

Appeal No. UKEAT/0256/13/LA

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 November 2013

Before

THE HONOURABLE MR JUSTICE KEITH

MR D J JENKINS OBE

MR G LEWIS

UNISON

APPELLANT

MR IAN AND MRS FRANCES STREET

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondents

MR IAN & MRS FRANCES
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(The Respondents in Person)

SUMMARY

TRADE UNIONS

Circumstances in which a term can be implied into a trade union's rulebook – scope of any such term to be implied – **Heatons Transport (St Helens) Ltd v Transport and General Workers' Union** [1973] AC 15 applied.

THE HONOURABLE MR JUSTICE KEITH

1. Before 1999, members of a trade union wishing to make a complaint about the union's breach of its rules could only do so by bringing a claim in the courts. That changed when the **Employee Relations Act 1999** inserted a new Chapter VIIA into the **Trade Union and Labour Relations (Consolidation) Act 1992**. That gave members of a trade union the option of complaining to the Certification Officer about the breach or threatened breach of the rules of the union relating to certain specified matters. That is the course which most people prefer to take, since the Certification Officer's decision on the complaint can be made relatively quickly, following a more informal and less costly hearing. It is the course which the Claimants, Ian and Frances Street, took when they complained that there had been breaches by UNISON of some of its rules.

2. One of their complaints was that there had been a breach of the rules when UNISON had denied them the opportunity to stand for or vote in the election for delegates to UNISON's National Retired Members' Conference to be held in October 2011. The Certification Officer dismissed that complaint, and Mr and Mrs Street have not appealed against that ruling. But the Certification Officer upheld their other complaint, which was that there had been a breach of the rules when an annual general meeting of the Derbyshire County Branch of UNISON had not been held in the first quarter of 2012. The Certification Officer made a declaration to that effect. An appeal lies to the Employment Appeal Tribunal against such a declaration limited to questions of law. UNISON now appeals against that declaration, and this is the Employment Appeal Tribunal's judgment following the hearing of that appeal.

3. The relevant facts are these. Mr and Mrs Street have both retired. They are therefore members of the Retired Members Section of UNISON and their branch is the Derbyshire County Branch in UNISON's East Midlands Region. For some time, UNISON's regional organiser had thought that the branch was in a state of dysfunction. In April 2011, he wrote a report to that effect. The Certification Officer described the problems which had been identified in the report as including "in-fighting among many of the branch leadership", "aggression and unacceptable behaviour between many of the leadership including racist remarks and attempts to instigate physical fights", "lack of respect for leadership decisions by key officers", "dysfunctional financial processes and dealings", "lack of consultation mechanisms with membership" and "no joined-up strategy for recruitment, campaigning or engagement with membership". The regional organiser concluded that the branch "cannot effectively make decisions, cannot dynamically or flexibly respond to protecting the membership's best interests in an efficient or effective way and cannot guarantee the stability of organisation or finance between its elected leadership". His view was that intervention was required in order "to break old and unacceptable cycles of behaviour and customs ... and to replace this with a culture of unity and community".

4. The kind of intervention which the regional organiser had in mind was what was known within UNISON as "regional supervision". The regional secretary thought that something short of regional supervision would be sufficient to bring the branch back to normal functioning, and the Certification Officer was not asked to consider whose view was correct. It is sufficient for us to state that the evidence before the Certification Officer was that regional supervision occurs only in the case of a "seriously dysfunctional branch". The nature and extent of the supervision, and the extent to which the branch is permitted to carry on as normal, varies from case to case, depending on the severity of the problems at the branch concerned. In cases where

the branch has completely ceased to function, has no effective governance, and has no branch officers, the regional organiser will in effect carry out the responsibilities of the branch committee and the branch secretary while rebuilding the branch from scratch. In less serious cases, regional officers will work with the branch officers to bring the branch back to normal functioning.

5. The decision was made to put the Derbyshire County Branch under regional supervision. It was initially taken by the chair of UNISON's Development and Organisation Committee ("the DOC"). On 4 May 2011, she appointed the regional head of local government to oversee the day-to-day running of the branch, and to make regular progress reports to UNISON's National Executive Committee (the "NEC"). On 13 May, she said that she had sought and received approval from the NEC to put the branch under regional supervision until such time as she was satisfied that it was functioning effectively once more. The recommendation to put the branch under regional supervision was endorsed by the DOC on 18 May.

6. A report on the branch for the meeting of the DOC on 7 December 2011 stated that the branch was working to a set of rules which had not been agreed at a quorate AGM, and were not compatible with the core branch rules which the NEC had approved in 2009. The report went on to say that there were no plans to hold an AGM in 2012, and that there was "some way to go to ensure that the bullying and intimidating atmosphere is permanently removed and that the branch can function independently of regional support". The DOC endorsed such recommendations as the report made about future action. Further reports to the DOC for its meetings on 16 May 2012, 19 September 2012 and 7 November 2012 stated that human resources consultants had been called in to help break down the barriers to communication within the branch, that a new set of branch rules had been agreed by the branch, and that it was

proposed to hold a branch committee meeting in November 2012 and an AGM in March 2013. The hearing before the Certification Officer took place on 17 January 2013. Presumably by then the branch committee meeting had taken place, and the Certification Officer found that it was still proposed to hold the AGM in March. In fact, Mrs Street told us today that the AGM took place in May.

7. UNISON's rules relating to branch meetings in general, and the branch's AGM in particular, are in rule G3 of the Rules. Rule G3 provides, so far as is material, as follows:

“3.2 Branches will hold an annual meeting in the January-March quarter. Additional meetings shall be held in line with the agreed branch rules or when summoned by the Branch Committee to discuss any matter affecting the branch.

3.3 The purposes of the branch meeting shall be to:

- .1 provide a means of communication between the Branch Officers and the membership**
- .2 enable the membership to take decisions on matters of branch policy**
- .3 ensure that the Branch Officers are accountable to the membership for conducting the affairs of the branch.**

3.4 At the annual meeting of the branch, the following business shall be transacted:

- .1 the receiving of reports from the Branch Officers and the Branch Committee, including a report on the branch's finances and presentation of branch accounts;**
- .2 the election or confirmation of election of Branch Officers for the coming year;**
- .3 the election or confirmation of election of branch representatives to other levels of the Union and to external bodies;**
- .4 such other business as may be required by the branch rules.”**

UNISON did not contest the fact that, despite rule G3.2, an AGM of the branch was not held in the first quarter of 2012. Indeed, it was not held in 2012 at all. But its argument before the Certification Officer was that rule G3.2 should be read as applying only when there was a normally functioning branch in respect of which UNISON had not made other arrangements, and with the Derbyshire County Branch that was not the case. The branch was under regional

supervision, and in those circumstances it was being said that the normal rule about the branch's AGM did not apply.

8. In the light of the way the case was then being argued, it is unsurprising that the Certification Officer's focus was on whether the NEC had the power to set aside any of the rules in UNISON's rulebook in order to give effect to regional supervision. That was why the Certification Officer's focus was on those of the rules which were said by UNISON to confer that power on the NEC. Regional supervision was not an expression which can be found in UNISON's rules. But rules D2.1 and D2.9 were said to provide the NEC with the power to put a branch under regional supervision, and rule D2.8 was said to enable the NEC to delegate that power to the DOC. Those rules provided, so far as is material, as follows:

"2.1 FUNCTIONS AND AUTHORITY

The general management and control of the Union between National Delegate Conferences shall be vested in the National Executive Council ... It shall have full power and authority to act on behalf of the Union in every respect and for every purpose falling with the objects of the Union. It shall not do anything that is inconsistent with these Rules or the policy of the Union as laid down by the National Delegate Conference."

2.8 COMMITTEES

The National Executive Council shall have the right to appoint such Committees from amongst its membership as it shall see fit, and shall have the power to delegate to such Committees any of its functions as it considers appropriate.

2.9 POWERS

As part of its general power in Rule D.2.1 above, and without limiting the scope of that power, the National Executive Council shall have the following powers:

2.9.1 to provide for any case in which the Rules are silent;

...

2.9.3 to interpret the Rules in event of doubt, conflict or dispute;

...

2.9.10 to open or close any branch of the Union following consultation with the appropriate Regional Council, Service Group, branch or branches;

...

2.9.15 to take all such action as shall seem to them to be necessary to ensure that the income, property and funds of the Union are safeguarded, and the objects and purposes of the Union achieved."

9. The Certification Officer had considerable sympathy with UNISON's argument that the rules should be construed in such a way which would allow the NEC to put a branch under regional supervision. He said that he was aware

“... of the real practical difficulties that trade unions have in ensuring the proper functioning of their branches, especially large trade unions. UNISON has about 1,100 branches. Each is dependent on members giving their time and efforts voluntarily, often in stressful and sometimes in political circumstances. Internal disputes, personality conflicts, mismanagement and financial problems are inevitable in some branches some of the time. It is important that those with overall responsibility for a union are able to manage those difficulties, especially where they impact significantly on the interests of the ordinary branch member.”

But the Certification Officer also noted that a union has to operate within its rules which are made and amended by its members in general meetings. “An activity”, he said, “which is not permitted expressly or impliedly by the rules, no matter how laudable, is likely to be in breach of rule.” He went on to find that, not only was there no provision in the rules which provided expressly for regional supervision but also that there was nothing in the rules, in particular in rules D2.1 and D2.9, which could properly be said to give the NEC the power to set aside any of its rules in order to give effect to regional supervision over a branch which was not functioning normally. Indeed, he pointed out that rule D2.1 expressly prohibited the NEC from doing anything which was inconsistent with the rules. That was the basis on which the Certification Officer declared that UNISON had acted in breach of rule G3.2 by failing to hold an AGM for the branch in the first quarter of 2012.

10. In our view, and here we think we are saying very much the same thing as the Certification Officer, the issue is not so much whether the NEC has the power to put a branch under regional supervision, but whether in doing so UNISON has the power to suspend those of its rules which would otherwise have applied, such as the rules about a branch's AGM. Like the Certification Officer, we recognise the desirability of the NEC being able to intervene in an UKEAT/0256/13/LA

appropriately *proportionate* way in the affairs of a branch when such intervention is *necessary* to protect the branch's finances (because UNISON owns the branch's funds), to further the interests of the branch and its members, as well as those of UNISON as a whole, and to ensure that the branch functions efficiently. But the critical question is whether UNISON can put any of its rules on hold while that is being done.

11. There has been a slight shift in UNISON's argument since the hearing before the Certification Officer. It is now being put on the basis that UNISON's rules should be treated as subject to an implied term permitting UNISON to suspend the operation of those of its rules relating to the organisation and management of its branches if intervention in the form of regional supervision is required, provided that the suspension of those rules which it is proposed to suspend is both necessary and not a disproportionate way of achieving the aims which regional supervision is intended to achieve. The route by which such a term should be implied is said partly to be the conventional one known to commercial lawyers, namely to give effect to the presumed intention of the parties (in other words, to provide for what they would have provided for themselves if they had thought it necessary to spell out what they had plainly intended to be the case), and partly by the need to ensure that a trade union's rulebook should not be construed in a way which goes against custom and practice.

12. The case of **McVitae v UNISON** [1996] IRLR 33 is a good example of the application of the former in the context of trade unions, and Lord Wilberforce had something important to say about the latter in **Heatons Transport (St Helens) Ltd v Transport and General Workers' Union** [1973] AC 15 at p. 101A-D. He said:

“... it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf. What the members understand as

to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the TUC Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:

'Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union.'

13. It is said by Mr Anthony White QC on behalf of UNISON, who did not represent UNISON at the hearing before the Certification Officer, that the Certification Officer himself recognised that a term of some kind should be implied. For example, the Certification Officer accepted the submission of counsel then appearing on behalf of UNISON that "there would be no breach of rule G3.2 in the circumstances of physical impossibility, for example if there were no branch officers and no interest by any member in participating in branch organisation". We do not think that, in accepting that submission, the Certification Officer was agreeing that there were circumstances in which a term may be implied which has the effect that the requirement for a branch AGM to be held in the first quarter of the year may be suspended. There was no reference to implied terms in either the skeleton argument of counsel then appearing on behalf of UNISON or in the Certification Officer's decision. The reason why the Certification Officer was saying that there would be no breach of rule G3.2 if it was physically impossible to hold an AGM was because, to use the language of the law of contract, compliance with that rule had become frustrated, not because there was a power to override it.

14. The difficulty at first blush about implying a term of the kind contended for by UNISON and which would have the effect of disapplying rules such as rule G3.2 if the temporary abrogation of such rules was a necessary and proportionate way of achieving the aims which regional supervision was intended to achieve, is that you cannot imply a term if its effect is to

override an express term which is clear and unambiguous. That applies just as much to a union's rulebook as to a normal commercial contract: see **Taylor v National Union of Mineworkers (Derbyshire Area)** [1985] IRLR 99. Here, as the Certification Officer pointed out, there was a provision in the rules expressly prohibiting the NEC from doing anything which was inconsistent with the rules. That prohibition is to be found in rule D2.1, the very rule which, when coupled with rule D2.9, is said to have given the NEC the power to put a branch under regional supervision.

15. The answer to that, we think, is that it would be wrong to treat the prohibition in rule D2.1 as applying only to the express rules in UNISON's rulebook. The prohibition in rule D2.1 must be treated as also applying to those rules which have to be implied either to give effect to the presumed intention of the parties or by custom and practice. If the decision to suspend the operation of rule G3.2 was a necessary and proportionate way of achieving the aims which regional supervision was intended to achieve, then that decision would not be inconsistent with any of the rules in the rulebook, because it would have been sanctioned by the implied term for which UNISON contends. In this context, we are particularly mindful of what Lord Wilberforce said in **Heaton** about interpreting rules in a trade union's rulebook in a way in which the rules would be understood by its members. At pp. 100H-101A, Lord Wilberforce said:

“... trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book.”

16. In our view, a term of the kind contended for by UNISON should be implied into the rules. Something has to be done about branches which are dysfunctional, and the term which it is sought to imply enables something to be done about them provided that, where what was

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involved includes the suspension of some of the rules relating to the organisation and management of the branch, the suspension of those rules which are to be suspended has to be justified. That justification can be met by allowing such rules to be suspended only when they are both necessary and not a disproportionate way of achieving the aims which regional supervision is intended to achieve. The route by which such a term is to be implied into UNISON's rulebook is by UNISON's custom and practice, which is reflected in the Certification Officer's finding that since 1995 (in other words, ever since UNISON was created following the amalgamation of NUPE, COHSE and NALGO) the DOC had put many branches into regional supervision, and the overwhelming inference is that many of the rules relating to branches have had to be suspended in the process of regional supervision to enable effective supervision to take place.

17. The more difficult question, though, is whether, in the light of how things were at the Derbyshire County Branch, the extreme step of cancelling a branch's AGM and thereby disenfranchising the members of the branch from voting on those issues which would be considered at such a meeting was a necessary and proportionate way of achieving the ends which regional supervision of the branch was intended to achieve. Would it be right, for example, for the members of the branch to be disenfranchised just because the branch officials has fallen out with each other to such an extent that they could not transact branch business? That is a question which undoubtedly would have troubled the Certification Officer had he addressed it. We know that because when he was addressing a different argument, namely UNISON's argument that if the NEC had the power to open or close a branch (as it did: see rule D2.9.10), it had to be inferred that it had the lesser power to suspend for a period of time some of the functions of a branch. When considering that argument, the Certification Officer said:

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“... there is a substantive difference between closing a branch and Regional Supervision. By rule G1.1 all members must belong to a branch. Only by belonging to a branch can a member participate in some of the democratic processes of the Union, such as the election of branch delegates and the submission of branch resolutions. The branch is an important first building block in a union’s constitution. If a branch is closed, the members must be reallocated to another branch (or branches) and thus they retain their rights of democratic participation. If a branch is put in Regional Supervision, the members of that branch lose those rights which derive from the rules that have been set aside. This can be for a substantial period. I heard evidence of one Regional Supervision lasting over four years and another over five years. In the present case the Regional Supervision commenced in May 2011 and it is hoped it will end after March 2013, a period of nearly two years. These are substantial periods for members to be deprived of certain basic rights contained in the contract of membership for which they signed up.”

18. We know, of course, that the Certification Officer found that the requirement to hold an AGM was not to be disapplied simply because the branch had been put into regional supervision. That is what he held, and it is plain from the passage which he have cited that he regarded as important the democratic participation of ordinary rank and file members of the branch in the affairs of the branch. But the critical question is whether, in the light of the implied term which we think the rules were subject to, the suspension of the requirement to hold the AGM in 2012 was both necessary and a proportionate way of achieving the ends which regional supervision was intended to achieve, having regard to the assault which that would make on the right of the rank and file members of the branch to participate in the democratic processes of the branch. That was not a question which the Certification Officer addressed. In the light of our analysis, that was what the Certification Officer had to consider. It is not, of course, an issue which we can decide for ourselves.

19. In the circumstances, the course which we propose to take is to allow the appeal, and to remit the case back to the Certification Officer to enable him to decide whether the suspension of the requirement to hold the AGM in 2012 was both necessary and a proportionate way of achieving the aims which regional supervision was intended to achieve. If he decides that it was, he will dismiss Mr and Mrs Street’s complaint. If he decides that it was not, he will

uphold it. It will be for the Certification Officer to decide what further evidence, if any, the parties should be permitted to give, and what form the hearing before him should take.