

D/8-11/18-19

Decision of the Certification Officer on an application made under Section 108A(1) of
the Trade Union and Labour Relations (Consolidation) Act 1992

Peros

V

Napo – the Trade Union and Professional Association for Family Court and
Probation Staff

Date of Decision

20 September 2018

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Decision

Upon application by Mr D Peros (“the applicant”) under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”):

1. I grant Mr Peros’s application for a declaration that on 17 August 2017 Napo breached its Constitution section 29(j) in stating that the investigation into Mr Peros’s conduct would not be conducted by a panel from a neighbouring branch, selected by the Branch’s Chair, who are not otherwise involved in the disciplinary action.
2. I grant Mr Peros’s application for a declaration that on or around 17th-31st August 2017 the union breached Disciplinary Rule 4.1 by the General Secretary not informing the Chair of a neighbouring branch within 10 working days that a disciplinary process has been initiated under Disciplinary Rule 3.4 and an investigation into the complaint is required.
3. I grant Mr Peros’s application for a declaration that on or around 7th September 2017 NAPO breached Disciplinary Rule 4.3 when Katie Lomas (Vice Chair) wrote to Mr Peros stating “We have been commissioned as the investigating panel for your case”. Katie Lomas had been involved in the decision to initiate the disciplinary process and this meant the panel did not consist of at least three members who were not otherwise involved in the disciplinary action.
4. I grant Mr Peros’s application for a declaration that on or around 17th February 2018 NAPO breached Disciplinary Rule 2.4 by not completing the disciplinary procedures against Mr Peros within six months. Mr Peros was not informed that this time period had been extended or told of exceptional circumstances by the General Secretary.

Reasons

The Complaints

5. Mr Peros brought this application as a member of Napo – the Trade Union and Professional Association for Family Court and Probation Staff (“Napo” or “the

Union”). He did so by a registration of complaint form received at the Certification Office on 16 February 2018.

6. Following correspondence with my office, Mr Peros confirmed his complaints as follows:-

Complaint 1

That on 17th August 2017 Napo breached its Constitution section 29(j) in stating that the investigation into Mr Dino Peros conduct would not be conducted by a panel from a neighbouring branch, selected by the Branch’s Chair, who are not otherwise involved in the disciplinary action.

Complaint 2

That on or around 17th-31st August 2017 the union breached Disciplinary Rule 4.1 by the General Secretary not informing the Chair of a neighbouring branch within 10 working days that a disciplinary process has been initiated under Disciplinary Rule 3.4 and an investigation into the complaint is required.

Complaint 3

That on or around 7th September 2017 Napo breached Disciplinary Rule 4.3 when Katie Lomas (Vice Chair) wrote to Mr Dino Peros stating “We have been commissioned as the investigating panel for your case”. Katie Lomas had been involved in the decision to initiate the disciplinary process and this meant the panel did not consist of at least three members who were not otherwise involved in the disciplinary action.

Complaint 4

That on or around 17th February 2018 NAPO breached Disciplinary Rule 2.4 by not completing the disciplinary procedures against Mr Dino Peros within six months. Mr Peros was not informed that this

time period had been extended or told of exceptional circumstances by the General Secretary.

7. At the hearing before me, Mr Peros was represented by Mr Dave Rogan. Written witness statements and oral evidence were provided by Mr Peros and Mr Peter Robinson. The Union was represented by Ms Betsan Criddle. Written witness statements for the Union were provided by Ms Chris Winters, Ms Yvonne Pattinson and Ms Katie Lomas; Ms Pattinson and Ms Lomas also gave oral evidence. There was also in evidence a bundle of documents consisting of 244 pages containing correspondence and the rules of the Union. Both the Applicant and the Union provided skeleton arguments.

Findings of Fact

8. Having considered the written and oral evidence and the representation of the parties, I find the facts to be as follows:-
9. In August 2017 Ian Lawrence, General Secretary of Napo informed Yvonne Pattison, Co-Chair of Napo about a complaint which had been made about Dino Peros and about some issues which had arisen in correspondence between the Assistant General Secretary and Mr Peros.
10. The Napo Officers met on 16 August 2017 and agreed that Katie Lomas, one of the Vice-Chairs of NAPO, would lead the investigation panel. They also agreed that it was necessary, to protect the interests of Napo, to suspend Mr Peros from individual member representation until the case was concluded. Chris Winters and Ms Pattison, Co-Chairs of Napo informed Mr Peros of the complaints, the decision to initiate an investigation panel, and how that would be convened, and the suspension.
11. Mr Peros's representative, Mr Rogan asked the Co-Chairs if the formal process could be paused to provide an opportunity to resolve the allegations at the lowest level. The Officers declined as they did not consider mediation or conciliation appropriate.
12. Mr Rogan raised a number of procedural issues about the process which had been adopted. He first raised these in a letter of 6 September. Ms Lomas, who

chaired the investigation panel, replied to that letter on 21 September. The Investigation Panel continued with their investigation but Mr Peros declined to participate.

13. The Investigation Panel completed its work in January 2018. It decided that there was no case to answer on two of the complaints but that two should proceed to a disciplinary hearing. It also decided to lift the suspension. Mr Lawrence informed Mr Rogan and Mr Peros of the decision.

14. On 1 March 2018 Mr Lawrence wrote to Mr Peros explaining that it had not been possible to arrange a disciplinary panel in line with constitutional requirements within a reasonable timescale. Because of the risk of unfairness, the impact on Napo's priorities and the fact that Mr Peros had been subject to a de facto suspension the Officers had decided to close the disciplinary process.

The Relevant Statutory Provisions

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

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) disciplinary proceedings by the union (including expulsion);

(c) the balloting of members on any issue other than industrial action;

(d) the constitution or proceedings of any executive committee or of any decision-making meeting;

(e) such other matters as may be specified in an order made by the Secretary of State.

The Relevant Rules of the Union

16. The rules of the union which are relevant for the purposes of this application are:-

CONSTITUTION

9. Officers

(g) The officers shall have the power to act between meetings of the NEC in the interests of the Association. They shall report to the next meeting of the NEC on all such actions and decisions taken.

(h) The officers shall act as employers on behalf of the NEC. They shall report to the next NEC on all such actions and decisions taken.

16. National Executive Committee

(l) All officials and administrative staff of the Association shall be employed by the NEC. It shall have the power to delegate any actions or decisions to the officers in accordance with clauses 9(g) and 9(h).

(m) Matters relating to the employment of individuals by the Association shall be treated as confidential to the NEC members only, unless designated otherwise by the Chair

29. Disciplinary Action

(c) All stages of the disciplinary process shall be conducted in accordance with the principles of natural justice and shall be governed by rules approved by the NEC. Complaints should be dealt with at the lowest possible level within these procedures.

(j) An investigation shall be conducted by a panel of members from a neighbouring Branch, selected by that Branch's Chair, who are not otherwise involved in the disciplinary action. The panel shall, in its composition, pay attention to race and gender. The Investigation Panel shall decide whether or not there is a case to answer and report its findings to the member's Branch Chair and to the General Secretary.

30. Amendments

(a) This constitution may only be amended by an AGM in 195 and every third year thereafter unless the amendment is proposed by the NEC.

DISCIPLINARY RULES

General

2.4 All parts of the disciplinary procedure shall be completed as quickly as possible consistent with the principles of natural justice. The full disciplinary procedure with the exception of the right to appeal shall be completed within six months of the original complaint being notified to Branch Officers or the National Officers, subject to 3.1 below. This time can only be extended in exceptional circumstances and with the agreement of the General Secretary.

2.7 At all stages the member who is the subject to the disciplinary procedure shall be informed of decisions taken. In the preliminary stages this shall be by the Branch Chair or the General Secretary. In the remaining stages it shall be by the General Secretary.

Preliminary Stages

3.4 On receipt of such a complaint the Branch Officers or the National Officers shall decide whether or not to initiate the disciplinary process. Their decision should be recorded in the minutes of the meeting at which it was made.

Investigation

4.1 On receipt of information that the disciplinary process has been initiated in accordance with Rules 3.4 and 3.5 the General Secretary shall within 10

working days inform the Chair of a neighbouring branch that an investigation into the complaint is required.

4.3 Such a panel shall consist of at least three members who are not otherwise involved in the disciplinary action.

Considerations and Conclusions

17. There is little disagreement over the facts of the case. For complaints 1, 2 and 3 the Union accepts that it did not follow the letter of the disciplinary process as set out in the Constitution and Disciplinary Rules but argues that the Officers have the power, within the Constitution, to adapt the process where necessary in the interests of natural justice. They also believed that it was necessary to do so to prevent a breach of staff confidentiality which they believed arose from the Constitution. Mr Peros believes that the Officers do not have such a power. The issue for me is, therefore, whether the Constitution gives the Officers the power to vary the Union's disciplinary process as happened in this case.

18. Complaint 4 is different in that the Union believe that they complied with the letter of this Rule. Mr Peros does not accept this. The issue here for me is, therefore, a more straightforward decision as to whether I have evidence to support Mr Peros's position that the Union did not comply with Disciplinary Rule 2.4.

Complaints One, Two and Three

19. Mr Rogan's point on these three complaints was very straightforward. Section 29 of Napo's constitution enables Napo to take disciplinary action against a member and sets out an overview of that process. It also requires all stages of the disciplinary process to be conducted in accordance with the principles of natural justice and to be governed by rules approved by the National Executive Committee (the Disciplinary Rules). Mr Rogan argued that the Napo Officers followed neither the Constitution nor the Disciplinary Rules.

20. Ms Criddle was clear that Napo had departed from the process set out in the constitution and the Disciplinary Rules but that this did not result in a breach of the Union Rules. Her view was that, if properly construed, the constitution and disciplinary rules permitted the investigation of the allegations, against Mr Peros,

by the NEC in the manner conducted. In doing so she drew my attention to Section 9(g) of the constitution which enables the Officers to act between NEC meetings in the interests of the association and to Section 16(l) and 16(m) which provide that the NEC should be the employer of Napo staff and require the NEC to treat all individual employment issues as confidential. She made the point that the Constitution and Disciplinary Rules should be read in totality and that, in this case, doing so enabled the Officers to take the action complained about.

21. Ms Criddle sought to rely on *Heatons Transport (St Helens) Limited v TGWU [1972] ICR 308* and *Jacques v AUEW [1986] ICR 683*. In doing so she argued that reading the Constitution on a literal basis and following the Disciplinary Rules to the letter would have, in this case, resulted in a breach of natural justice and a breach of staff confidentiality. The Officers had taken into account the Disciplinary Rules and the requirement of Section 29(c) of the Constitution which requires that all stages of the disciplinary process shall be conducted in accordance with the principles of natural justice.

22. Her view was that the requirement for natural justice enabled the Officers to modify the literal terms in the rules where that was necessary to achieve natural justice. In this case there were matters of staff confidentiality and fairness to Mr Peros. She argued that the decision by the Officers to adopt a variation in the process set out in the Constitution and the Disciplinary Rules in this case was taken within the rules and to achieve natural justice.

23. In addition, Ms Criddle argued that there was custom and practice for making such a variation. She referred to another case, which predated this one, where the Officers had adapted the process in a similar way because of the sensitive nature of the complaint.

Custom and Practice

24. Dealing first with custom and practice, both Mr Rogan and Ms Criddle agreed that there had been a previous case where a similar process had been adopted. I heard evidence from Mr Peter Robinson, a member of Napo who had represented the member whose conduct was being investigated. He explained that the decision to commission the investigation panel had been made before he became involved in the case. He and the member decided to participate in

the investigation because doing otherwise would have exacerbated the distress already experienced by the Member he represented.

25. The detail of the case is not relevant to the issues before me but the case was concluded at the investigation stage as the investigators believed that there was no case to answer. Mr Robinson said that he would have raised the procedural issues at the disciplinary panel had it reached that stage. No other witness had been involved in that case although Ms Pattinson and Ms Lomax had been aware of it as they were members of the NEC and Officers at the time.

26. I cannot see that one case, which did not proceed to the final stage, could be considered custom and practice. Mr Peros told me that he was not aware of the case at the time it proceeded nor when he received the letter of 17 August which referred to it. Ms Pattinson, Ms Lomax and Mr Robinson all told me that they would not have expected many in the Union to be aware of how the case had been handled. I was given no evidence of other disciplinary processes being varied in this way before the decision to proceed with the investigation to Mr Peros. On that basis I cannot see that convening a panel of the NEC, rather than referring a case to a neighbouring Branch Chair to convene a panel of its members, could be considered to be established custom and practice.

The Constitution and Disciplinary Rules.

27. Turning now to whether a proper reading of the Constitution enables the Officers or the NEC to vary the disciplinary process described in the Constitution and the Disciplinary Rules. Ms Pattison and Ms Lomax were both clear in evidence that they believed that the Constitution gave them this power and that they were acting in accordance with the Constitution at all times. Ms Lomax was at the meeting which took the decision to investigate the complaints and commissioned the Investigation Panel. She also chaired the Investigation Panel.

28. She told me that the meeting of the Officers was concerned about the seriousness of the complaints, the allegations about the quality of representation and their obligations to staff. They did not believe that the Union's procedure for dealing with complaints from staff was appropriate because it could not be used for all of the complaints which had been made. It may have been relevant to the complaints of bullying and harassment but could not have been used for the allegations of

poor representation. Additionally, it did not offer a route to impose any sanction on Mr Peros had any of the allegations been proved. Instead there would have needed to be a second procedure, under Section 29 of the constitution. This was considered to be unfair to Mr Peros as he may have been the subject of two processes.

29. Additionally, the Officers were mindful of Mr Peros's standing and seniority within the Union and believed that to be effective, the Investigating Panel must have experience of individual representation. They did not feel that an investigation by a neighbouring branch was appropriate for someone of Mr Peros's standing; nor could it, in their opinion, ensure that the Panel had the necessary experience of individual member representation.
30. Both Ms Pattison and Ms Lomax explained that they were trying to find the best way forward for Mr Peros, the complainants and the Union. Neither Mr Rogan in his submissions, nor Mr Peros in giving evidence, challenged this. Mr Rogan suggested that the reasons for their decisions to vary the process may have post dated those decisions; however, Ms Lomas candidly explained why she believed that some of the detail was not included in the minutes of the meeting which commissioned the investigation. She also confirmed that the reasons given in the letter of 17 August and her email of 21 September were the reasons discussed at the Officers' meeting on 16 August.
31. From the evidence before me I have no doubt that the Officers were trying to find a way forward which was fair to everyone. There were clear issues of staff confidentiality and these were serious allegations about a senior member of Napo.
32. I have looked carefully at Sections 9(g), 16(l) and 16(m) of Napo's Constitution. Section 9(g) clearly enables Napo's Officers to act between meetings of the NEC in the interest of the Association. In my view this may enable the Officers to reach decisions which would normally be for the NEC but could not be deferred until the next NEC meeting. Consequently, this could, in principle, enable the Officers to make amendments to the disciplinary rules which would otherwise fall to the NEC under Section 29(c). I cannot see, however, that it enables the Officers to make amendments to the constitution since that can only be amended at the AGM (Section 30 (a)).

33. Complaints 1 and 2 relate to breaches of the constitution and so I cannot see that Section 9(g) is relevant to those. In principle, Section 9(g) may be relevant to complaint 3 as the requirement for panel members to have had no involvement in the complaint arises from the Disciplinary Rules; however, the constitution requires that the complaint be referred to the Chair of a neighbouring Branch and so the appointment of the panel rests with the Branch Chair rather than with the NEC. I cannot see, therefore that Section 9(g) is relevant to complaint 3.
34. Looking next at Sections 16(l) and (m) it is clear that the NEC are the employers of Napo staff and it was clear in evidence given by Ms Pattison and Ms Lomax that they take this responsibility very seriously. My reading of Section 16(m), however, is that NEC members are, quite rightly, held to a duty of confidentiality around matters relating to an individual's employment. I can see that this prevents NEC members from sharing certain information with others; however, it enables the Chair to designate that this Section should not apply. Such a power would, of course, have to be used with extreme caution; however, all disciplinary panels must be held to a duty of confidentiality and, in my view, the Chair could have used this power to permit the sharing of any confidential matters relating to an individual's employment to an investigation panel made up from members outside the NEC. Ms Lomax told me that the Officers did not consider using this power and I have been given no evidence or argument as to why it would not be an appropriate course.
35. It is worth noting here that I am making no decision about whether the information which was to be shared with the Investigating Panel was information which would fall within Section 16(m); however, the Officers clearly believed that it was.
36. That leaves the argument as to whether Section 29 (c) enabled the officers to vary the process because doing so was the only way to ensure that the principles of natural justice were applied. Ms Lomax was clear in her evidence that she believed that the principles of natural justice outweighed the need to follow the prescribed process literally. I do not agree, however, that this Section enables the Officers to vary the disciplinary process set out in the constitution without an explicit power to do so. My reading is that it requires that the disciplinary process is conducted in accordance with the principles of natural justice and governed by

the Disciplinary Rules. Put simply it requires Napo to conduct a fair process and follow the Disciplinary Rules.

37. At this stage it is worth reflecting that I believe that the Officers were trying to find a way forward which was fair and in the best interests of all parties including Napo. They clearly felt that none of the procedures open to them in dealing with the complaints against Mr Peros were appropriate. They had been advised that a similar variation to the process had been made in the past and were unaware of any objections to that process. They believed that they were acting within the Constitution and Disciplinary Rules. I have been given no evidence that they deliberately or willfully disregarded the process or their obligations; rather they demonstrated that they gave considerable thought to the best way forward to be fair to all involved. However, I cannot agree with Ms Criddle's argument that the decisions they took and the processes which they put in place were consistent with their powers under the Constitution and the clear requirements of the Disciplinary Rules.

38. Bearing in mind the clarity of the Constitution and the Rules I cannot see that, for complaints 1, 2 and 3 there should be any doubt as to the procedure which should be followed when Napo is taking disciplinary action under section 29 of the Constitution. Consequently, I find it hard to see that the Union can rely on the case law in *Heatons Transport (St Helens) Limited v TGWU [1972] ICR 308* and *Jacques v AUEW [1986] ICR 683*. It is my view that these provide guidance only where there is some deficiency or lack of clarity in the procedures.

On that basis I uphold complaints one, two and three:

Complaint 1

That on 17th August 2017 NAPO breached its Constitution section 29(j) in stating that the investigation into Mr Dino Peros conduct would not be conducted by a panel from a neighbouring branch, selected by the Branch's Chair, who are not otherwise involved in the disciplinary action.

Complaint 2

That on or around 17th-31st August 2017 the union breached Disciplinary Rule 4.1 by the General Secretary not informing the Chair of a neighbouring branch within 10 working days that a disciplinary process has been initiated under Disciplinary Rule 3.4 and an investigation into the complaint is required.

Complaint 3

That on or around 7th September 2017 NAPO breached Disciplinary Rule 4.3 when Katie Lomas (Vice Chair) wrote to Mr Dino Peros stating "We have been commissioned as the investigating panel for your case". Katie Lomas had been involved in the decision to initiate the disciplinary process and this meant the panel did not consist of at least three members who were not otherwise involved in the disciplinary action.

39. I would add that I have seen no evidence that Mr Peros was subjected to any detriment by the procedure which was adopted. In evidence he agreed that he was not participating in the process only because it was not consistent with the Rules and the Constitution. In correspondence Mr Rogan assured the investigation panel that there were no concerns about the individuals involved. No issues of potential bias or unfairness have been raised with me. I asked Mr Rogan specifically what detriment had been caused by the use of this procedure; none was identified other than the impact of the suspension which is not part of the complaints before me. It is worth commenting that, had he approached the disciplinary process in the way in which Mr Robinson appears to have approached the earlier case which he described to me, he may have been able to resolve the procedural issues at the investigation or disciplinary stage. This may have avoided the need to bring a complaint to me.

Complaint 4

40. It is clear from the correspondence in the bundle and evidence given by Ms Pattinson and Ms Lomax that the complaint was not completed within the six months required by paragraph 2.7 of the Disciplinary Rules. When giving evidence, both told me that no decision was taken to extend that period. As a

consequence, Mr Peros could not have been informed that the period had been extended.

41. In her submissions Ms Criddle argued that Disciplinary Rule 2.7 did not require a decision to be taken nor any notification of any extension to be sent to Mr Peros. She also argued that it was unclear whether the complaint was about the decision itself or the notification. Further she was of the view it could be inferred that the General Secretary must have agreed with the extended time period as he had written to Mr Peros offering mediation as a way forward after the six months had expired.

42. I see no merit in Ms Criddle's arguments on this point. The essence of Complaint 4 is that the investigation was not completed within six months. It is clear that it was not and I have seen no evidence of any decision to extend it; on the contrary I was told that no decision had been made. There was, therefore, nothing for the General Secretary to agree to. Nor could anyone inform Mr Peros about a decision. I would add that, whether or not a notification was required on a strict reading of the Constitution and Disciplinary Rules, the requirement to conduct the process in accordance with the principles of natural justice and follow the Disciplinary Rules must require that Mr Peros should have been informed of any decision.

43. Consequently, I uphold Mr Peros's complaint four:

That on or around 17th February 2018 NAPO breached Disciplinary Rule 2.4 by not completing the disciplinary procedures against Mr Dino Peros within six months. Mr Peros was not informed that this time period had been extended or told of exceptional circumstances by the General Secretary.

44. In reaching this decision I make no judgement on the reasons why the investigation was not completed within six months.

45. At the Hearing Ms Criddle asked me to consider *McMillan v Airedale NHS Foundation Trust [2015] ICR 747*. Although the case arose in a different context, she suggested that, following the guidance given by Underhill LJ in that case, I should decline to make a declaration that there had been a breach even if I

found that such a breach had occurred. My view, however, is that the case is not relevant to my power to make a declaration in this case as my declaration, in itself, offers no remedy to Mr Peros.

Enforcement Order

46. Having reached a decision that the Union has breached its rules I must consider whether an enforcement order is appropriate. My powers to make an Order are, in this case, limited to requiring Napo to take specified steps to remedy the breaches I have found or to refrain from specified acts with a view to preventing a similar breach in the future.
47. Mr Rogan and Ms Criddle agreed that, as the disciplinary proceedings against Mr Peros had been discontinued any breach had now been remedied. It is not, therefore, open to me to make an Order to remedy the breach.
48. Mr Rogan argued that it was, however, necessary to make an Order requiring all Napo members, including Chairs and Officers, to abide by the Constitution and the Disciplinary Rules of Napo. Such an Order would not, however, be within my powers as it would neither remedy the breach nor require Napo, or its members, to refrain from any specific acts.
49. I have considered whether, to meet the spirit of Mr Rogan's request, I should make an Order requiring all Members to refrain from breaching the constitution and Disciplinary Rules. Such an Order would, however, add nothing to the current position whereby all members are required to comply with the Constitution and Disciplinary Rules. Additionally, members who believe that Napo is in breach of its constitution are currently able to bring their complaint to my office or to the Court under section 108 A of the Trade Union and Labour Relations (Consolidated) Act 1992.
50. I decline to make an Enforcement Order.



Sarah Bedwell

The Certification Officer