



The Commissioner
for Public Appointments
Northern Ireland

“Guardian of the Public Appointments Process”

REPORT

Complaint to the Commissioner for Public Appointments for Northern
Ireland

From Mr John Corey

concerning

Appointment of two Non-Executive members to the Northern Ireland
Social Care Council

by

THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

MAY 2014

COMPLAINT TO THE COMMISSIONER FOR PUBLIC APPOINTMENTS FOR NORTHERN IRELAND ON THE APPOINTMENT OF TWO NON-EXECUTIVE MEMBERS TO THE NORTHERN IRELAND SOCIAL CARE COUNCIL

by

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

The Complaint

By letter of 22nd March 2014, Mr John Corey [the Complainant] submitted a complaint to the Commissioner, detailing six matters of concern regarding the 2011 recruitment competition by the Department of Health, Social Services and Public Safety [DHSSPS or the Department]. The six matters were detailed by the Complainant as follows:

1. Re Code of Practice for Ministerial Public Appointments in Northern Ireland [the Code] of the Commissioner for Public Appointments for Northern Ireland [the Commissioner], version issued 1st February 2010, Paragraph 1.4[b].

'That there was a breach of the principle that public appointments be made "in accordance with the requirements of the law". The information available to [the Complainant] indicates that the decision to exclude [the Complainant] from consideration for this public appointment was related directly and/or indirectly to [his] application being supported by a trade union, and/or, [his] trade union membership, and/or, [his] trade union activities and beliefs. A decision on such grounds would be in breach of anti-discrimination laws.'

2. Re Code paragraph 2.3

'That there was a breach of the diversity principle – the public advertisement invited applicants involved with the trade union movement to seek a nomination by a trade union. However as a consequence of doing so, [the Complainant], as an applicant, was then excluded from consideration for appointment. [The Complainant] ask[s] the Department to respond to two points of complaint:-

- a) that the Minister's decision breached the diversity principle, and
- b) that the Department's overall conduct of the competition resulted in a breach of the diversity principle by permitting the exclusion of any trade union nominated candidates from final consideration for appointment.'

3. Re Code paragraph 2.4

'That there was a breach of the equality principle in that the Department failed to ensure "equality of opportunity and treatment of all applicants at every stage". As evident from the above paragraphs [the Complainant] was excluded from consideration for appointment at the final stage of the process solely on the grounds of being a trade union nominee.'

4. Re Code paragraph 2.5

'That there were breaches of the principles of openness and transparency. The evidence is that the Department did not query the Minister's stated reason for his decision which clearly contradicted the facts.'

5. 'That the Minister and Department's action in this competition breached paragraph 2.9 of the Code of Practice – the requirement to treat candidates with respect throughout the public appointment process.'

6. 'That the Department has further breached paragraph 5.12 [5.11 in February 2010 version] of the Code of Practice – the Department failed to make [the Complainant] aware of [his] right to ask the Commissioner to investigate if [the Candidate] was dissatisfied with the Department's response.'

In addition to the six matters of complaint quoted above, the Complainant provided, in his letter of 22nd March 2014, the following point of view:

'Furthermore [the Complainant] believe[s] that the Court's findings merit further consideration by the Commissioner for Public Appointments; for example, [the Complainant] respectfully submit[s] that consideration needs to be given to whether or not the Code of Practice [paragraph 3.39 et seq] should include guidance where there is a change of Minister after a public appointment competition, approved by a previous Minister, has been progressed to the final appointment stage.'

The CPA NI decision to investigate the complaint

There is a gap of two and a half years between the complaint to the Department [15th September 2011] and the current complaint to the Commissioner [22nd March 2014]. It is unusual for CPA NI [the Office of the Commissioner for Public Appointments for Northern Ireland] to deal with a complaint after such a gap but since, on this occasion, the delay was due to the Department's understandable decision, signalled in its letter of 6th October 2011 to the Complainant, to delay its response until legal proceedings [instituted by the Complainant] had been dealt with, the Commissioner is of the view that matters outstanding [i.e. not considered by the Court] should now be investigated, as requested by the Complainant.

Scope of the Investigation

The investigation involved a detailed review of the following documentation:

- A. Supplied by the Complainant
 - Letter of complaint to CPA NI.
 - Letter of complaint and exchanges of correspondence between Complainant and DHSSPS.
 - High Court Judgement [TRE9042].
 - High Court Order.

- B. Supplied by the Department [DHSSPS]
 - Information Pack for applicants for post of Member, Northern Ireland Social Care Council.
 - Guidance Notes for Applicants, with CPA NI enclosure on 'Making a Complaint' and 'Guidance on Conflicts of Interest and Integrity'.
 - 'Election Guidance for Northern Ireland Civil Servants' including guidance on Ministerial appointments during a time of election to the Northern Ireland Assembly.
 - 2011 DHSSPS public advertisement for two non-executive members [Lay Member and Trade Union Representative Member] of the Northern Ireland Social Care Council.

Background

In 2011, the Complainant applied, in response to a public advertisement, for a position as a member of the Northern Ireland Social Care Council.

He succeeded, on merit, in being put on the list of candidates, deemed 'appointable' by the selection panel, presented to the Minister for the Minister to choose two appointees.

The advertisement had called for applicants for positions as a 'Lay Member' and a 'Trade Union Representative Member'. The complainant had applied for the trade union member position.

The Minister, in making his appointments, chose not to select a trade union member.

The Complainant, by letter dated 11th July 2011, sought, from the Department, the reasons for the Minister's decision and was not satisfied with the response received from the Department by letter dated 12th August 2011.

The Complainant wrote to the Department on 15th September 2011, submitting 'a formal complaint about the appointment process for investigation by the Department'.

The Department responded, by letter dated 6th October 2011. The letter informed the Complainant that the Department would take no further steps in relation to responding to the Complainant's letter until after legal proceedings had been completed.

Legal proceedings took the form of a Judicial Review in the High Court. The judgement, reference TRE9042) was produced on 9th November 2013 and a High Court Order, CO6212888, was produced on 6th January 2014.

The Complainant then wrote to the Department, on 10th January 2014, referring to the Department's letter of 6th October 2011 and making the following request: 'The legal proceedings referred to in [the letter of 6th October 2011] have now been completed - see attached Order dated 6th January 2014. I would be grateful therefore for the Department's response to the complaints raised in my letter dated 15th September 2011.'

The Department responded, by letter dated 18th February 2014. It acknowledged the Court's findings and declared that since the matter had been before the Courts and a final decision made, 'it does not consider that anything further is to be gained by correspondence about the issues that have been raised and therefore considers this matter at a close'.

The Complainant was dissatisfied with this response and wrote to the Commissioner on 22nd March 2014 with a formal request that the Commissioner investigate the complaints 'in line with Paragraph 5.12 of the Code of Practice for Ministerial Public Appointments in Northern Ireland' which states 'If a complainant is dissatisfied with the Department's response, that individual can ask the Commissioner to consider investigating the matter.'

The six elements of the complaint are as detailed above in the section entitled 'The Complaint'.

The Commissioner decided, after studying the correspondence from the Complainant and the Department, and after considering the range of issues considered by the Court, that there were outstanding matters from the Complainant's concerns that were still to be addressed. He wrote to the Complainant and the Department on 31st March 2014 informing them of his decision to investigate the complaint and offering the Department the opportunity to add any relevant documents to those received from the Complainant in support of his complaint. The Department responded, in a letter dated 11th April 2014, adding documents referred to above in the section entitled

'Scope of the Investigation' and assuring the Commissioner of the Department's full cooperation with the investigation.

Findings

The CPA NI investigation has considered all the matters of complaint detailed above [in section entitled 'The Complaint'], **in the context of the Code**, with the objective of determining whether the Code has been breached.

The determination on each element of the complaint is as follows:

1. RE Code paragraph 1.4b - 'That there was a breach of the principle that public appointments be made 'in accordance with the requirements of the law'.

It is clear, from the judgement delivered by the High Court, that the appointment decision was unlawful. It is clear from the subsequent High Court Order that action by the Department will be necessary to prevent reoccurrence of the problem. In the light of this the Commissioner considers this matter to have been dealt with.

2. Re Code paragraph 2.3 - 'That there was a breach of the diversity principle'

2.a - 'that the Minister's decision breached the diversity principle'.

2.b - 'that the Department's overall conduct of the competition resulted in a breach of the diversity principle by permitting the exclusion of any trade union nominated candidates from final consideration for appointment'.

After careful consideration, the Commissioner has formed the view that the breach of the Code was a breach of the Equality principle rather than the Diversity principle – see section 3 below.

The Commissioner does not uphold this element of the complaint.

3. Re Code paragraph 2.4 - 'That there was a breach of the equality principle in that the Department failed to ensure "equality of opportunity and treatment of all applicants at every stage'.

By specifically excluding the Complainant from consideration for appointment, the Minister did not afford equality of opportunity to the Complainant. This happened after the Complainant had gone through the full recruitment process in the belief that there was a place on the NISCC for a trade union member.

The Commissioner upholds this element of the complaint.

4. Re Code paragraph 2.5 - 'That there were breaches of the principles of openness and transparency. The evidence is that the Department did not query the Minister's stated reasons for his decision which clearly contradicted the facts'.

The documentation makes it clear that 'un-notified policy change regarding union membership', was implemented at the final Ministerial decision stage of this recruitment competition.

The Complainant was not made aware of the change until after the Minister's decision was made. This fact alone is sufficient to demonstrate that, from the viewpoint of the Complainant there was a fundamental lack of openness and transparency, so serious that, in the event, the Complainant was, unknowingly, competing for a position on the NISCC that no longer existed.

It is also clear from the documentation that Department Officials did query the Minister's decision not to appoint a trade Union member but that query did not lead to any change in the Minister's position.

The Commissioner upholds this element of the complaint.

5. That the Minister and Department's action in this competition breached paragraph 2.9 of the Code of Practice – the requirement to treat candidates with respect throughout the public appointment process'.

There is no reason to infer, from any of the documentation perused by CPA NI, that the Complainant was treated with any lack of respect throughout the process of application for the post, at the shortlisting and interview stages, or in his subsequent dealings with the Department. There is the question, however, of the 'un-notified' change of policy, which, in the Commissioner's view, itself demonstrates a lack of respect for a candidate who was, essentially, chasing what became an unattainable position in the light of that change.

Due to the Minister's change of policy, the Complainant had completed what had become a nugatory and pointless exercise.

The Commissioner upholds this element of the complaint.

6. 'That the Department failed to make [the Complainant] aware of [his] right to ask the Commissioner to investigate if he [the Candidate] was dissatisfied with the Department's response'.

As part of its submission of documents to this investigation, the Department supplied CPA NI with a copy of its document DH1/11/31698 entitled, DHSSPS Public Appointments Guidance Notes for Applicants – Non-executive Member Posts – Ref: NISCC 1/11'. The final item on that document [page 9] is headed 'Complaints'. It includes the statement 'If you are unhappy with the Department's response, you may wish to contact the Commissioner for Public Appointments in Northern Ireland. The Commissioner operates an independent complaints procedure dealing with potential breaches in the Code of Practice for Ministerial Appointments to Public Bodies.' The Department has informed CPA NI that this document, together with a CPA NI publication outlining the complaints process and giving the Commissioners contact details, was supplied to every candidate in the NISCC competition.

The Commissioner does not uphold this element of the complaint.

Finally, on the Complainant's suggestion that 'the Court's findings merit further consideration by the Commissioner for Public Appointments' regarding guidance to Departments where there is a change of Minister after a public appointment competition, approved by a previous Minister, has been progressed to the final appointment stage':

The Commissioner does not see this issue as requiring a Code change; it is, in his view, a matter for the Office of First Minister and deputy First Minister [OFMDFM] in its policy- development role with regard to public appointments, to address. The Commissioner will pass the matter on to OFMDFM for consideration.

Conclusion

As detailed in the findings above, the Commissioner has upheld significant elements of this complaint. He has determined that there were breaches of his Code of Practice in the conduct of the competition to recruit non-executive members to the Northern Ireland Social Care Council, profoundly damaging the prospects of the Complainant achieving membership of the NISCC and frustrating the legitimate expectations that had been generated by the advertisement for the posts.

The Commissioner has a duty, under paragraph 5.5 of the February 2010 Code, to act upon all such instances of non-compliance. In this case, the Commissioner requires the Department to acknowledge, in writing, the breaches identified; to take appropriate action to address the issues raised with respect to future competitions; and to deliver to the Commissioner, in writing, details of such action within two months of receipt of this report.

With the Complainant's permission, this report will be published on the CPA NI website.