

Election Tribunal Appeal Decision (23 October 2020)

On 21 October 2020 at 5.39pm the Returning Officer (RO) provided the Election Tribunal (Tribunal) a document requesting that the tribunal consider an appeal of the Returning Officers decision dated 20 October 2020 at 5.00pm. There were no details provided as to who was making the appeal. The tribunal requested from the RO the details of the person(s) making the appeal. The Tribunal received the contact details for Anna Purtill (the appellant). The election tribunal contacted the appellant to confirm the appeal and provided an opportunity for the appellant to provide any additional submissions in relation to that appeal including the names of any relevant persons. The appellant confirmed it was her appeal and provided no further submissions.

Original complaint and RO ruling

On 18 September 2020, the RO received two complaints regarding campaign material published on behalf of the unofficial 'Ignite' group of candidates. Candidates that allegedly formed this group are Anna Purtill, Maxi Hunt, Hannah Cohen, Bridget Lee, Harvey Gibbs, Tiana Schurmann, Riley Fenn, Yingying Zhang, Ziyi Luo, Wenhan Jia, Jingyu Chen, Wen Xue and Nan Jiang.

For the purpose of this appeal it is the second complaint that is most relevant.

The second complaint was regarding two posts made on WeChat, which were subsequently also found to have been posted on Australia51.com. These posts, written in Mandarin, were published on 23 September 2020 (**post 1**) and 16 October 2020 (**post 2**).

The RO was appointed on 2 October 2020. While post 1 was made prior to the election period, it was available during the election period and as it is election material it is covered by Regulation 19.

Post 2 was made during the election period.

Post 1 was found by the RO to be in breach of the Election Regulations for the following reasons: (relevant to this appeal are r.19.2, 19.3.3 and 19.3.3).

1. Regulation 19.2 – No authorisation was included on the publicity and the post was not provided to the Returning Officer for approval.
2. Regulation 19.3.2 - Multiple misleading or deceptive comments are in the article including that the current core members of MONSU are trying to make international students lose their right to vote and be elected.
3. Regulation 19.3.3 – No English translation is provided on the publicity.
4. Regulation 19.3.4 – The MONSU logo is used multiple times throughout the post.
5. Regulation 19.5 – Publicity was made available prior to the close of nominations.
6. Regulation 31.5.7 – Publicity being published that breaches each of the above regulations.

In response to the breaches of Regulations 19.2 and 19.5 the RO directed that the post be removed, which has already been done from WeChat and the RO determined that no sanctions were required in response to breaches these two breaches. The RO did make sanctions regarding breaches of r.19.3.2, 19.3.4 and 31.5.7.

On requesting a response regarding the posts, Riley Fenn advised the RO the following:

1. *No candidate or campaigner involved with the Ignite candidates had any involvement with the preparation of any campaign communications of the kind that are in the posts.*
2. *The posts were made by an individual named 'Zixuan Li' who is a person aware of the momentum that has been building behind the Ignite campaign, is a supporter of the campaign, and wanted to make a post on WeChat demonstrating his support.*
3. *The QR codes on the page were never set to link to any website.*
4. *The candidate had managed to connect to Zixuan Li and instructed them to remove the material.*

The RO found that it was not credible that no candidate or campaigner was involved in the preparation of the posts was for the following reason.

- 1. The phone number of one of the candidates is listed on post 2 as the person to contact if the WeChat group is full. It seems nearly impossible that this candidate was never aware that this publicity was made with their phone number on it or that someone who would create this post and a related group chat would suggest students contact someone with no knowledge of the post or group if the group became full.*
- 2. Post 2 contains images of the logo being used by the Ignite candidates, both as an individual image and on candidate images for 6 candidates that have nominated. This logo was subsequently provided to me by Riley Fenn for approval for use from the close of nominations and the six candidates subsequently submitted nominations to me. Unless this logo was posted publicly prior to post 2 being made, which would itself be a breach of the Election Regulations but does not appear to have occurred, the logo and details on which positions six Ignite candidates were nominating for must have come directly from the Ignite candidates or campaigners involved with the candidates.*

The RO determined Riley Fenn breached Regulations 31.2, 31.3 and 31.5.1 by providing false, dishonest and deceptive information to the Returning Officer and imposed a ban from campaigning for an additional 4 days from 6pm Tuesday 20 October until 6pm Thursday 29 October. Riley Fenn did not appeal the RO's decision.

The RO found the Zixuan Li, based on eligibility checks was not a student. As such, the RO found that Zixuan Li breached Regulation 31.5.9 by campaigning on behalf of candidates through publishing this publicity.

Relevant to this appeal is the decision that Post 2 dated 16 October 2020 breached r. 19.2, 19.3.2, 19.3.3, 19.3.4, 19.5, 19.6 and 31.5.7.

Accordingly, in response to the breach of Regulation 19.5 in the publication of post 2, the RO imposed a ban on the Ignite candidates and any students campaigning on their behalf from campaigning for 3 days. This is equivalent to the period campaigning was occurring before it was permitted in accordance with Regulation 19.5.

Further, for the breaches of the Regulations in the publication of posts 1 and 2, the RO banned the Ignite candidates and any students campaigning on their behalf from campaigning for an additional 2 days and directed that the posts be removed from Australia51.com, the WeChat group cease to be used for any campaign purposes, and any Ignite candidates leave the group.

The ban was not concurrent, with a combined ban from campaigning for 5 days from 6pm Tuesday 20 October until 6pm Sunday 25 October.

Appeal

The appeal made by Anna Purtill on the following basis:

1. The Regulations clearly limit the scope of the Returning Officer's disciplinary authority in relation to "the person" – that is, the relevant person responsible for the particular conduct which allegedly has contravened the Regulations.
2. There is no clause within the Regulations that confers any power upon the Returning Officer to punish any one student for the conduct of another student (or non-student) on the purported factual basis that they share a common team banner, or had actual knowledge of a breach by another. Even if knowledge is a sufficient foundation to impute responsibility to a candidate for the actions of another, that actual knowledge must be proven positively, and is not proven by the mere fact of candidates sharing a common banner.
3. Moreover, that allegation of knowledge is flatly denied. The Returning Officer only provided one student with questions and did not provide any other student subject to the discipline any

questions. Moreover, the Returning Officer did not provide the appellant with the relevant factual material upon which he based his conclusion that and d other campaigners, knew or were party to the relevant conduct. Nor did he provide his interpretation of the Election Regulations, that is an egregious breach of natural justice, as we were robbed of any opportunity to attack the factual and interpretative bases of your decision and offer reasonable, alternative interpretations and conduct additional inquiries.

4. In this ruling the Returning Officer suggests that if there is a common association between candidates, that it is 'reasonable through implication that individuals campaigning as a group on behalf of one or more candidates can be sanctioned as a group even if not every person in that group directly breached the Regulations.'
5. The text of the Regulations does not support that interpretation. There is no reasonable basis for that interpretation as the Regulations were specifically amended to deregulate the conduct of students campaigning collectively.
6. The fact that there are gaps in the Regulations with respect to the Returning Officer's powers to deliver sanctions – for example, the regulations referred to in 31.5.9 in his declaration – does not mean that the Returning Officer can by fiat fill that gap on the basis of what he declares to be 'reasonable to assume.' That gap can only be filled by the Student Council which is the repository of that power under C33.1 of the MONSU Constitution.
7. The Returning Officer has in so declaring put the burden on candidates that he alleges to have a common association to disprove any connection to or actual knowledge of the offending student and non-students. Moreover, these candidates have not been given an opportunity to offer any evidence to counter the Returning Officer's position and discharge that burden.
8. The effect of the Returning Officer's declaration is that any student that publicizes material branded similarly to a candidate or group of candidates can, by publishing prohibited publicity, compel the RO to punish all associated candidates using that branding regardless of the intent and actions of the publisher or the punished candidates, and regardless of their actual association to the punished candidates. That is a nonsense.
9. The Returning Officer has penalized individual candidates for conduct:
 - a. Engaged in by other students and non-students;
 - b. Not within the candidate's sphere of influence;
 - c. Without any evidence actually demonstrating on the balance of probabilities a connection to the relevant students and non-students that engaged in the offending conduct (in breach of Reg 4.3)
 - d. On the basis of an extraordinarily unlikely interpretation of the Regulations which has no foundation in its text. The Returning Officer has wrongly assumed the role of the Council which is to declare the Regulations.
10. The appellant requested that the Returning Officer immediately, and for the period preceding the Election Tribunal's declaration, restricts this ruling in its operation only to the offending individuals – i.e. the publishers.
11. The Returning Officer's ruling was without basis and failed to provide a fair hearing to the persons he alleges to be of the 'Ignite' team. That will constitute a defect in the conduct of the election. Meanwhile, the consequence of the Returning Officer's ruling is that several candidates are prohibited from campaigning for some 5-6 days. That may materially affect the results of their individual elections and the election as a whole. Therefore, any one of those students may appeal against the result of the election under 35.2 to the Election Tribunal.
12. The best pathway in my view to avoid there being any doubt with respect to the validity of the election is for the Returning Officer to withdraw his ruling, and immediately (within 24 hours) convening a meeting of the Election Tribunal in relation to the declaration he made yesterday.

Tribunal Ruling

After examining all submissions and the relevant documents, this Tribunal finds that based on facts and evidence as presented before the RO, the RO acted appropriately in his deliberations. Further, the RO ruling dated 20 November 2020 was in accordance with the authority afforded on him pursuant to the MONSU Constitution and Election Regulations on the following basis:

1. Anna Purtill, Maxi Hunt, Hannah Cohen, Bridget Lee, Harvey Gibbs, Tiana Schurmann, Riley Fenn, Yingying Zhang, Ziyi Luo, Wenhan Jia, Jingyu Chen, Wen Xue and Nan Jiang have been identified by the RO as the 'Ignite' candidates, by virtue of their conscious decision to organise themselves and brand themselves as such. Accordingly, they each hold responsibility for the actions of persons or organisations acting to the benefit of the collective 'Ignite'.
2. The ruling by the RO upon the 'Ignite' candidates has taken into consideration communications created in breach of Election Regulations. The MONSU governing documents including, the constitution and regulations, is paramount for the conduct and appraisal of the severity of breaches made by such a collective, as well as their contained individuals.

The Constitution states:

C7. Obligations and Liability

Members must at all times comply with this constitution and any regulations made under it.

C24.4 Members must at all times comply with the regulations as if they formed part of this constitution.

3. The Returning Officer has highlighted the following crucial point:

"These are examples of actions that cause a defect in the conduct of an election that could materially affect the result, meaning these actions could result in a successful appeal against the result of the election. The purpose of sanctions during the election is to deal with these actions as they arise during the election and avoid an appeal against the final result."

4. The level at which sanctions may be passed by the RO is made in consideration of the following regulations:

31.13.1. the severity of the breach;

31.13.2. whether or not the person was dishonest in the course of their breach of the regulations; and

31.13.3. the likely number of votes influenced or affected as a result of the person breach of the regulations.

5. Pursuant to the following regulations, the Returning Officer must apply sanctions for such breaches.

31.13.1.1. in judging the severity of the breach, if a serious breach has occurred the Returning Officer shall apply at least one of regulation 32.12.3 - 32.12.5 to the person that committed the breach. For the avoidance of doubt a breach of regulations 32.4 or 32.5.1 – 32.5.5 shall be automatically considered to be a serious breach.

31.12.3. suspend the person from campaigning for a period of time;

31.12.4. disqualify the person from voting in that election; or

31.12.5. disqualify the person reported from campaigning or standing or campaigning and standing in:

31.12.5.1. that election; or

31.12.5.2. that election and a specified number of future elections; or

31.12.5.3. all elections.

6. The Returning Officer in making the ruling considered the group 'Ignite' conduct, as evidenced by the content in the posts (and the statements of Riley Fenn) to have engaged in breaches of the Election Regulations.
7. The RO's application of the sanctions was based on the following.
"This is equivalent to the period campaigning was occurring before it was allowed to occur in accordance with Regulation 19.5."
8. Regulation 4.1.2 provides that the Returning Officer may decide on all matters not provided for in the Regulations. The conduct of informal groups of candidates and their supporters falls into the category of matters not provided for in the Regulations.
9. The removal of tickets from the Regulations is to remove ticket names and ticket voting from the ballot; and
10. Riley Fenn did not appeal the RO ruling pertaining to her.

The appeal is dismissed, and the RO ruling dated 2 October 2020 is upheld.

Election Tribunal
22 October 2020