

IN THE MATTER OF

Mrs L Mccann

COMPLAINANT

and

Mr M Reynolds

RESPONDENT

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COMMISSIONER'S DETERMINATION

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1. On 5 October 2016 the Commissioner directed that this complaint should be stayed pending the outcome of an ASA internal club dispute. For ease of reference the earlier decision is reproduced in full below

1. *The Complaint, dated the 28<sup>th</sup> August 2016, was received at the Office of Judicial Administration 'OJA' and by the ASA Judicial Commissioner on the 5<sup>th</sup> September 2016.*
2. *The Complainant alleges in Section 5 Brief description of Complaint:*

***“Concise Description of Complaint***

***Failure by Mr Reynolds to comply with ASA Regulations 150-155 inclusive. By citing his power of privileges to isolate me from the club, his discriminatory treatment, both directly n poolside at the Championship, and indirectly by email communications.”***

3. *This is a case where the Complainant has complained of the failure on the part of the Respondent (the Chairman of Deepings Swimming Club (“the Club”)) to follow due process in the handing of an internal club dispute/disciplinary process.*
4. *In response the Respondent has, in effect, contended that this complaint is premature as the Club are in the process of dealing with matters. The Commissioner accepts this contention and accordingly **as a matter of due process only** has decided that this Complaint shall be placed on hold pending the outcome of the internal club process.*
5. *Whilst as a general rule guidance is made available to the parties separately via their ASA Friend (if appointed) in order to assist the process the*

*Commissioner is prepared to offer the following guidance, as to process only, without having formed any view as to the merits of the respective parties contentions as to the substantive issues involved.*

### ***Handling of Internal Club Disputes***

6. *An ASA club is entitled to conduct its own internal disciplinary/dispute resolution processes in accordance with ASA Regulation 281.1.1. Further the club may establish its own internal disciplinary procedure (ASA Regulation 281.1.3). It should however be noted that this power to establish procedures allowed by ASA Regulation 281.1.3 is strictly subject to ASA Regulation 281.1.4 set out below for ease of reference*

#### ***281.1.4 Any such provisions shall comply with the ASA Recommended Club Constitution and the accompanying Guidance Notes***

*In that regard the Commissioner refers to paragraph 11 of the Guidance Notes and also Annex 3 which sets out some helpful practical guidance in securing a fair hearing process.*

*For convenience paragraph 11, extracted from the Guidance Notes is set out below. The Commissioner would emphasise the words he has underlined below.*

#### ***11. Expulsion/Suspension/Disciplinary Action***

*None of the above may be applied to a member unless there is a rule which allows this. Whenever a Club exercises any power given in respect of the above it must act in good faith, comply strictly with its own rules and Judicial Rules 150 – 155 (inclusive) and satisfy the rules of natural justice.*

*See **Annex 3.***

*Annex 3 provides further guidance on complying with the principles of natural justice and gives the following conclusion with regard to Club disputes*

#### ***6 Conclusions***

*The key message when dealing with disputes is to ensure:*

- (a) All parties are treated fairly;*
- (b) The complainant has the opportunity to present the case; and*
- (c) The accused has the opportunity to respond.*

7. *The Commissioner has noted a letter from the Club to the Complainant seeking availability for a mediation meeting. Whilst the time for notifying acceptance of the dates proposed has now passed that there appears the possibility of mediation is to the mind of the Commissioner most encouraging. The Commissioner wishes to place on record that the fundamental purpose of the ASA Judicial process is to deal with matters as expeditiously as possible, with an eye to the cost implications to the parties (and the sport) subject always*

*to an overall regard to the fairness and proportionality of the process in the interests of all concerned, particularly the interest of our young swimmers.*

*It is the view of the Commissioner that matters are most often best dealt with through informal means, and Mediation is in the view of the Commissioner an excellent process to achieve a fair and lasting outcome.*

8. *Further, to comply with the ASA requirements and the rules of natural justice an ASA club must follow an appropriate process and reach a decision which is then communicated in a timely manner, in particular the Complainant must necessarily be provided in advance with details of all the issues of concern which have led the Club to impose a suspension upon her. If there are any such details which have yet to be supplied this should be done immediately.*
  9. *The Club internal process may involve the convening of an independent panel if the mediation process does not now proceed or if it should fail to secure a resolution of the matters of dispute.*

*In such eventuality the Commissioner **recommends** that the Club populate a panel wholly independent of the decision making process to date. In any event the Club should provide the Complainant with the opportunity to object with reasons to the proposed composition of the panel. There should be included details of the skills and experience of the proposed panel members and disclosure of any personal and/or business relationships any of them may have with the officers and members of the Club managing committee.*
  - 10 *It is however the hope of the Commissioner that this will not be necessary and that the parties will seek an informal resolution of all differences between them in the best interests of all concerned. Both parties are encouraged to actively and constructively engage with the Club internal process.*
  11. *The Commissioner would ask that the parties advise the OJA as to the progress of resolution of this dispute by means of appropriate updates as to progress and outcomes.*
  12. *ASA Laws and Regulations do not provide for any right of appeals against the Commissioner's decision in relation to a stay of proceedings.*
2. There then followed attempts at mediation which proved unsuccessful. Matters proceeded to a hearing before an independent panel on 19 December 2016 the findings of which are set out below

“Following the Panel Hearing I am required to put our findings in writing; therefore, please see the summary below:

After reviewing the written witness statements and listening to the verbal statements from the Complainant (Deepings Swimming Club (DSC)) and Defendant (Mrs McCann) and their witnesses, the Panel concluded that they

could not categorically prove the balance of probability, from the evidence presented to them, that the alleged incident took place.

Therefore, the Panel recommends that the DSC:

1. Amend their Code of Conduct for committee members, officials and volunteers to bring them in line with the Code of Conduct detailed in Wavepower and request that all new and existing members, sign and retain a copy for their records.
2. Review their policy for travelling abroad and adopt the guidelines on the supervision of members (and parents) when away from the organisation detailed in Wavepower.”
3. It is clear to the Commissioner that the allegations made against the Complainant were not proven, in essence the case was dismissed. The Complainant was cleared of the alleged wrongdoing. However no further order was made such as, for instance, the issuing of an apology to the Complainant.
4. The Commissioner is reasonably satisfied that whilst there may have been shortcomings in the process of initial investigation employed by Deepings Swimming Club into the alleged incidents in Eindhoven in July 2016, overall a fair disciplinary process was followed.

**Accordingly, the Commissioner directs that the above findings be reproduced in full in the minutes of the next meeting of the Deepings Swimming club executive committee and further be placed on the club website with a clear and prominent link from the Home and/or News Pages such link to be in place for a period of not less than 90 days from the date of this Determination. The link should state “Findings of an independent panel in connection with an alleged incident in Eindhoven on 2 July 2016”**

5. There then followed a series of communications between the Respondent on behalf of Deepings Swimming Club and the OJA, extracts of which are set out below

On 13 January the OJA was advised

“Having read the brief report from the Panel the Executive Officers of the Club feel that the Club have still not yet been given Mrs McCann’s account of events relating to the incident. As a result the Executive Officers have requested a more detailed report from the Panel.”

On 27 January

“The Committee were surprised at the outcome of the panel meeting and agreed that the panel chairman be approached and requested to provide a more detailed report.”

On 30 January 2017 the following communication was sent at the direction of the Commissioner

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“The Commissioner has commented as follows:

*“In light of the decision of the independent panel that the case against Mrs Mccann was not proven and now that the Club have received the additional information requested from the panel, a copy of which was supplied to the OJA, the Commissioner would welcome clarification of the current position and in particular any communications that will be issued by the club to Mrs Mccann in light of the panel findings.”*

On 12 February the Respondent responded as follows

“The Executive Officers of Deepings Swimming Club have reviewed the report produced by the Panel from their meeting on 15<sup>th</sup> December 2016, received on 29<sup>th</sup> January and have agreed to reluctantly accept the Panel findings.

The following communication was sent to the Complainant

“23<sup>rd</sup> February 2017

Dear Mrs McCann,

I write to you regarding the incident in Eindhoven on 2<sup>nd</sup> July 2017 which was instigated following a verbal complaint, supported by statements and documents from the hotel and witnesses, that we were advised by the ASA OJA to start an internal dispute under ASA Rule 150. The Club have now completed the ASA’s Internal Club Dispute Process with the Panel Meeting on the 16<sup>th</sup> December.

Following a communication from the ASA OJA’s Commissioner in which he states -

*“In light of the decision of the independent panel that the case against Mrs Mccann was not proven and now that the Club have received the additional information requested from the panel, a copy of which was supplied to the OJA, the Commissioner would welcome clarification of the current position and in particular any communications that will be issued by the club to Mrs Mccann in light of the panel findings.”*

The Executive Officers of the Club have recommended to the Club Committee that the Complaint against you be closed with no further action. We are pleased that the Panel have now issued their more detailed report. It is with regret the process took as long as it did and we can only apologise for the fact that you felt unable to meet with us, to give your version of events. We hoped that we could have drawn a line under this much sooner, with your assistance.

At the Committee Meeting on the 21<sup>st</sup> February the Club Committee agreed to the Executive Officers recommendation and that I should write to advise you that the Club Committee have agreed that the incident is now closed.

Therefore please accept this letter as formal notification that the Internal Club Complaint raised against you is now closed.

For and on behalf of Deepings Swimming Club.

Martyn Reynolds”

6. The Commissioner is disappointed at both the tone and content of these communications. The independent panel appointed by the club having made its own findings, and subject to any available appeal, it was not for the club executive committee to purport to “close” the proceedings. That decision had already been made by the panel.

7. So turning to the present complaint made against the Respondent. The Commissioner has determined that this Complaint relates to less serious allegations which may properly be categorised as maladministration falling within the ambit of ASA Judicial Regulation 160.2.3 and has further decided to make a substantive determination on the issues as he is empowered to do under the applicable regulation.

**Determination**

8. This complaint is one made not against Deepings Swimming Club, but rather, against the Respondent the chairman of the club in an individual capacity. However, the Commissioner finds no evidence that the Respondent as chairman has done any more than implement agreed club committee decisions. In the absence of evidence of personal action on the part of the Respondent outside the scope of authorities given to him by the club committee the Commissioner has no alternative but to reject this complaint.
9. **A copy of this Determination shall be published in the same manner as the findings of the independent panel as set out in paragraph 4 above**
10. The Parties to this Complaint are reminded that the Commissioner's Determination may be appealed, in writing, within twenty one days of the date of the dispatch of this Determination to Miss K Moss at the Office of Judicial Administration, c/o British Swimming Para-Swimming, St James Building, Floor 9, 79 Oxford Street, Manchester, M1 6FQ.
11. **THE PARTIES SHALL NEITHER PUBLISH NOR MAKE ANY REFERENCES TO THIS DETERMINATION ON SOCIAL NETWORKING SITES, NEWSPAPERS, MAGAZINES OR ANY OTHER MEANS OF MASS COMMUNICATION UNLESS EXPRESSLY DIRECTED TO DO SO BY THE COMMISSIONER.**

*A Gray*  
**ASA Judicial Commissioner**  
26<sup>th</sup> April 2017

Cc Mrs L Mccann  
Mr M Reynolds  
The Hon Secretary, Deepings swimming Club  
Any appointed ASA Friends