

Decision Notice:
Reappointment Process for Board Members of a Public Body

Introduction

In February 2022, the Commissioner for Public Appointments received a complaint about two reappointments made by a Welsh Government minister to the board of a public body. A decision notice was originally issued in relation to that complaint in February 2023. The decision notice was withdrawn in October 2023, and is here reissued.

To preserve the anonymity of the complainant, this decision notice does not name the individuals or the body concerned.

The public body no longer exists, having been dissolved by the Welsh Government since the original complaint was made.

The Complaint

On 18 December 2021, a complaint was made to the Welsh Government about the reappointment of two members of the board of a public body. The complainant claimed that in making the reappointments, the relevant minister had breached the Principles of Public Appointments and the Governance Code on Public Appointments. The complainant made seven complaints:

1. The board members were not subject to a satisfactory performance appraisal, in contravention of the requirement set out in section 3.5 of the Code;
2. The reappointments were not made on merit, in contravention of Principle D of the Principles of Public Appointments;
3. The reappointments were not made in the public interest, in contravention of Principle B of the Principles of Public Appointments;
4. The minister did not consider whether those being reappointed were capable of meeting standards in public life, in contravention of section 9.1 of the Code;
5. The minister did not consider potential conflicts of interests which might have existed, in contravention of Principle C of the Principles of Public Appointments;
6. The reappointments breached the Equality Act, in contravention of Principle F of the Principles of Public Appointments and the Public Sector Equality Duty;
7. There was no public announcement of these reappointments, and no declaration of political activity by those reappointed, in contravention of Principle E of the Principles of Public Appointments, and sections 8.1 and 9.2 of the Code.

The Welsh Government rejected all of these complaints on 11 February 2022, explaining that there had been no breaches of the Governance Code.

On 14 February 2022, the complainant lodged the same complaints with the Commissioner for Public Appointments.

The Commissioner's Jurisdiction

Article 4 (4) of the Public Appointments Order in Council¹ makes provision for the Commissioner for Public Appointments to consider complaints.

The Commissioner may conduct an inquiry into the procedures and practices followed by an appointing authority in relation to any public appointment whether in response to a complaint or otherwise.

Section 4.4 of the Governance Code on Public Appointments² provides further guidance on how the Commissioner should treat complaints.

The Commissioner should consider complaints made about a public appointments process. Complaints should be raised with the appointing department in the first instance, which is responsible for having effective complaints handling procedures, for making applicants aware of their right to complain and for referring them to the Commissioner's complaints procedures. If, after investigation by the department, the complainant remains dissatisfied, they may bring their complaint to the Commissioner for Public Appointments.

These sections limit the Commissioner's powers in two ways:

1. He must be satisfied that the relevant appointing authority has had an opportunity to respond to the complaint before he considers it;
2. He may only consider complaints relating to the procedures and practices followed by an appointing authority.

Point 1

In this case, it is clear that the complainant did complain to the relevant appointing authority, the Welsh Government, and that the Commissioner did not consider the complaint until after they had an opportunity to respond.

Point 2

The point relating to 'procedures and practices' is more complex, and requires some explanation.

The principal effect of this point is to limit the Commissioner's powers so that he cannot consider the substance of a decision taken by an appointing authority, specifically whether it was 'right' or 'wrong'; his powers only permit him to consider whether the necessary steps were engaged before and after that decision was taken, not the decision itself. Scrutiny of the substance of a decision is reserved for the relevant legislature, in this case the Senedd Cymru, as described in Principle A of the Principles of Public Appointments:

The ultimate responsibility for appointments and thus the selection of those appointed rests with Ministers who are accountable to Parliament for their decisions and actions. Welsh Ministers are accountable to Senedd Cymru, Welsh Parliament.

¹ <https://papt-publicly-accessible-docs.s3.eu-west-2.amazonaws.com/Public-Appointments-Order-in-Council.pdf>

² https://assets.publishing.service.gov.uk/media/65c4f9a19c5b7f0012951b7a/governance_code_on_public_appointments.pdf

Some of the complaints raised here straddle questions of 'process' and 'substance', for example, that the appointing authority had not considered 'merit' in making the appointment. That complaint can be viewed both in terms of the process applied (i.e. was merit considered?), and in terms of the substance of the decision (i.e. were the board members sufficiently meritorious to be reappointed?). The established interpretation of the Commissioner's powers is that he can only consider the former question, not the latter, which would be reserved for the Senedd to consider.

Complaints 3, 4, 5 and 6 were not addressed in the previous decision notice because they were judged to be questions of substance and not process, and so fell outside the Commissioner's jurisdiction. The complainant challenged that part of the decision, which led to the complaint being reopened and reconsidered, on the basis that the Commissioner should consider them from a process-perspective.

Having reconsidered the complaints, the Commissioner accepts that they do fall within his jurisdiction, but with the important qualification described above, that he can only consider the process followed, and not the decision made. This has also caused him to reconsider his analysis of complaint 2, which did form part of his original decision, and his new decision is set out below.

Findings and Conclusions

Complaint 1

The board members were not subject to a satisfactory performance appraisal, per the requirement set out in section 3.5 of the Code;

The Commissioner's original inquiries revealed that when the reappointments were made, the public body did not have a formal performance appraisal process in place, but that Chair of the board had independently concluded that the performance of the relevant members was not satisfactory and that they should not be reappointed.

Welsh Government officials advised the relevant minister that, 'in the absence of agreed objectives against which to measure performance, or of consistent, documented performance discussions between Chair and Board members, it is difficult to arrive at an assessment which could be termed objective.'

In evidence provided to the Commissioner, Welsh Government officials clarified this point, explaining that 'as Board Members did not have agreed performance objectives, [the assessment by the Chair] could not be considered to constitute a formal assessment of performance, but it did offer an opportunity for members and the Chair to reflect on successes, as well as areas for development.'

In his original decision notice, the Commissioner agreed with this assessment, finding that the absence of a formal performance appraisal process did not preclude reappointments taking place, and that it was right for the relevant minister to consider a range of information, including the assessment of the Chair, in considering whether the requirement set out in section 3.5 had been met. The question as to whether the public body should have had a formal performance appraisal process prior to the reappointments taking place falls outside the Commissioner's jurisdiction.

The Commissioner confirms his original decision not to uphold this complaint.

Complaints 2, 3, 4, 5, 6

The reappointments were not made on merit, in contravention of Principle D of the Principles of Public Appointments;

The reappointments were not made in the public interest, in contravention of Principle B of the Principles of Public Appointments;

The minister could not be satisfied that those being reappointed were capable of meeting standards in public life, in contravention of section 9.1 of the Code;

The minister did not consider potential conflicts of interests which might have existed, in contravention of Principle C of the Principles of Public Appointments;

The reappointments were made in breach the Equality Act, in contravention of Principle F of the Principles of Public Appointments;

As explained above, the Commissioner's powers only extend so far as to look at whether these issues were considered by the relevant minister as part of the decision-making process, and not whether the minister made the 'right' or 'best' decision in finding that the board members were suitable for reappointment.

The Welsh Government provided copies of both the submission put to the minister prior to the decision being made, and the response to that submission, but neither addressed these issues in any detail. As a result, the Commissioner decided he should write to the minister and ask for an explanation as to whether they had considered questions of: merit and the public interest; if the candidates were capable of meeting the principles of standards of life; if any conflicts of interest existed; and the requirements of the Equality Act. The minister responded, and confirmed that they had.

The only other information available to the Commissioner in considering these complaints was an assertion made by the complainant that it would have been perverse for the minister to have taken these points into account and still made the reappointments. The complainant explained that in his opinion there are clear reasons why the candidates were not meritorious, incapable of meeting standards in public life, subject to conflicts of interest etc. Because this argument is focused on the substance of the minister's decision, and not the steps followed in making it, it cannot form part of the Commissioner's consideration of these complaints. Any questions relating to the merits of the Minister's decision are rightly reserved for the Senedd.

In the light of the assertion from the minister that they did comply with Public Appointments Principles B, C, D and F, and section 9.2 of the Governance Code, by considering merit, the public interest, standards in public life, conflicts of interest and equality, and in the absence of any evidence to the contrary, the Commissioner does not uphold these complaints.

Complaint 7

A public announcement of these reappointments, including a declaration of any political activity by those reappointed, in contravention of Principle E of the Principles of Public Appointments, and sections 8.1 and 9.2 of the Code.

The Welsh Government accepts both that the reappointments were not publicly announced and that there was a failure to publish details of the significant political activity for one of the reappointees. The reason given for these failures was a lack of resources to complete this work within the relevant parts of the Welsh Government at that time. The Commissioner therefore finds that Principle E and sections 8.1 and 9.2 of the Code were breached and upholds this complaint.

Recommendations

In his original decision notice, the Commissioner sets out the following remedial measures, which the Welsh Government have subsequently confirmed that they have complied with:

- The Welsh Government to apologise to the complainant in writing for not addressing their concerns regarding the breaches identified in relation to Complaint 7 (above).
- The Welsh Government to share the key lessons learned from this case across its ALBs, including the importance of robust performance appraisals for Board members and the requirement to ensure a robust ALB governance model.

The Commissioner makes no further recommendations in this revised decision notice.