BEFORE THE BISHOP'S DISCIPLINARY TRIBUNAL FOR THE DIOCESE OF CHICHESTER
IN THE MATTER OF A COMPLAINT UNDER THE CLERGY DISCIPLINE MEASURE 2003

THE VENERABLE MARTIN WILLIAMS

- and -

THE REVEREND AB
(by his Litigation Friend CD)

DETERMINATION OF A PRELIMINARY ISSUE

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1. This is the determination of a preliminary issue brought before this Tribunal at a hearing on 20 May 2021. This hearing presents novel, complicated and, as far as we are aware, previously unaddressed issues around the approach to the question of a respondent's capacity in clergy discipline proceedings. We have provided full reasons in this decision in the hope that it will assist future tribunals facing this issue. The purpose of this preliminary issue hearing was to determine both the capacity of the Revd AB to participate in the proceedings and arguments concerning whether there has been an abuse of the Tribunal's process. In essence, we are asked to determine the appropriate future conduct of the proceedings.

The factual background

2. This case concerns a complaint brought against the Reverend AB ('the Respondent') by the Archdeacon of Brighton and Lewes ('the Archdeacon') arising from allegations made against him by Mrs EF and Mrs GH concerning events dating between 2015 and 2017. It is alleged that during that period the Revd AB had an inappropriate intimate relationship with Mrs EF and harassed Mrs GH and engaged in non-consensual sexual touching of her. Although the complaint is brought by the Archdeacon of Brighton and Lewes, by agreement Mrs EF and Mrs GH were referred to as 'the Complainants' at the hearing on 20 May 2021 and, for reasons of clarity, we have continued to use that nomenclature in this decision.

3. This case has a lengthy and complex history. On 17 March 2017 the Archdeacon met with the Complainants to hear their concerns and experiences. He was sufficiently concerned by what he heard to bring a complaint in Form 1a dated 22 March 2017. Not long before that, in January 2017, the Respondent had suffered a series of strokes over a period of about three days. He unsuccessfully attempted to return to work in March 2017 but since that time he has not exercised his ministry as a result of his ill-health, taking medical retirement from his parish in October 2017.

4. Although no criminal proceedings were instituted in relation to the allegations made by the Complainants, in May 2017 the Respondent was charged with 3 criminal offences in relation to allegations made by others relating to events in 1992/3 and 2001/2. In February 2019 those charges were the subject of a five-day trial in the Crown Court which resulted in a hung jury. Measures were put in place during that trial to accommodate the Respondent's ill-health. After that trial two medical reports were prepared for the Crown Court by Dr Diana Coffey, Consultant Psychiatrist, addressing the Respondent's capacity to stand trial at the retrial. After consideration of those medical reports the Crown Prosecution Service decided to offer no evidence at the Respondent's retrial and not guilty verdicts were accordingly entered in July 2019.

5. The Archdeacon's complaint against the Respondent had been stayed by the Bishop pending the outcome of the criminal proceedings. That stay was lifted in November 2019 and the complaint was progressed. After some delay, the matter was referred for formal investigation in May 2020. That investigation was concluded in July 2020 and on 6 August 2020 the Deputy President of Tribunals decided to refer the complaint to a Tribunal. Throughout this period, although the Respondent's solicitors corresponded on his behalf, he did not respond to the substance of the complaint, his solicitors having written indicating that he was unable to respond given his medical condition. Delays related to staff sick-leave caused by Covid-19 meant that that Decision was not sent to the Respondent's solicitors until 30 October 2020. On 11 November 2020 the Respondent's solicitors applied to the President of Tribunals under section 18 of the Clergy Discipline Measure 2003 ('the Measure') for an order that the complaint be withdrawn on the basis that the Respondent lacked capacity to answer the complaint, that there had been excessive delay and that pursuit of the complaint was not proportionate. The Deputy President again dealt with the matter and on Christmas Eve last year declined to determine the application, indicating that the matter should be dealt with by the Chair of the Tribunal and that the section 18 power to order the withdrawal of the complaint was not properly to be used where a case has already been remitted to a Tribunal. The Tribunal Chair was appointed in late February 2021 and on 26 March 2021 a case management hearing took place before the Chair in order to determine how the matter should progress.

The case management hearing

6. At that hearing it was common ground between the parties that the issue of the Respondent's capacity to respond to the complaint should be determined as a preliminary issue. Submissions were made about whether the issues of the Respondent's capacity and whether there had been an abuse of process could be determined by the Chair alone or whether the full Tribunal should be convened to determine those issues. Section 18(3)(b) of the Measure requires that in these proceedings "the determination of any matter before the tribunal or court shall be according to the opinion of the majority of the members thereof…". Nevertheless, provision is made for the procedural management of the proceedings by the Registrar of Tribunals or by the Chair sitting alone. In particular, under rule 30(2) of the Clergy Discipline Rules 2005 ('the Rules') the Registrar of Tribunals "may at any stage refer

any matter of difficulty or dispute to the Chair". Rule 33 (1) states that "[d]irections may be given in respect of all procedural matters". The Chair, therefore, had to decide whether the issue of the Respondent's capacity amounted to the determination of an issue before the Tribunal or whether it was simply a procedural matter. Given the need for the careful consideration of evidence and the consequent finding of fact required in order to decide the issue of the Respondent's capacity, the Chair decided that this was not merely procedural, could not be determined by her sitting alone, but rather was "the determination of [a] matter before the tribunal" requiring the convening of a full Tribunal under section 18 (3)(b) of the Measure. Given the overlap in issues between the Respondent's capacity and whether there had been an abuse of process, that matter was also referred for determination at the preliminary hearing before the Tribunal. Directions were giving for the swift convening of a Tribunal and the preliminary issues were set down to be determined at the hearing on 20 May.

Appointment of a litigation friend

7. The issue having been raised at the case management hearing, on 30 March 2021 the Respondent's solicitors applied for the appointment of CD as his litigation friend. There is no express power under the Rules for the appointment of a litigation friend. Nevertheless, as mentioned above, the Chair does have broad power under rule 33 to make directions "in respect of all procedural matters". In *Jhuti v Royal Mail Group Ltd and ors* [2017] UKEAT/0061/17/RN, an appeal to the Employment Appeal Tribunal, Simler J said at paragraphs 21 and 22 of the judgment:

> "Rule 29 of the 2013 Rules empowers employment tribunals to make case management orders at any stage of the proceedings… Case management orders are widely defined as including any order or decision of any kind in relation to the conduct of proceedings… Furthermore, Rule 29 is to be interpreted in accordance with the overriding objective, as the 2013 Rules make clear. That includes dealing with a case fairly and justly and so far as practicable ensuring that the parties are on an equal footing. To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation is tantamount to continuing a hearing in that party's absence and flies in the face of a Rule designed to ensure so far as practicable that parties are on an equal footing."

She went on to say, at paragraph 32 that:

> "…whilst there is no express power provided by the Employment Tribunals Act 1996 or the 2013 Rules made under it, the appointment of a litigation friend is within the power to make a case management order under the 2013 Rules as a procedural matter in a case where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice…"

8. The Chair determined that the principles applied in the *Jhuti* case were equally applicable in relation to the provisions of the Measure and the Rules; the broad procedural power to give directions under rule 33 was in all materials respects

equivalent to the provisions of Rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the overriding objective set out at rule 1 of the Rules reflects that applicable in employment proceedings. Accordingly, the Chair has power under rule 33 to appoint a litigation friend where appropriate.

9. Although Part 21 of the Civil Procedure Rules 1998 does not apply in a Bishop's Disciplinary Tribunal, the Chair sought to draw on the provisions of CPR 21.4 by analogy when considering the question of the appointment of a litigation friend within Tribunal proceedings. She required evidence from the proposed litigation friend (in this case, CD) that she:
    a. Consents to act as litigation friend for the Respondent;
    b. Can fairly and competently conduct proceedings on behalf of the Respondent; and
    c. Has no interest adverse to the Respondent.

    That evidence was provided and, given the lack of objection from the Designated Officer, the concerns about the Respondent's capacity arising from the medical evidence filed with the Tribunal and the enjoinder in rule 1 of the Rules that the parties should be treated on an equal footing procedurally an order was made appointing CD as the Respondent's litigation friend.

The preliminary issues hearing

10. On 20 May 2021 the full Tribunal was empanelled to determine the preliminary issues relating to:
    a. The capacity of the Respondent; and
    b. Whether there has been an abuse of process.

    The Designated Officer, Mr Dobson, appeared on behalf of the Archdeacon and the Respondent was represented by Counsel, Mr Foster. The hearing took place virtually on Microsoft Teams. We are enormously grateful to both advocates for their assistance in clarifying the issues in what has been a difficult determination.

The capacity of the Respondent to conduct proceedings

11. The Measure, the Rules and the Clergy Discipline Measure Code of Practice 2003 ('the Code of Practice') make no provision for what happens when a respondent lacks the capacity to conduct proceedings, although provision is made for the proceedings to be automatically terminated if the respondent dies (Rule 54). This is in contrast to the specific provision made in the event of the death or incapacity of a complainant or Tribunal member under rules 52 and 55 to 57. Whether this lacuna in the Measure was intentional or an oversight is not clear to us, but whatever the reason it needs to be addressed in this case. To the best of our understanding (and that of Counsel appearing before us) this issue has not been addressed by a Tribunal before now.

12. Although the parties disagree on the issue of whether the Respondent has the capacity to conduct these proceedings, there is much common ground between them concerning the law on that issue. It seems to us that disciplinary proceedings are a

sort of hybrid which sit somewhere between the spheres of criminal and civil litigation. Useful assistance was drawn from both spheres to assist us in our determination.

13. Having heard argument from the parties we find that the following principles should apply in determining whether a respondent in disciplinary proceedings lacks capacity to conduct those proceedings:
    a. A respondent is presumed to have capacity to conduct the proceedings. The burden lies on him or her to prove otherwise on the balance of probabilities.
    b. A respondent's capacity or otherwise is to be judged in relation to the decision or activity which is required to conduct the proceedings, and not globally (see *Dunhill v Burgin* [2014] UKSC 18).
    c. Although these proceedings are not criminal proceedings, assistance in identifying the relevant "decision or activity" can be drawn from the criminal decisions of *R v Pritchard* (1836) 7 Carrington & Payne 303 and its application in the modern decision of *R v John M* [2003] EWCA Crim 3452.
    d. Specifically, in order to conduct proceedings a respondent must be able to do each of the five things listed below (adapted from the questions in *R v John M* to fit the parameters of the disciplinary process); if we are persuaded, on the balance of probabilities, that he or she is unable to do any one of these things then we must find that they lack the capacity to conduct proceedings: (1) understand the complaints made against them; (2) decide whether to make admissions in relation to the complaints; (3) instruct solicitors and/or counsel; (4) follow the course of the evidence; and (5) give evidence in his or her own defence.
    e. In determining whether a respondent has capacity to conduct proceedings, account must be taken of all special measures and assistance that might be available to aid the respondent in his or her function and understanding.
    f. In determining whether a respondent has capacity the Tribunal must rigorously examine the evidence available to it and reach its own conclusion on the facts (see *R v Walls* [2011] EWCA 443).

14. In this case, the Respondent relies upon three reports of Dr Diana Coffey, Consultant Psychiatrist dated 26 April 2019, 10 May 2019 and 28 April 2021 respectively. As will be apparent from their dates, the first two reports were those prepared for the Respondent's retrial in the Crown Court. The third was prepared specifically for this Tribunal. It is argued on behalf of the Respondent that those reports prove that he cannot do the things listed at (1) to (5) in paragraph 13 d. above. Mr Dobson argues that these reports are insufficient to discharge the burden upon the Respondent to prove his incapacity, particularly when account is taken of the various available accommodating measures which can be taken to ameliorate the situation.

15. We were taken through the medical reports in careful detail. Mr Dobson pointed out that there has never been any judicial determination of the question of the Respondent's incapacity. The 2019 criminal proceedings were abandoned when the Crown offered no evidence, not as a result of a judicial determination that such proceedings could not be pursued. We accept this. Whereas it seems unlikely that the Crown Prosecution Service would have offered no evidence in response to the filing

of the medical reports unless they had been satisfied that the Respondent lacked the capacity to proceed, we have nevertheless subjected the evidence to the rigorous scrutiny referred to in the ***Walls*** case in reaching our own decision about whether the Respondent has discharged the burden of proof which rests upon him.

16. Dr Coffey is an undoubted expert in her field. Her expertise and the substance of her evidence was not challenged by Mr Dobson; rather, he argued that her evidence was insufficient to discharge the burden on the Respondent to prove that he lacked capacity. Dr Coffey's reports rely not only upon her own interview and assessment of the Respondent, but also upon reports, correspondence and assessments by various other experts such as an occupational therapist, a chartered psychologist, a consultant neurologist and the court intermediary.

17. In her reports Dr Coffey concludes that the Respondent is suffering from significant cognitive difficulties as a likely result of the two strokes in January 2017 and also from severe depression and anxiety with suicidal ideation. The evidence is clear that his neurological functioning and condition will not improve and is very likely to deteriorate. His depression, however, has been affected by the prospect of ongoing proceedings and is the subject of ongoing management through antidepressant treatment. In her most recent report Dr Coffey speaks of "an overlap of significant depressive symptoms and cognitive problems". It is not clear to us what the impact of the cessation of proceedings would have on his depressive state.Much was made in submissions about the fact that the earlier two reports were written two years ago and in relation to a different type of proceedings. We have been mindful these factors. In the earlier reports Dr Coffey states that:

> "In my opinion Mr AB is unable to understand the course of proceedings at the trial so as to make a proper defence; he is unable to give adequate instructions to his legal advisers…no further improvement in Mr AB's neurological condition or functioning is expected…It is very likely that his condition will progress to dementia." (Report of 26 April 2019)
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> "I would like to express significant concerns about the reliability of his evidence during cross-examination because it is very likely that at the time of his cross-examination in February 2019 Mr AB already had significant memory impairment that affected his recall and ability to process the relevant information." (Report of 10 May 2019)

18. Much was also made of the difference in language used in the most recent report. In the 2021 report on two occasions Dr Coffey indicates that the Respondent "will struggle" (to understand and respond to the allegations; and to understand written and oral evidence due to his cognitive problems). This contrasts with her earlier opinion set out above that he was "unable" to follow the course of proceedings, to understand or recall what was happening and to make a proper defence. It is said that that change in language means that the Tribunal cannot be satisfied that the Respondent currently lacks the relevant capacity.

19. As an expert witness of almost 20 years' experience, Dr Coffey will not have chosen the language used in her reports casually. This has caused us, once again, to review the medical evidence in careful detail. There are parts of the reports where the language does indeed seem to fall short of establishing the requirement that the Respondent is unable to fulfil those functions listed at paragraph 13 d. above, but in our careful scrutiny we have also noted that Dr Coffey's language is less ambiguous elsewhere in her 2021 report. In particular, she states:

> "Furthermore, if Mr AB were put in front of the Tribunal, he would not be able to provide meaningful or reliable answers because he would not understand what he was asked and potentially provide inconsistent responses." (our emphasis)

Also, having used the clear language of 'inability' in the earlier reports, she confirms repeatedly in her 2021 report that when reviewed in August 2020, 15 months after the initial reports, the Respondent continued to present with significant cognitive problems without any sign of improvement. This accords with her initial opinion, repeated in the report of April 2021, that:

> "individuals with this level of cognitive impairment continue to deteriorate. It is very likely that his condition will progress to dementia…it is very unlikely that his condition will improve. Unfortunately, it is likely that the situation will deteriorate."

and

> "During his review in August 2020, there was no evidence of any improvement in his cognitive functioning or the level of his depression. Therefore, my opinion remains as stated above in that it is very unlikely that his condition will improve. Unfortunately, it is likely that the situation will deteriorate."

20. It is important that it was also highlighted in Dr Coffey's April 2019 and April 2021 reports that the Respondent:

> "has also completed a Paulhus Deception Scales. This was part of the psychological assessment by Dr Hale as summarised in his report. Mr AB had a normal result which indicated that he was not deliberately trying to influence the results of the tests. To explain it in simple terms, this means that he was not malingering his symptoms of cognitive and functional impairment."

21. Having carefully considered the detail of the three medical reports provided, we have concluded that the evidence shows that the Respondent, as things stand, has discharged the burden on him to prove, on the balance of probabilities, that he lacks the capacity to conduct these proceedings. In particular, it shows that he cannot follow the course of the evidence or give evidence in his own defence. Having determined that the Respondent has discharged this burden of proof, we have gone

on to consider whether special measures could be put in place to remedy his lack of capacity.

Special measures

22. Various special accommodations were suggested in argument to address the Respondent's difficulties including: the provision of cross-examination questions in advance; the use of simple language; extra time; and the use of an intermediary to facilitate communication. We are mindful of the fact that such special measures were put in place during the Respondent's Crown Court trial, the detail of which is set out in the skeleton argument of Mr Foster at paragraph 18 - including the appointment of an intermediary, adaptation of questioning style, use of simpler language, efforts to keep the courtroom quiet and still and the taking of frequent breaks. Although Dr Coffey was not asked expressly to comment on the impact of such special accommodations in her most recent report, it is clear from paragraph 3.1 of Dr Coffey's first report that she was fully aware of the measures recommended in the Crown Court as she had been provided with the Assessment and Recommendations of the Intermediary who was appointed in those proceedings. The knowledge of those measures did not prevent her from concluding in both her 2019 and 2021 reports that the Respondent lacked the necessary capacity.

23. It has been argued that Tribunal proceedings are different in nature to a Crown Court trial and that that, together with the ability of the Tribunal to appoint a litigation friend, means that the Respondent cannot be said to lack the necessary capacity. Whereas the appointment of a litigation friend can be (and indeed no doubt has been) of enormous assistance in the provision of instructions for the manner in which these proceedings have progressed, including the arguing of these preliminary issues before the Tribunal, it is in the nature of these particular allegations that the appointment of a litigation friend – whether CD or another person – cannot address the Respondent's inability to answer the complaint or give evidence in his own defence. A litigation friend cannot assist the Respondent by giving instructions on the material facts in this case. Equally, the relatively less formal setting of the Tribunal does not assist in this case, particularly when viewed against the accommodations which were put in place in the Crown Court trial. These proceedings are still essentially adversarial in nature and involve the Respondent in answering the allegations put by way of direct evidence and questioning.

24. Having considered the special measures proposed, we are of the view that, although they would make the proceedings easier for the Respondent, they would not address his inability to follow the course of the evidence or give evidence in his own defence. As referred to above, it is in the nature of the allegations in this matter that the majority of the most serious allegations took place in private when only the Respondent and the relevant Complainant were present. If the Respondent is unable to give evidence about the instances alleged then he cannot fairly be tried. We find that he lacks the relevant capacity to conduct these proceedings.

25. This has not been an easy decision to make. We are acutely aware that this decision will have enormous consequence for both the Complainants and the Respondent and that it has been made on the basis of the evidence of a single witness, albeit with reference to the reports of others. We have absolutely no reason to doubt the expertise and competence of Dr Coffey – it was not challenged and she is undoubtedly eminent in this field, but we are mindful of the requirements of the Criminal Procedure (Insanity) Act 1964 when broadly similar decisions are being made. Section 4(6) of that Act requires that "[t]he court shall not make a determination [of the question of the fitness to be tried] except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved". There is no such requirement in the Measure or Rules (largely because, as noted above, they do not address the issue of the capacity of a Respondent at all) and as such the Respondent cannot be criticised for failing to produce a second medical opinion. We would, nevertheless, encourage those who are part of the current review of the Measure and Rules to consider whether such a requirement would be appropriate under any new rules. Although on the evidence before us we are satisfied that the Respondent has discharged the burden of showing on the balance of probabilities that he lacks the capacity to conduct proceedings, the importance of the issue means that the existence of a second medical opinion could have lead us to a more confident conclusion in this case.

26. The question then arises of how the matter should progress.

A trial of the facts

27. Mr Dobson raised for the first time in his skeleton argument at the preliminary issue hearing the argument that, if the Tribunal is satisfied that the Respondent lacks the capacity to conduct the proceedings, it should nevertheless order a trial of the facts to determine whether the incidents alleged in the complaint did in fact occur. It is said that such an approach would serve the public interest by ensuring a determination of serious allegations against a priest who was at the time in public ministry and would further the overriding objective of the Rules by allowing the Complainants to give their evidence, thereby treating them fairly and justly.

28. The legal basis for this approach, which as far as we are aware is novel and has not been used before, is by the drawing of an analogy between these proceedings and the criminal context. In the criminal courts, under section 4A of the Criminal Procedure (Insanity) Act 1964, where a court has determined that a defendant lacks capacity, the jury shall nevertheless go on to determine whether they are satisfied that the defendant did the act or made the omission charged against him. Section 5 of that Act makes clear that if such findings are made, the court must make either a hospital order, a supervision order or an absolute discharge in relation to those findings. So, can and should such a procedure be imported into the jurisdiction of the Tribunal?

29. It is of note that the wording of section 4 of the Criminal Procedure (Insanity) Act 1964 speaks of "any disability such that <u>apart from this Act</u> it would constitute a bar to [the defendant] being tried". It is clear from that wording that without the provisions of

the 1964 Act the defendant's disability would prevent this issue being tried. In other words, the creation of the 1964 Act was required before the fact finding process it establishes could be undertaken. There are no such statutory provisions within the Clergy Discipline Measure.

30. The purpose of the 1964 Act is plain. If a defendant in criminal proceedings is under a disability such that he cannot be tried, something may need to be done to ensure the safety of the public even if the defendant's disability means that he cannot fairly be found to be responsible for his actions. There has been no question of whether the Respondent had capacity at the time of the events alleged. Rather, it is the case that the Respondent's current lack of capacity means that there cannot be a fair trial. The purpose of the Measure is to identify and penalize the personal misconduct of clerks in Holy Orders. In the wider context of the Church of England mechanisms clearly do exist for the management of any risk that a respondent may pose within the Church. Diocesan safeguarding processes will be engaged; Safeguarding Risk Assessments would be directed and risks managed in that way. There are powers and duties to ensure the safety of those within the Church, but those powers and duties are not found within the Clergy Discipline Measure.

31. In relation to the Respondent in particular, we are told that he is already on the Archbishop's List maintained under section 38 of the Measure as a list of those clerks in Holy Orders who may present a safeguarding risk. Further, the details of this complaint will be on his Clergy Personal File (his 'blue file'). The safeguarding risk assessment process is in place to ensure that any risk to safety which may be presented by the Respondent is avoided.

32. The Tribunal undoubtedly has a wide discretion to determine "any matter" before it under section 18 of the Measure, but we do not think that that can be so broadly read as to provide a jurisdiction to conduct the sort of fact finding exercise which is proposed. The Tribunal is a creature of statute and has no inherent powers which are not provided under the Measure creating it. Clearly it is possible to construe the Measure and the Rules in a broad way, but to adopt the procedure set out in the 1964 Act would be to import a process foreign the disciplinary process based upon a statute which is not applicable in that context.

33. In fulfilling its purpose of identifying and penalising personal misconduct in a clergyperson, the Tribunal must have regard to the overriding objective set out at rule 1 of the Rules – the proceedings must be dealt with "justly, in a way which is fair to all relevant interested persons and proportionate to the nature and seriousness of the issues raised". Under rule 1(a), "the complainant and the respondent shall be treated on an equal footing procedurally". To pursue a fact finding hearing in this case when the Respondent lacks capacity to answer the complaint would fail to treat the parties on an equal footing.

34. Mr Dobson directed our attention to the wording of section 19 of the Measure which makes clear that the imposition of a penalty upon a finding by the Tribunal that the Respondent committed the misconduct complained of is discretionary. On that basis

he submits that it would be an acceptable route for the Tribunal to take, upon the making of a finding of fact that the Respondent committed the alleged acts, not to impose a penalty in light of the fact that the Respondent was unable to take part in those proceedings. It seems to us that the effect of the Respondent's lack of capacity is that it would simply not be possible, with allegations of this nature, fairly to make any findings of fact. In the circumstances of this case, where the Respondent is unable to engage in the proceedings as necessary, any finding of fact at a hearing in which he is unable to give evidence or any imposition of a penalty on the basis of those facts would clearly be unjust and would amount to a breach of his Article 6 right to a fair trial.

35. We have struggled to reach this decision. We acknowledge as deeply unsatisfactory the absence of any method or procedure under the Measure to allow the Complainants in this matter to be heard in circumstances where, through no fault of their own, the Respondent has lost the capacity to conduct the proceedings. In such circumstances a complainant is deprived of her opportunity to be heard and the truth established. The lack of any explicit procedural rules addressing the issue of how a respondent's incapacity should be dealt with within proceedings is a significant gap in the current Rules which has left all persons in this case in a situation of uncertainty. The lack of procedural clarity is likely to have added to the delay in progressing this matter. We would urge those applying their minds to the current review of the Clergy Discipline Measure to address this issue in any new revision of the Measure and Rules.

Abuse of Process

36. As well as his arguments about capacity, Mr Foster for the Respondent argued that these proceedings should, in any event, be stayed for an abuse of process. That argument was based on arguments of delay and proportionality.

Delay

37. The Form 1a complaint in this case is dated 22 March 2017. That is now more than four years ago. We are grateful for the detailed chronology which was agreed between the parties and formed part of the bundle before the Tribunal. The Respondent argues that this delay means that to continue this complaint would amount to an abuse of the process of the Tribunal.

38. It is common ground that the Tribunal has jurisdiction under its wide procedural powers under rule 33 to prevent its procedures from abuse by ordering a stay in an appropriate case. Such an order will only exceptionally be appropriate. It is also common ground that in order to assess whether any delay is such as to give substance to the abuse of process argument, the Tribunal must examine not only the reasons for the delay but also the impact of that delay.

39. In order to assess the reasons for the delay, we must first determine with which period of delay the Tribunal is concerned. Submissions were made by Mr Dobson that the appropriate date from which any period of delay should be calculated is the date that

the matter was referred to the Tribunal by the (Deputy) President and the wording of the complaint formulated – in this case, 6 August 2020. In the alternative, he argues that time should be calculated from the date of the commencement of the Designated Officer's investigation - here 5 May 2020. Mr Foster for the Respondent argues that it is the date of the Form 1a complaint which should start time running.

40. Mr Dobson relied upon the European Court of Human Rights decision of *Guisset v France* (2002) 34 EHRR 47 which decided that time should be calculated for purposes of the right under Article 6 of the ECHR to a fair and public hearing within a reasonable time (our emphasis) from the date of 'charge', hence his argument that time should only be calculated from 6 August 2020. Our attention was also drawn to the alternative proposition that the investigative period should also be included in our calculations under the common law in the textbook extract from *Disciplinary and Regulatory Proceedings (Foster et al, 10th edn, 2019)* at para 7.72.

41. The abuse of process arguments are not, here, founded exclusively upon the suggestion that proceedings have not been brought within a "reasonable time" under Article 6, but include the wider common law concept of delay. Looking specifically at the provisions of the Measure and Rules which create the processes which we are concerned to protect, it is clear that those provisions create a whole scheme for the management of disciplinary complaints against the clergy. We do not think that it is fair or appropriate to limit the consideration of the Tribunal only to that part of the process which post-dates a referral to the Tribunal or the beginning of an investigation by the Designated Officer when considering whether there has been such significant delay such that it would amount to an abuse of the process of the Tribunal to continue with the matter. The question for the Tribunal on this point is whether the delay has been such as to render a continuation of the complaint unjust. To limit the matters which the Tribunal can take into account in determining that question to only that later part of the process which is set out in the Measure and Rules as a whole would not further the overriding objective of justice and proportionality. We are mindful of the fact that the Measure contemplates the suspension of a respondent from their duties in an appropriate case at the very early stages of the disciplinary process, with all the consequential prejudice to the respondent of that step.

42. Accordingly, we have concluded that the appropriate date from which to calculate time for the purposes of delay is the date of the Form 1a complaint. We note that rule 9 of the Rules refers to "the date when proceedings were instituted, which is the date that the complaint was received". It is the receipt of the Form 1a complaint which is the catalyst for the various timescales imposed within the Rules[1], which clearly anticipate the timely conduct of matters from that date.

43. Applying this decision to the facts of this case, as mentioned above, we must consider both the reasons for and the impact of the delay since 22 March 2017. Here, it is accepted that a significant amount of the delay in this case was caused by the need to await the outcome of the criminal proceedings. It is accepted that this was appropriate

[1] See, for example, rules 7(3), 9(2), 12(1), 28(5) and 29(1).

and no issue is taken with that element of the delay. The outcome of the criminal proceedings was notified to the Diocese in early July 2019. Concern is raised about the 22-month period it has taken from July 2019 to the determination of the issue of the Respondent's capacity.

44. It is clear that there are various reasons given for the delay over that period. Some of the delay was caused by staff ill-health as a result of the current global pandemic; some was caused by the decision of the Bishop to seek the advice of the President over the issue of capacity. The reasons for other periods of delay are less obvious. It is certainly clear that there has been significant and unacceptable delay in this case. A process which was envisaged by the Measure to take six months (from preliminary scrutiny to referral to the Tribunal) has taken almost three times that long. This is deeply unsatisfactory for all concerned in the proceedings, including the Complainants and the Respondent. We are not satisfied that all of the delay in this case has a good reason.

45. Nevertheless, we are required not only to consider whether there is a good reason for the delay, but also what the impact of that delay has been. We accept Mr Dobson's submission that a stay for abuse of process on the grounds of undue delay should rarely, if ever, be granted unless that delay has been shown to have caused serious prejudice to a respondent such that no fair trial can be held.

46. It is said that the delay has caused serious prejudice to the Respondent in that his health is deteriorating and any delay affects his ability to answer the allegations made against him. It is further submitted that the lengthy delay places additional stress and pressure on the Respondent to the detriment of his health such that he is at increased risk of attempting suicide. Having carefully reviewed the evidence of Dr Coffey in relation to the Respondent's neurological condition and taken account of the approach of the Crown Prosecution Service in the criminal proceedings it is clear that the Respondent lacked the capacity to conduct these proceedings before any of the delay complained of occurred. Although Dr Coffey is clear that the Respondent's condition is a deteriorating one – his neurological difficulties will only get worse – there is no direct evidence that his condition has in fact deteriorated between July 2019 and now. We cannot be satisfied on the evidence available that as a result of the delay there has been a deterioration in the Respondent's condition so as to seriously prejudice him in his ability to answer the complaint. Although we accept the evidence that the ongoing prospect of delayed proceedings has had an impact on the Respondent's depression and anxiety, we do not consider that the evidence provided reaches the high threshold which must be discharged if an abuse of process is to be established of showing that a fair trial can no longer take place as a result.

Proportionality

47. As already mentioned, the overriding objective of the Rules is to ensure that proceedings are "dealt with justly, in a way that is both fair to all relevant persons and proportionate to the nature and seriousness of the issues raised". That includes applying the principle that undue delay and undue expense are to be avoided.

48. Mr Foster also argues that these proceedings are an abuse of process because they are disproportionate and are causing undue expense given the fact that in all practical senses the Respondent's ministry is over. He points to the maximum penalty which the Tribunal could impose – one of prohibition for life – and argues that that would make no practical difference to the current reality of the Respondent's situation. The Respondent accepts that he will never minister in the Church of England again. His current capacity means that returning to ministry is impossible. The medical evidence is clear that the Respondent's condition is a deteriorating one. He will never recover. Significantly, even if, contrary to the evidence we have seen, the Respondent did recover capacity sufficiently to return to ministry at some point in the future no bishop would be able to authorise his return to ministry without an independent safeguarding risk assessment in light of the fact that his name is on the Archbishop's List and the fact that this complaint will sit on his blue file.

49. We do not accept the argument that these proceedings are so disproportionate and costly as to render them an abuse of the Tribunal's process. The Clergy Discipline jurisdiction applies to all clerks in Holy Orders, regardless of whether or not they are in active ministry. Although in the case of this Respondent the practical impact of any penalty imposed is unlikely to be significant for the reasons given above, it is nevertheless right that the imposition of a penalty is a public statement of the Church's response to a finding of misconduct which will be of real significance to the Complainants, the wider Church and the public at large. These are serious allegations of sexual misconduct which must be treated accordingly. The prosecution of such a complaint in these circumstances cannot be said to be an undue expense or disproportionate so as to amount to an abuse of the Tribunal's process.

Conclusion

50. It will be apparent from the above that we do not accept the Respondent's argument that the issues of delay and proportionality in this case mean that to continue with the proceedings would be an abuse of the Tribunal's process. We are nevertheless, satisfied on the balance of probabilities that, on the evidence before us, the Respondent lacks the capacity to conduct these proceedings. In line with the overriding objective, it would accordingly be unjust and contrary to his Article 6 right to continue with the proceedings.

51. We are acutely aware that there are two women in these proceedings who will be left, through no fault of their own, with their complaint undetermined. Whilst it has been made clear to us that the Respondent will never return to public ministry, our inability to determine the complaint is a deeply unsatisfactory state of affairs. We have no doubt that the lack of any explicit process within the Measure or Rules for the determination and management of the issue of the Respondent's capacity will have added to the delay in reaching this stage, not least by the understandable referral by the Bishop to the President of Tribunals for directions in December 2019. This will undoubtedly have added to the stress and distress of all concerned. As mentioned above, the Clergy Discipline Measure is currently the subject of substantial scrutiny

and review and a new Measure and reformed process is anticipated. We would urge those concerned in those efforts to take steps to clarify and address the manner in which issues around a respondent's capacity should be managed and, where appropriate, determined within the earliest possible stages of proceedings.

52. There was discussion at the hearing about the appropriate order for the Tribunal to make in the event that proceedings were not to progress beyond this issue – whether the proceedings should be dismissed or stayed or whether there should simply be a statement from the Tribunal that the matter can go no further. We make it abundantly clear that it would be entirely inappropriate to dismiss these proceedings. There has been, and will be, no finding of the truth or otherwise of these allegations. To dismiss the complaint would be to suggest that the complaint was not made out or somehow should not have been brought. That is not the case here. Instead, we order that these proceedings should be stayed as it is not possible to progress matters further given the Respondent's lack of capacity. No determination has been made on the substance of the complaint and it will remain on the file. In the unlikely event that the Respondent should regain capacity in the future, this complaint can be brought back before the Tribunal for determination.

Dated this 2nd day of June 2021

The Worshipful Canon Ruth Arlow, Chair of Tribunal
Mrs Caroline Babb
The Venerable Richard Brand
The Revd Canon Anna Eltringham
Dr Michael Todd