it had published on 18th January and suspend the election.
- 1.24 The next question is did the Board have power to set a new timetable for May 2021. Whilst I have great sympathy with the approach of the Board as set out by the president in his reply namely that a long stop date has been published but effectively with the intention to keep it under review and amend when it was safe to do so. It does seem to me that the power of the Board in exceptional circumstance to suspend, would only justify suspension of the election for so long as the “exceptional circumstances” continue to justify the suspension. I note that the Returning office was not asked to attend the Federal Board meeting when considering the length of any delay and was not asked or gave an opinion on the timing of any suspension. It seems to me that it should be a matter of good practice that the Returning Office be invited to attend that part of the Board meeting that deals with calling and timetabling of elections that they are likely to be involved in.
- 1.25 Therefore as to the second question. I agree with the appellant that to suspend the elections to May 2021 cannot be justified. I see no reason why once restrictions cease and it becomes safe to do so, that an election cannot be conducted as soon as practical thereafter. When this will be, must be left to the Judgement of the Board, who will need to ensure that no election takes place until it is clearly safe for one to be conducted.
- 1.25 The Board will understand that some members of the Parliamentary Party have already declared an intention to stand and that a level playing field must be maintained in the interim and that once the exceptional circumstance cease, the suspension must be lifted as soon as practicable thereafter and the election concluded. The Board will be aware that an unjustifiable delay in lifting the suspension is likely

to give rise to further complaint to the Federal Appeals Panel and that should be an incentive not to delay where it would no longer be justifiable to do so..

Formal Ruling

125. I find that the Federal Board did have the power to revoke the timetable it published on 18th January and suspend the election in the current “exception circumstances”. I do not find that the Board had the power to suspend the election until May 2021; though if the present “exceptional circumstances” continue, I do not rule out that a delay to that time could be justified. However it is not at the present time.
- 1.26 For the avoidance of doubt, I imply into Article 18.4 of the constitution the following sentence in italics set out below

“18.5

Upon the calling of an election, the Federal Board shall publish a timetable for nominations, withdrawals, despatch and receipt of ballot papers and the holding of ballots and shall appoint a disinterested person or body to receive and count the ballot papers. *Where exceptional circumstances justify it, the Board may postpone or suspend an election but only for so long as those exceptional circumstances continue to justify a postponement or suspension.*”

Order

- 1.27 I direct that the May 2021 timetable be rescinded and that the election should remain suspended until the exceptional circumstances that exist at present cease to justify their suspension. I direct that the Board keep this under continuous review, though that doesn't mean that they need to have a vote on it, at every meeting of the Board.
- 1.28 This ruling is of real importance, and I would ask that the Board publish this ruling widely to all the Party and in particular to members of the Parliamentary Party.

Alan Masters

Chair of the Federal Appeals Panel

13th April 2020