

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE
UNDER SECTION 108A(1) OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

MR T SAVAGE

v

UNION OF SHOP, DISTRIBUTIVE AND ALLIED WORKERS

Date of Decision:

13 November 2009

DECISION

Upon application by Mr Savage (“the Claimant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

I refuse to make the declaration sought by the Claimant that on or about 16 February 2009 the Union of Shop, Distributive and Allied Workers breached rule 9(6) of its rules by the election to its Executive Council of two members from the same branch, one as President and the other as a Divisional Representative.

REASONS

1. Mr Savage is a member of the Union of Shop, Distributive and Allied Workers (“the Union”, or “USDAW”). By an application received in the Certification Office on 11 June 2009, Mr Savage made allegations against his Union arising from the ‘President and Executive Council’ elections held in 2009. The complaint was confirmed by Mr Savage in the following terms:-

“that on or about 16 February 2009 the union breached its rule 9(6) by allowing both Mr J Broome and Mr K Davies to take seats on its Executive Council, despite them both belonging to the Boots Logistics (Nottingham) Branch.”

2. I investigated the alleged breach in correspondence. A hearing took place on 22 October 2009. At the hearing, Mr Savage represented himself. He did not submit a witness statement or skeleton argument. The Union was represented by Ms K O’Neill, Head of Legal Services for the Union. Evidence for the Union was given by Ms T Wilcox, Head of Administrative Services, and Mr J McGarry, Executive and Administration Officer, who each submitted a written witness statement. A 217 page bundle of papers was prepared for the hearing by my office

containing documents submitted by the parties. The rules of the Union as amended in 2008 were in evidence. The Union submitted a written skeleton argument.

Findings of Fact

3. Having considered the oral and documentary evidence and the submissions of the parties I find the facts to be as follows:-
4. Mr Savage is a member of the Fallowfield Branch of the Union which is in its K Division (North West). He has been a member of the Union since 1975 and was a full-time officer for over 24 years before he retired in 2003. He was a member of the Union's Executive Council ("EC") between 1987 and 1989. He also stood unsuccessfully for election as President in 2006.

The Central Facts

5. The central facts of this matter are not in dispute. The issues to be determined are the correct interpretation of rule 9(6) of the rules of the Union and the application of that rule to the facts.
6. Rule 9 is headed "Executive Council". Rule 9(1) provides:
"The Executive Council shall consist of a President, a General Secretary, and representatives elected as hereinafter provided."
Rule 9(6) provides:
"No branch of the Union shall be entitled to have more than one of its members serving at any one time on the Executive Council as an elected member."
7. Rule 10 deals with the election and functions of the President and rule 11 deals with the election and functions of the General Secretary. These are positions for which all the members of the Union have a vote.
8. The Union is comprised of seven divisions, which are labelled alphabetically A-K, divisions B and D having merged to form K division. Each division elects two representatives to the EC, with the exception of K division which, by virtue of its size, elects three representatives. There are therefore 15 representatives elected to the EC from the divisions, by the membership of each division. Members within a division may only vote for representatives of that division. Accordingly, there are in effect seven discrete elections taking place simultaneously for these places on the EC.
9. Both the President, elected by a national vote, and the members of the EC, elected by the divisions, have a term of office of three years. Rule 10(1) provides that these elections shall be held at the same time. The General Secretary is subject to the statutory provisions which limit the period for which a General Secretary may hold office without re-election. A General Secretary election would rarely be held at the same time as a Presidential and EC election.
10. In 2009, the Union held a Presidential and EC election. On 13 February 2009, the Union's Independent Scrutineer, Electoral Reform Services ("ERS"), reported that the person elected as President was Mr Jeff Broome and that one of the two members elected to the EC from E Division (Midlands) was Mr Kelvin Davies.

Both Mr Broome and Mr Davies are members of the Boots Logistics (Nottingham) Branch.

11. Mr Savage asserts that it is a breach of rule 9(6) of the rules of the Union for two members of the same branch to be on the EC at the same time, whether or not one of them has been elected by the whole membership as President and the other has been elected by a division as its representative

Background Facts

12. There has been a provision equivalent to the present rule 9(6) in the rules of the Union since 1948. At that time, the equivalent provision was in rule 9(4) and provided as follows:

“For the purpose of the election of the other sixteen representatives, one representative shall be elected from each of the twelve territorial Divisions of the Union. The remaining four representatives shall be allocated one to each of the four territorial Divisions of the Union with the highest membership recorded at the end of the year preceding the taking of the vote. No branch of the Union shall be entitled to have more than one of its members serving at any one time on the Executive Council as an elected member.”
13. By 1977, rule 9(4) had been abbreviated and provided as follows:

“For the purpose of the election of the other sixteen representatives, two representatives shall be elected from each of the eight Divisions. No branch of the Union shall be entitled to have more than one of its members serving at any one time on the Executive Council as an elected member.”
14. In 1979, elections were held under the 1977 rules for the position of President, for membership of the EC and for membership of the Divisional Councils. In these elections, the person elected as President came from the same branch as a person elected to the EC. There was no allegation that this was a breach of the then rule 9(4). As to the Divisional Council elections in 1977, the then rule 15(8) was for all relevant purposes in identical terms to the last sentence of the then rule 9(4). It was applied to the election for membership of the Southern Divisional Council. Amongst the candidates in this election were two from the same branch. They each received enough votes to be elected. However, applying the then rule 15(8), the one with the lower number of votes was eliminated and the candidate with the next highest vote was declared elected. The Union maintained that this demonstrated the way in which the relevant rule was intended to operate.
15. In 2001, the rules of the Union were amended and rule 9 has remained unaltered since then. The main purpose of the 2001 amendment to rule 9 was to enable the merger of two divisions. B Division (Manchester) was to merge with D Division (North Western). Previously, each of the eight divisions elected two representatives. With this merger, a more complex representational model was adopted, with transitional provisions until 2003. Accordingly, the new rule 9(4) provides for the number of representatives on the EC from each division from 2003. New rule 9(5) provides for certain transitional provisions until 2003 and new rule 9(6) reproduces the last sentence of the former rule 9(4).
16. In 2006, Mr Savage stood for election as President of the Union. At that time the General Secretary was, and is currently, Mr John Hannett. Both Mr Savage and

Mr Hannett are members of the Fallowfield branch. On the interpretation given to rule 9(6) by Mr Savage, this would have presented a problem had Mr Savage been elected as President. However, he was not elected.

17. I accept the evidence of Mr McGarry and Ms Wilcox that since at least 1984 the administrative systems of the Union reflect its understanding that rule 9 does not and never has prevented the President from being in the same branch as a member elected to the EC from his or her division. On the other hand, the Union's administrative systems do identify members from the same branch who seek election to the EC from their division, as occurred in the 2006 elections. At the time of such elections, the Union sends circulars to branches which describe the 'same branch' restriction. This description appears in a paragraph dealing with elections to the EC, not in the section dealing with the election of the President. No previous complaint has been made to the Union that rule 9(6) or its predecessors should be applied as between the President and a person elected to the EC from a division. I accept the Union's evidence that it reasonably believed this to be because the generally held view amongst those members with sufficient interest to give this matter some thought, was that rule 9(6) only applied as between persons elected to the EC from their division.

The Relevant Statutory Provisions

18. The provisions of the 1992 Act which are relevant for the purpose of this application are as follows:-

Section 108A Right to apply to Certification Officer

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

- (a) the appointment or election of a person to, or the removal of a person from, any office;*
- (b) -(e)*

The Relevant Union Rules

19. The Rules of the Union which are relevant for the purpose of this application are as follows:-

Rule7 Constitution

7(3) For the general administration of the Union's business, and for the government of the Union in the interval between the Annual Delegate Meetings, an Executive Council shall be established as provided by Rule 9 (Part1 of the Rule Book).

Rule8 Delegates and Delegate Meetings

8(11) Any elected officer or member of the Executive or Divisional Councils may be removed by a Delegate Meeting.

Rule9 Executive Council

9(1) *The Executive Council shall consist of a President, a General Secretary, and representatives elected as hereinafter provided.*

9(2) *No person shall be eligible to serve as a member of the Executive Council who, at the time of nomination for any vacancy required to be filled, is not a full member of the Union, or has not been a member for at least 12 months or has not attended at least 50 per cent of their own branch meetings in the past 12 months prior to their nomination...*

9(3) *The President and General Secretary shall be elected in accordance with Rules 10 and 11 (Part1 of the Rule Book)*

9(4) *As from the 2003 Union elections the Executive Council representatives shall be elected by and from each of the divisions of the Union in accordance with a system of proportionate democracy based on the size of divisional membership...*

9(5) *Until the 2003 Union elections transitional arrangements shall apply...*

9(6) *No branch of the Union shall be entitled to have more than one of its members serving at any one time on the Executive Council as an elected member.*

9(7)(a) *All branches in the respective Divisions shall have power to make nominations having regard to the number of representatives required from each Division...*

(b) *Voting shall be conducted so as to secure that, so far as is reasonably practicable, those voting do so in secret...*

9(8) *With effect from the 1991 Union elections, each member of the Executive Council shall hold office for a period of three years commencing immediately after the Annual Delegate Meeting following her/his election, and at the close of her/his term of office she/he shall be eligible for re-election. Should a vacancy occur during the period of office of any representative, a by-election to fill such vacancy shall be held in the Division of the Union of the outgoing representative and the representative elected at such by-election shall serve the unexpired term of office of the outgoing representative. If such a vacancy is declared within four months of the expiring term of office, no steps shall be taken to fill such a vacancy.*

9(9) *The Executive Council shall, prior to the holding of an election, appoint an independent Returning Officer to attend to the election of officers and Executive Council...*

9(17) *The Executive Council shall have the right to be represented by such of their number as they may deem necessary at any meetings of Divisional Councils, Federations and branches, and of any other bodies set up for the purposes of the Union's work.*

Rule10 President

10(1) *The President shall be elected by a national vote of the members eligible to vote of the Union at the same time, for the same period, and with the same eligibility for re-election as the representatives on the Executive Council.*

10(2) *All branches shall have the right to make nominations. Voting papers containing the names of candidates shall be prepared and issued by the Central Office to all members eligible to vote. Voting shall take place in the manner prescribed in Section 7(b) of Rule 9 (Part 1 of Rule Book)...*

10(3) *The persons indicated in Section 2 of Rule 9 shall not be eligible for the office of President.*

10(4) *The President shall take the chair at all meetings of the Executive Council...She/he shall have the right to attend any meetings of Divisional Councils, Federations and branches, and of any other bodies set up for the purposes of the Union's work, and to attend as a delegate to Trades Union Congresses, to Labour Party Conferences...*

Rule11 General Secretary

11(1) *The General Secretary shall be elected by a national vote of the members by way of a statutory postal ballot as prescribed by the Trade Union and Labour Relations (Consolidation) Act 1992. All branches shall have the right to make nominations...*

Summary of Submissions

20. Mr Savage submitted that it was clear from rule 9(1) that the EC was comprised of the President, General Secretary and the representatives elected by the divisions. He argued that, as the General Secretary and President were both elected and were both members of the EC, they must be subject to the restriction in rule 9(6) that “*no branch shall be entitled to have more than one of its members serving at any one time on the EC as an elected member*”. Mr Savage stated that this is the plain and literal meaning of the words and must therefore be applied, even if it were to have inconvenient consequences. He submitted that the purpose of the rule was to ensure that the EC is made up of as wide a cross-section of members as possible and no single branch is over represented. He further pointed out that both Mr Broome and Mr Davies were paid officials of their branch and that the members of their branch would be disadvantaged if the two men were absent from their branch on EC business at the same time.

21. Ms O’Neill, for the Union, presented a lengthy and cogent written submission, for which I am grateful. She noted that the terms ‘officer’, ‘representative’ and ‘member’ are used interchangeably in the rules of the Union and argued that accordingly no particular significance could be given to the use of these words in any particular provision. She submitted that, in these circumstances, the rules should be interpreted broadly, in accordance with the guidance in *Jacques v AUEW* (1987) 1 All ER 621, *British Actors Equity Association v Goring* (1977) ICR 393, *Heatons Transport v TGWU* (1972) IRLR 25 and *Lee v NASUWT* (D/8-19/06 - Certification Officer). Ms O’Neill referred to the history of the present rule 9(6) and argued that the meaning of these words was clear beyond any doubt in the former rule 9(4). In Ms O’Neill’s submission, the debate that preceded the amendments made in 2001 made no reference to changing the meaning of, or extending the scope of, the ‘same branch’ restriction to include the President and General Secretary. She noted that the then rule 9(4) was comprised of two sentences. The first sentence dealt with the number of members to be elected to the EC from each division and the second dealt with the ‘same branch’ restriction. She pointed out that in 2001 these two sentences became split. The effect of the first sentence (the allocation of the number of representatives from each division) was retained in new rule 9(4), to have effect from 2003. The second sentence (containing the ‘same branch’ restriction) became rule 9(6) with transitional provisions being interposed as rule 9(5). Accordingly, in her submission, the 2001 amendments should not be seen as amending the plain meaning of the ‘same branch’ restriction as contained in the pre-2001 rules. Ms O’Neill pointed out that the Union had always understood rule 9(6) and its

predecessors as not applying to the General Secretary and President. She stated that not only had the Union built internal systems on that basis, but that circulars to the membership had explained the provision in this way. She further pointed out that the Union had consistently applied the rule in accordance with its present understanding of its meaning and that no previous complaints had been received about that interpretation. In Ms O'Neill's submission, it was not necessary for me to consider the history or usage of rule 9(6) as its meaning was clear from an analysis of the rules themselves. She argued that, with two exceptions, rule 9 has no direct application to the General Secretary or President. The exceptions are to be found in rule 9(1) which states that the EC shall consist of the General Secretary, President and "*representatives elected as hereinafter provided*" and in rule 9(3) which states that the President and General Secretary shall be elected in accordance with rules 10 and 11 respectively. It was noted that rules 9(8) and 9(17) are not appropriate for application to the General Secretary and President and that, where it was appropriate for parts of rule 9 to apply to the President, those parts were expressly incorporated into rule 10, as can be seen in rules 10(2) and 10(3). Ms O'Neill also noted the distinction that is made between "*any elected officer*" and "*member of the Executive*" in rule 8(11). She argued that this distinction supported her submission that rule 9(6) did not apply to the elected officers, namely the General Secretary and President. Ms O'Neill stated that the purpose of rule 9(6) was to prevent a single branch dominating the representation of a division on the EC and that the elections of the General Secretary and President are not comparable, as these are elections of the whole membership. She further argued that Mr Savage's interpretation of rule 9(6) could produce some illogical and unreasonable results which cannot have been intended. For example, she asked rhetorically what would happen if a General Secretary was to be elected half-way through the term of office of an EC, or if there was a vacancy for the Presidency half-way through that term of office, and the person elected as General Secretary or President was in the same branch as a sitting EC member. She stated that there was no rule to cover such an eventuality, which strongly supported her submission that rule 9(6), properly understood, does not have the meaning for which Mr Savage contends.

Conclusion

22. Mr Savage's complaint is in the following terms: -
"that on or about 16 February 2009 the union breached its rule 9(6) by allowing both Mr J Broome and Mr K Davies to take seats on its Executive Council, despite them both belonging to the Boots Logistics (Nottingham) Branch."
23. Rule 9(6) provides: -
"No branch of the Union shall be entitled to have more than one of its members serving at any one time on the Executive Council as an elected member."
24. Mr Savage's submission depends upon the words "*serving at any one time on the Executive Council as an elected member*", including within their ambit the General Secretary and President. It is agreed that both the General Secretary and President do sit on the EC and both are elected. However, is this sufficient to make good Mr Savage's submission?

25. Ms O'Neill has, with great diligence, provided detailed evidence of the history of rule 9(6), its previous application, the administrative procedures for its processing and its generally accepted interpretation both within Head Office and in publications to members. I agree with her that these matters only require careful examination if the meaning of rule 9(6) is not clear from the rules themselves. Ms O'Neill conceded that the present rule 9(6) is perhaps less clear than its predecessor, the then rule 9(4). However, I must consider whether the meaning of the current rule 9(6) is sufficiently clear from an examination of the rules themselves.
26. I note firstly that rule 8(11) makes a distinction between "*any elected officer*" and "*member of the Executive*". This suggests that where the expression 'members of the executive' occurs in the rules it should not automatically be read as referring to the President and General Secretary. This distinction is given further weight by the fact that the President and General Secretary have separate rules which provide for their election and functions - rules 10 and 11. I also accept Ms O'Neill's analysis that rule 9 does not apply generally to the positions of President and General Secretary, but only where it expressly so provides. This is apparent from the inappropriateness of certain of the provisions within rule 9 to the positions of President and General Secretary and from the fact that, where appropriate, rules 10 and 11 expressly incorporate parts of rule 9 to apply to those positions. The relevant provisions were identified in the submissions of the Union (see para 21).
27. More centrally, however, I find that the expression "*serving ... on the EC as an elected member*" in rule 9(6) refers to those members of the EC who derive their position on the EC from a specific election to that position; being a representative elected by, and from, a division in accordance with rule 9(4). I find that neither the President nor General Secretary derive their positions on the EC from being specifically elected to it. They are elected to their respective positions in accordance with rules 10 and 11 and then derive their positions on the EC from rule 9(1). They are, in effect, ex-officio members of the EC by virtue of the positions to which they have been elected by the whole membership. I therefore find that the General Secretary and President do not serve on the EC as an elected member within the meaning of rule 9(6). In my judgment, rule 9(6) applies only to those members of the EC who have been specifically elected to it as representatives of a division.
28. Although it has not been necessary for me to rely upon the derivation of the current rule 9(6) or custom and practice with regard to its interpretation and application, I find that my judgment is supported by these matters. I also obtained support for my decision from Mr Savage's concession that it would be inappropriate for his interpretation of rule 9(6) to be applied where the General Secretary and a member of the EC came from the same branch. Mr Savage was unable to say what would have happened had he succeeded in being elected President in 2006, given that he and the General Secretary are both members of the Fallowfield Branch. There can be no sensible interpretation of rule 9(6) which separates the General Secretary on the one side and the President and divisional representatives on the EC on the other side.

29. For the above reasons, I find that the Union did not breach rule 9(6) of its rules in the President and Executive Council elections 2009 by allowing Mr Broome to take his seat on the EC having been elected as President and Mr Davies to take his seat on the EC having been elected as a divisional representative, notwithstanding the fact that Mr Broome and Mr Davies belong to the same branch. Accordingly, I refuse to make the declaration sought by the Claimant.

David Cockburn
The Certification Officer