D/42-43/10-11

DECISIONS OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER SECTION 108(A)(1) AND SECTION 55(1) OF THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

MR D DAWES

V

ROYAL COLLEGE OF NURSING

Date of Decisions **3 February 2011**

DECISIONS

Upon application by Mr Dawes ("the claimant") under section 108A (1) and section of 55(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

(i) I refuse to make the declaration sought by the claimant that the Royal College of Nursing breached bye-law 2 and rule 3.1(i) of its rules on or about 23 June 2010 by allegedly not giving him any warning or following any set procedure prior to terminating his membership of the union.

(ii) I refuse to make the declaration sought by the claimant that the Royal College of Nursing breached section 47(1) of the 1992 Act on or about 23 June 2010 by allegedly excluding him unreasonably from standing as a candidate in the 2010 election for the position of Deputy President.

REASONS

1. Mr Dawes is a member of the Royal College of Nursing ("the RCN" or "the College"). By an e-mail of 19 August 2010 and a Registration of Complaint Form received at the Certification Office on 20 August 2010, Mr Dawes made complaints of a breach of the rules of the RCN and of a breach of the 1992 Act. He maintained that the breaches of rule were within my jurisdiction under section 108A(1) and (2) of the 1992 Act. Following correspondence with my office, Mr Dawes confirmed the two complaints that he wished to pursue in the following terms:-

   Complaint 1

   "That on or around 23 June 2010 the union breached its rule 3(1)(i) and bye-law 2 by not giving any warning or following set procedure prior to terminating Mr Dawes' membership of the union. This resulted in Mr Dawes being unreasonably removed from his position as UK Council Member for the North West and in him being barred from standing as a candidate in the election in 2010 for the position of Deputy President".

Complaint 2

"That on or around 23 June 2010 the union breached s47(1) of the 1992 TULR(C) Act in that the union unreasonably excluded Mr Dawes from standing as a candidate in the 2010 election for the position of Deputy President".

2. I investigated the alleged breaches in correspondence. A hearing took place on 11 January 2011. At the hearing, the claimant represented himself and gave evidence. He called no other witnesses but produced witness statements from Mr Gerry Bolger, ex vice-chair of the RCN Council and Nicky Wallace, RCN member. The RCN was represented by Mr Michael Ford of counsel, instructed by Ms D Tuck of Bates Wells and Braithwaite. Mr Ford called four witnesses; Mr Kevin Hasler, Director, RCN Direct, Mr Tim Golbourn, Director of Finance & Corporate Services, Ms Sandra James, Chair, RCN Council and Ms Jane Clarke, Director of Governance Support. Each person who gave oral evidence produced a written witness statement. There was in evidence a 391 page bundle of documents consisting of letters and other documentation supplied by the parties for use at the hearing to which one additional document was added at the hearing. Mr Dawes and Mr Ford each provided a written skeleton argument. There was a separate bundle of authorities.

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. The RCN is a trade union and a Special Register Body as defined in section 117 of the 1992 Act. Its legal status derives from a Royal Charter, by which it is an incorporated body. The RCN is governed by its Royal Charter, bye-laws and rules. Article 17 of the Royal Charter provides for there to be bye-laws and paragraph 47 of the bye-laws provides for there to be rules.

5. The RCN has approximately 400,000 members. As a membership organisation it depends largely on the subscriptions of its members and has systems in place to ensure that members maintain payment of their subscriptions. Nevertheless, at any one time, there are approximately 5,700 members in arrears. Payment of subscriptions by direct debit is encouraged and about 372,000 members pay in this way. Nevertheless, in any particular month, about 1,700 direct debit requests are rejected by the relevant banks. One reason for such a refusal is that there are insufficient funds in the member's account to make the payment. A typical subscription at the relevant time was £15.60 a month.

6. Mr Dawes has been a member of the RCN since 1990. He has held many local, regional and national elected positions within the College and in 2007 was given the RCN Long Service Award for 15 years continuous elected service. He was elected to the RCN Council in 2009 for a period of four years. He is a director of the Foundation of Nursery Leadership and is a visiting lecturer at Liverpool John Moores University.

7. Mr Dawes has had problems over the years in maintaining the regular payment of his subscriptions. At the hearing before me he referred to difficulties he had experienced in the late 1990s but the documentation in evidence relates to the difficulties he has experienced since 2006 with regard to failed direct debit payments. In this period he received a number of letters from the College about his failure to make a payment on the due date. I describe below the RCN system in relation to failed subscriptions generally and failed direct debits in particular.

8. Paragraph 2 of the RCN bye-laws provides that its Council may order, if it thinks fit, the removal from the Roll of Members the name of any member whose subscription is in arrears for not less than three months. For as long as any witness could remember this bye-law has been applied automatically to any member whose subscriptions are three months in arrears. This practice was discussed by Council at its meeting on 22 February 2008 and endorsed. Although this discussion is not noted in the minutes of that meeting, I accept the evidence of Ms James that such endorsement was given. Given the large membership of the RCN and the numbers of members in arrears at any one time it would clearly be impractical for Council to consider individually the position of each member whose subscriptions fell three months in arrears. I find that bye-law 2 gives Council the power to remove such members from its roll and that Council has exercised that power so as to require the automatic removal of any member with three months arrears.

9. The automatic operation of this part of bye-law 2 is mitigated and partly explained by the final sentence of that bye-law. This provides that Council may, in its discretion, restore the name of any person so removed upon the satisfaction of any condition set by Council.

10. The rules contain a procedural safeguard against a member falling into arrears accidentally and being subject to the automatic operation of bye-law 2. This is found in rule 3.1(i) which provides as follows:

> Rule 3.1 "Under Bye-Law 2, the Council has the power to remove members from membership. However, in doing this, the following procedure applies (subject to 7.2(vi)):-
>
> (i) If a member falls behind with their subscription they will receive at least one warning before their name is removed from membership. Proof that that warning was sent to the address on the Membership database is sufficient evidence that this requirement has been met."

11. The procedure applied by the RCN to a member who ordinarily pays by direct debit but whose direct debit payments fail is as follows.

    11.1 At the failure of the first direct debit payment, the RCN sends a standard form letter known as a D11. This letter informs the member that the College's request for the payment has been rejected by his or her bank and gives the reason why. It goes on, *"Your subscription is now in arrears. For membership this means that your membership will now be recorded as being in a lapsed status, and may affect the services and benefits that you receive as part of RCN membership. Unless you notify us otherwise, we will try to collect all outstanding amounts shown below on (specific date inserted), and*

successful collection will continue your membership with no effect on cover or benefits". The letter states that two months subscription will be collected on the first of the coming month and gives the amount.

11.2 Should the members next direct debit also be rejected, he or she is sent a standard form letter known as a D10. This letter again informs the member of the rejection and the reason given by the bank. It goes on *"As a result of this rejection we are unable to make any further attempts to debit the above account for outstanding arrears... If you wish to continue the subscription the direct debit must be reset ... If we do not hear from you within the next month, your RCN membership will be cancelled".*

11.3 Should the member not contact the RCN to reset the direct debit or otherwise pay the arrears, a standard form letter is sent by the marketing department of the RCN during the course of the next month. This is known as "the Marketing Letter". It informs the person that his or her membership has recently expired. It goes on to state, *"You have until (specific date inserted) to reinstate your membership. After this date your records will be marked as deleted and you will need to reapply for membership. You can rejoin now by visiting www.rcn.org ...".*

11.4 The RCN also operate a three months "grace period" by which members are treated as though they have not been in arrears if they pay all such arrears at any time within the period of three months from the date of the first arrears. In respect of members who pay by direct debit the grace period is effectively four months as it operates from the time the second direct debit is rejected and the D10 letter is triggered.

12. In the period between May 2006 and October 2010, Mr Dawes received six D11 letters and two D10 letters.

13. I now come to the events which gave rise to the present complaints. Mr Dawes was due to make a payment of his RCN subscription of £15.60 by direct debit on 1 November 2010. His bank refused payment as there were insufficient funds in his relevant account. The RCN system automatically generated a D11 letter on 4 November, which Mr Dawes received. A copy of the D11 letter was put on Mr Dawes' membership record. Mr Dawes' bank also informed him by letter that the direct debit had failed. He telephoned the RCN and assured them there would be sufficient funds to cover the sum which would be requested on 1 December 2010, namely £31.20.

14. On Tuesday 1 December 2010, there was insufficient money in Mr Dawes' account when the RCN requested payment of £31.20 and its request was accordingly refused by the bank. There had been sufficient funds in Mr Dawes' account at the beginning of 1 December and there were again sufficient funds in that account on 2 December. However, Mr Dawes had allowed his account to drop below the required amount during the course of 1 December when, it would appear, the bank tried to obtain payment.

15. The RCN system automatically generated a D10 letter on 4 December 2010, a copy of which was placed on Mr Dawes' membership record. Mr Dawes states that he did not receive this letter. Similarly Mr Dawes' bank wrote to him about this failed direct debit but he states that he did not receive this letter either. Mr Dawes gave evidence that, as he had heard from neither the RCN or his bank, he assumed the direct debit had gone through. He now accepts, however, that he was at fault in not checking his bank statement to ascertain whether the direct debit had been taken.

16. Upon the second failure of Mr Dawes' direct debit, the RCN ceased the direct debit arrangement. The RCN stated that it does this to prevent members incurring further bank charges for failed direct debits. Accordingly, no subscriptions were paid by Mr Dawes in January, February or March 2010.

17. In January 2010, the RCN Marketing Department automatically generated its "Marketing Letter" which was sent to Mr Dawes on or about 18 January. The College gave evidence that this letter gave Mr Dawes until 1 March to reinstate his membership, after which his records would be marked as deleted and he would need to reapply for membership. Mr Dawes states that he did not receive this letter. A copy of it was not retained by the RCN or its mailing house. The only evidence that it was sent is that Mr Dawes' details were included in the batch which was sent electronically to the mailing house which was to prepare and send the appropriate letters to those members included in the batch.

18. On the above facts, Mr Dawes's period of grace to retain membership of the college was three months from 1 December 2009. Accordingly this period of grace expired on 28 February 2010 with the effect that from 1 March 2010 he would need to reapply for membership and his continuous membership of the College would be broken. The RCN would then ordinarily not permit such a member to pay his or her arrears and be granted continuous membership. Ms James explained in evidence that this is an important principle to the RCN. It prevents members whose subscriptions have lapsed for more than three months claiming RCN assistance for an incident which arose in the lapsed period, such as an accident at work or for representation in relation to employment or professional disciplinary hearings, by the simple expedient of offering to pay the arrears. Ms James stated that she was aware of some very senior members whom the RCN had refused to represent because they were not in membership at the time of the incident. Ms James also stated that it was very important that this policy was applied consistently to all members and that preference was not given to members of Council.

19. During the course of February 2010, the RCN prepared membership renewal packs for all those members shown on its computer as having a renewal date of 1 April. Mr Dawes fell into this category. Furthermore, his name remained on the relevant database as he was then still within his period of grace. The membership renewal packs were delivered to members between 27 February and 6 March and, on the balance of probabilities, Mr Dawes received his pack on or after 1 March. The pack contained a new membership card and a covering letter dated February 2010. The membership card stated that it did not guarantee membership of the RCN. The letter stated, inter alia, "*Your membership will be renewed automatically on 1 April 2010*". The letter further informed Mr Dawes that membership would be automatically renewed as he was a direct debit paying member.

20. Mr Dawes asserted that he continued to believe he was a fully paid up member of the RCN from December 2009 to March 2010. He stated that he had no reason to believe that he was not a member and many reasons to believe that he remained in membership. He referred to the new membership card he had received. He also referred to his unchallenged attendance at a meeting of Council on 19 and 20 March. He referred to the fact that he was still able to access the RCN website and library using his membership number and that he continued to receive the RCN's journal, Nursing Standard. He also referred to the fact that his booking for a place at Congress in late April had been accepted and confirmed to him on 1 April.

21. Matters began to unravel for Mr Dawes on 30 March 2010. Ms Clarke, the RCN Director of Governance Support, was then informed that, as a result of Mr Dawes' application to attend Congress as a member of Council, a routine check had shown his membership as having been deleted from 1 November 2009 due to non payment. Ms Clarke immediately realised the seriousness of the situation. She knew that Mr Dawes could not continue on Council as Article VI(c)(a) of the Royal Charter provides that "*the office of a member of the Council shall ipso facto be vacated if such a member ceases for any reason to be a member of the College*". She further knew that, even if he rejoined, he would be unable to stand for certain elected positions for three years as, inter alia, bye-law 26 provides that, "*the President and Deputy President shall be elected by the Members of the College from amongst the Members who have been Members of the College for such period as the Council shall from time to time determine*". It was common ground that the period so determined was three years. Ms Clarke immediately consulted Ms James in her position of Chair of Council and throughout the events that ensued Ms Clarke acted upon Ms James' instructions. Ms James directed that Mr Dawes be informed of the position as soon as possible.

22. Ms Clarke spoke with Mr Dawes on the telephone on 31 March 2010 and informed him of the position. He presumed that there must have been some error on the part of the RCN which could be sorted out quickly. Shortly afterwards, he telephoned Membership Services in Cardiff and a transcript of his conversation with the operator to whom he spoke was in evidence. Whilst she at one stage appeared willing to accept a payment of arrears of £63.73 she asked to be excused for a moment and, 50 seconds later, she told Mr Dawes that a colleague had confirmed what she had thought, namely that as his arrears were greater than three months she could not take the arrears and so retain his continuous membership. Mr Dawes then spoke with Mr Hasler, the director of RCN Direct ("RCND"), the member contact and advice centre in Cardiff. Mr Hasler had already been alerted to the problem by Ms Clarke who had given him the impression that the RCN could well have made a mistake. Mr Hasler obtained confirmation from Mr Dawes that the database had his correct home address, membership number and bank details. He explained the process for collecting direct debits and that he had no authority to accept arrears outside the period of grace. Indeed, Mr Hasler had no knowledge of any such late payment having been accepted and knew that, if it were to be done at all, it would have to be at a higher level than himself. Mr Dawes told Mr Hasler that he had not received any of the relevant letters and expressed surprise at not having been telephoned to be told he was in arrears. Mr Hasler said he would investigate the situation at his end and prepare a report. Mr Dawes then emailed Ms Clarke

confirming that he had no idea there was a problem and that he considered that it would be fairly straightforward to resolve the situation.

23. Mr Hasler completed his report on Mr Dawes' membership position on the same day, 31 March 2010. He concluded, in effect, that there had been no errors on the part of the RCN membership system. He had satisfied himself that the D11 and D10 letters had been despatched by Royal Mail from the RCND post room in Cardiff Gate and that Mr Dawes' details were on the data file which had been sent to the mailing house, Etrinsic, where the relevant marketing letters were printed automatically using the information on the data file and despatched.

24. A report on the situation was made to the Council Executive Team ("CET") on 7 April 2010. The CET is made up of about eleven senior lay officials, including the President and the Chair of Council (which are distinct positions in the RCN). It oversees the implementation of Council decisions and acts on matters requiring urgent attention, reporting back to Council. The CET agreed that Mr Dawes should be informed of his position under the RCN membership policy.

25. Ms Clarke emailed Mr Dawes on 9 April 2010 informing him that the internal report had shown that all the RCN systems and processes had been followed correctly. She confirmed that his membership had lapsed on 1 March, after two BACS requests had failed and the RCN had not received any response to the three letters he had been sent between November and January 2010. Ms Clarke also explained that, as a result, his name had been removed from the list of Council members. She went on to ask him if he had any evidence that would support his position that he was not aware that there was a problem and had not received the relevant correspondence.

26. Mr Dawes responded to Ms Clarke by emails of 9 and 13 April 2010 in which he restated that he had not received the D10 or Marketing Letter and therefore had no reason to believe that his subscriptions were in arrears. He also stated that the actions of the RCN had been inconsistent with him being in arrears. He referred to being sent a new membership card and being able to access the library and website using his membership number.

27. On 19 April 2010 Mr Dawes rejoined the RCN by making a single payment of £193.

28. The RCN's annual Congress was due to begin on Monday 26 April 2010 in Eastbourne. Prior to Congress, Mr Dawes' position was discussed in a CET teleconference on 22 April and at a meeting of Council on 25 April. In the teleconference Ms James confirmed the view she had set out in an email to CET members on 20 April. She stated that the RCN's relevant process was robust and generous and that there were no grounds to make an exception in the case of Mr Dawes to the policy of not allowing the payment of arrears after the grace period. She stated that Mr Dawes should not be treated any differently just because he was a member of Council. She considered that to do so would set a very difficult precedent and potentially open up the RCN to a large number of complaints from other members who had been removed from membership in similar circumstances. The CET agreed that Mr Dawes should be informed that he could not now pay his arrears so as to reinstate continuous membership. The president,

Ms Buchannan, agreed to inform Mr Dawes of this decision and that he could submit a written complaint to Council if he felt there was an organisational error that has led to his membership lapsing. On the same day, Mr Dawes wrote to selected members of Council setting out his case and asking them to table a motion for Council permitting him to pay his arrears and be reinstated on Council.

29. At the Council meeting on 25 April 2010, Ms James gave a report on the position and explained that if Mr Dawes submitted a complaint about the lapsing of his membership this would be investigated and, if it was found that an error had been made by the RCN, his membership and his position on Council would be restored. No substantive decision was taken by Council at this meeting.

30. On 5 May 2010 Mr Dawes submitted his complaint. He understood that this would trigger an independent investigation and review of his removal from Council. He accepted that his membership had lapsed "*because of errors on both sides*" but noted that Council had a discretion which he invited them to exercise to reach a different conclusion having regard to the mitigating circumstances. Mr Dawes set out his case in considerable detail.

31. The RCN asked Mr Chris Cox, its director of legal services, to compile a report. He interviewed Mr Dawes and visited RCND in Cardiff where he interviewed Mr Hasler. He also considered the relevant documents. Mr Cox's extensive report is dated 4 June 2010. It concluded that the automatic termination of Mr Dawes' membership with effect from 1 March 2010 was consistent with the long standing practice adopted by the College in relation to members who are more than four months in arrears in their direct debits. He found no organisational errors on the part of the RCN.

32. On 8 June 2010, Mr Dawes was sent a copy of Mr Cox's report and asked to comment upon it. He did so by a note dated 9 June which he sent to the RCN's Chief Executive and General Secretary, Dr Carter, with an email of 13 June. Mr Dawes again set out his case but he also argued that there could have been a problem with the RCN's relevant technology, the Oscar Data Management System. He noted that this had been reported in the Risk Register presented to Council as being one of the highest risks in the organisation. He also argued that he'd been treated differently to other members who had had their membership reinstated and backdated due to RCN system errors.

33. On 11 June 2010, Mr Dawes submitted his nomination to be a candidate in the election that was about to be held for the office of deputy president. By a letter dated 14 June, Ms Clarke informed Mr Dawes that his nomination was not valid as his membership record showed that he did not have three years continuous membership at the date that nominations closed, 11 June.

34. An emergency meeting of the CET was held by teleconference on 18 June 2010 to discuss this latest development. It was agreed to call a Council meeting on 23 June at which Council would consider its discretion under the bye-laws and decide whether to restore Mr Dawes' continuous membership. It was also decided to defer the despatch of ballot papers in the relevant election until after that Council meeting.

35. On 20 June 2010 Mr Dawes wrote to selected members of Council again setting out his case.

36. The Council meeting of 23 June 2010 lasted some two hours and dealt only with the issue of Mr Dawes. Ms James explained that the purpose of the meeting was for Council to consider its discretion under bye-law 2. Mr Hasler and Mr Golbourn, the director of finance and corporate services, attended the meeting to give assistance on technical matters if required. Mr Dawes was not asked to attend and did not do so. In the course of discussion it was noted that the problems that had caused the Oscar Data Management System to appear on the Risk Register were not related to the way it dealt with membership subscriptions and members in arrears. It was also noted that no instance could be found of anyone in Mr Dawes' situation being treated differently. Council voted on whether to exercise its discretion in Mr Dawes' favour. It voted against doing so by 16 votes to 2. Ms James wrote to Mr Dawes the same day to inform him of the decision of Council.

37. Mr Dawes commenced this application by a Registration of Complaint Form received at my office on 20 August 2010.

The Relevant Statutory Provisions

38. 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.

47 Candidates

(1) No member of the trade union shall be unreasonably excluded from standing as a candidate.
(2) No candidate shall be required, directly or indirectly, to be a member of a political party
(3) A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all members are excluded by the rules of the union.

But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded.

55 Application to Certification Officer

(1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.

The Relevant Union Rules

39. The governing instruments of the RCN which are relevant to this application are as follows:-

Article VI(c) of the Charter

c. "The office of a member of the Council shall ipso facto be vacated;

a. if such member ceases for any reason to be a member of the College";

Bye-Law 2

Membership

"The Council shall maintain the Roll of Members and the Roll of Student Members referred to in Article V of the Charter and may order if it thinks fit the removal from the said Rolls of the name of any Member or Student Member whose subscription is in arrears for not less than three months. The Council may also order the removal from the said Rolls of the name of any Member or Student Member who in the opinion of the Council has been guilty of conduct unfitting in a Member or Student Member of the College, provided that no Member's or Student Member's name shall be removed from the said Rolls for this reason unless that Member or Student Member shall have been given a reasonable opportunity of being heard by the Council or a Committee thereof in his or her own defence. The Council may also in its discretion restore the name of any person so removed if that person has complied with such conditions or requirements as may be laid down by the Council for the restoration of the name of such person to the relevant Roll".

Bye-Law 26

"The President and Deputy President shall be elected by the Members of the College from among Members who have been Members (but not Student or Associate Members) of the College for such period as the Council may from time to time determine nominated by such national forums and local branches of the College, and such number of such bodies as the Council may from time to time decide. Six months in advance of the Annual General Meeting at which the new or re-elected President and Deputy President shall take up office the Council shall appoint a Returning Officer who shall not be a Member of the College to be responsible for and to make such regulations as are necessary for the proper conduct of the elections to these offices. The elections to the office of President and Deputy President shall be separate but concurrent........."

Rule 3

Membership

Rule 3.1 "Under Bye-Law 2, the Council has the power to remove members from membership. However, in doing this, the following procedure applies (subject to 7.2(vi)):-

> (i) If a member falls behind with their subscription they will receive at least one warning before their name is removed from membership. Proof that that warning was sent to the address on the Membership database is sufficient evidence that this requirement has been met."

Complaint 1

40. Mr Dawes' first complaint is as follows:-

> "That on or around 23rd June 2010 the union breached its rule 3.1(i) and bye-law 2 by not giving any warning or following set procedure prior to terminating Mr Dawes' membership of the union. This resulted in Mr Dawes being unreasonably removed from his position as UK Council Member for the North West and in him being barred from standing as a candidate in the election in 2010 for the position of Deputy President".

Summary of Submissions - Complaint 1

41. Mr Dawes was requested to address both the issue of jurisdiction and whether the relevant rules had been breached. On the issue of jurisdiction, Mr Dawes argued that this complaint was within my jurisdiction as the rules in question related to one of the matters mentioned in section 108A(2) of the 1992 Act, namely "*the appointment or election of a person to, or the removal of a person from, any office*". Whilst Mr Dawes accepted that neither bye-law 2 nor rule 3.1(i) expressly concerned a matter listed in section 108A(2), he argued that they "related" to his removal from Council and to him being declared ineligible to stand for election as deputy president. He submitted that the RCN's sole justification for removing him from office and for excluding him from the election was based on its application of the membership renewal process. Mr Dawes referred to the case of *Finlay v. Unite the Union* (CO-D/28-30/07) in support of his argument that my jurisdiction is not confined to rules which specifically mention appointments or elections. He also considered that it would set a dangerous precedent if unions were able to remove members from office or exclude them from elections under the guise of a decision on membership, when Parliament clearly intended the Certification Officer to have jurisdiction in such matters.

42. As to whether there was a breach of the rules in question, Mr Dawes argued that there was a breach of rule 3.1(i) and that this necessarily resulted in a breach of bye-law 2. He submitted that he had not received any warnings before he was removed from membership. He specifically denied that the D11 letter dated 4 November 2009, which he did receive, could be construed as a warning. In Mr Dawes' view, this letter merely informed him that his membership would be recorded as being in a lapsed status and that the RCN would try to collect all outstanding monies on 1 December 2009. He further argued that the RCN had not presented proof that the D10 letter of 4 December or the Marketing Letter of 18 January had been sent to his address. In his submission, such proof would need to be supported by a third party such as would be the case if the RCN had obtained a "Proof of Posting" certificate from the Post Office or if the letters had been sent by recorded or special delivery. In the absence of such proof, Mr Dawes considered that the RCN had breached rule 3.1(i). He further considered that if no

warning letter had been sent there could be no automatic termination of his membership after three months in accordance with bye-law 2. Mr Dawes also argued that the Oscar Data Management System was so unreliable that any evidence of posting based on that system could not be proof that the letters in question had been sent. He asserted that he had plainly not received the D10 letter or the Marketing Letter as, upon receipt of such letters, he had always made immediate contact with the RCN to rectify the situation and he had not done so on this occasion. Mr Dawes further argued that he had been treated unfairly as a result of other members in arrears having been treated more favourably and as a result of him not being permitted to address the Council meeting on 23 June 2010 nor having access to all the materials that were before Council.

43. Mr Ford, for the union, submitted that I do not have jurisdiction to consider whether the RCN had breached bye-law 2 and/or rule 3.1(i) as neither rule related to matters mentioned in section 108A(2) of the 1992 Act. He argued that these rules on their face related to membership and not the removal of members from office nor elections. He agreed with the approach in *Lynch v. UNIFI* (CO/1964/18 7 October 2004) that that my jurisdiction under section 108A should be viewed restrictively. He further relied upon my observation that the connection between the rule allegedly breached and the matters listed in section 108A(2) must be "clear and direct". Mr Ford submitted that a rule may relate to one of the matters mentioned in section 108A(2) if, on a plain and literal reading of the rule, it is clearly and directly related to one of the listed matters or if, in its general practical operation, it is clearly and directly related to one of the listed matters. In the latter case, however, Mr Ford submitted that it was not sufficient if the application of a rule merely impacted on one of the listed matters. He argued that this would be inconsistent with the restricted jurisdiction recognised in *Lynch*; that it would be inconsistent with the wording of section 108A(1) and its focus on "the rule", that it would amount to substituting a test of whether a rule affects or impacts upon one of the listed matters for the statutory wording and that it would be inconsistent with clear Parliamentary intention. Mr Ford asserted that Parliament had given jurisdiction over such matters to employment tribunals under Chapter V of the 1992 Act. In accordance with this analysis, Mr Ford respectfully argued that a part of my decision on jurisdiction in the case of *McDermott v. UNISON* (D/1-9/10) was wrong. He further argued that it could not be correct for my jurisdiction over a particular rule to depend upon the personal circumstances of the claimant so that I would have no jurisdiction in respect of a rule concerning membership if, for example, the member did not hold office but that I would have jurisdiction over the same rule if the member held office or was seeking nomination for an elected position. On the facts of this case, Mr Ford submitted that the connection between the rules allegedly breached and the matters listed in section 108A(2) was anything but clear and direct. He submitted that it was oblique and coincidental.

44. As to whether there was a breach of rule 3.1(i), Mr Ford argued that the D11, D10 and Marketing Letters were all warning letters. He noted that Mr Dawes had received the D10 letter dated 4 November 2009 and submitted that this in itself was sufficient to satisfy rule 3.1(i). However, Mr Ford went on to argue that the RCN also had proof that the D10 and Marketing Letters had been sent to Mr Dawes and that these letters also satisfy the requirements of rule 3.1(i). He submitted that the evidence of Mr Hasler and Mr Golbourn had established beyond doubt that,

whatever criticisms there might be of the Oscar Data Management System, there were no valid criticisms of the way it operated in relation to the collection of direct debit subscriptions and the generation of letters to members whose direct debit payments had failed. As to the policy of automatically removing members who fell into arrears by three months, Mr Ford noted that this had been the policy of Council for as long as anyone could remember and that it had been expressly approved at a meeting of Council in 2008. He argued that such a policy was necessary having regard to the large membership of the RCN and the number of direct debits that were rejected by members' banks each month. He also argued that it was a reasonable policy having regard to the warnings that had to be sent to members under rule 3.1(i). Mr Ford commented that any reading of bye-law 2 to the effect that Council must exercise its discretion separately in each individual case would be unworkable in practice and was accordingly an unlikely interpretation of that bye-law. Mr Ford further argued that the RCN had exercised its discretion on whether Mr Dawes should be restored to the Roll of Members in accordance with bye-law 2. He stated that this was the express purpose of the Council meeting of 23 June 2010. Mr Ford submitted that there was no basis for implying rules of natural justice into a non-disciplinary rule of this kind but that in any event the procedure adopted by Council on this occasion, in the absence of a laid down procedure, was fair and reasonable. He further argued that the decision reached by Council was one that was open to it in the proper exercise of its discretion. In particular, he submitted that it was entitled to conclude that the membership database was not unreliable and that no other member had had their membership backdated after the period of grace had expired.

Conclusion – Complaint 1

45. I will deal firstly with the issue of jurisdiction and then with the substantive complaint.

Jurisdiction

46. Section 108A(1) and (2) of the 1992 Act provide 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.

47. The above provisions limit my jurisdiction in respect of claims of breach of rules of a trade union. A claim is only within my jurisdiction if it is of a breach or threatened breach of the rules relating to any of the matters mentioned in subsection (2). In the case of *Re UNISON* (D/11/00 – 16 June 2000) my predecessor stated at paragraph 23:-

> *"I do not have a general jurisdiction over breaches of union rules. Whilst I do not accept Mr Langstaff's argument that I have jurisdiction only over rules which are on their face concerned with the matters set out in 108A(2) – there may well be rules which are of general application but which in the context in which they are allegedly breached clearly relate to one of those matters – I do not consider that the relationship is close enough in this case."*

In the case of *Lynch* I observed as follows at paragraph 48:-

> *"The Certification Officer had no jurisdiction to determine potential breaches of trade union rules prior to the Employment Relations Act 1999. By that Act, section 108A was inserted into the 1992 Act. This section gives the Certification Officer a limited jurisdiction over a restricted category of union rules. It also gives the Secretary of State power to extend the jurisdiction to breaches of other types of rule. In my judgment, the history and structure of section 108A demonstrates an intention by Parliament that my jurisdiction under this section should be viewed restrictively."*

Ms Lynch laid emphasis on the breadth of the word "relate", as does Mr Dawes in the present case. In that connection, I further observed in the Lynch case at paragraph 49:-

> *"In my judgment, however, the use of the word "relate" does not have the effect of extending my jurisdiction to all those rules which touch upon, no matter how obliquely, the matters set out in section 108A(2). I find that the connection between the rule allegedly breached and the matters set out in section 108A(2) must be clear and direct. Whether a rule is one relating to a matter listed in section 108A(2) is a matter of fact and degree to be determined in the circumstances of the particular case."*

In the case of *Finlay v. Unite the Union,* I observed that a variety of union rules may have an impact on the appointment, election or removal of a person from office but that does not automatically make them rules relating to such matters for the purposes of section 108A(2). I went on to comment at paragraph 49:-

> *"There is clearly a continuum of rules impacting on appointments and elections, some of which are rules relating to appointments, and some of which are not. The decision on where the line is to be drawn falls to be decided in the context of the union rule book as a whole and custom and practice of the union."*

Most recently in *McDermott v. UNISON*, I observed at paragraph 47:-

> *"Whether a rule does relate to any of the prescribed matters is to be considered firstly on an objective reading of the rule, disregarding the facts of the instant case. If it does not objectively and obviously relate to any of the matters in subsection (2), I may exceptionally consider whether it is a rule which is so closely related with any of the prescribed matters that it can properly be found to "relate" to one or more of them."*

Whilst Mr Ford did not dissent from this general approach, he respectfully submitted that I had wrongly applied the statutory provision to one aspect of Mr McDermott's complaint of breach of rule, which complaint he considered to be within my jurisdiction on other grounds. I agree with the view expressed by Mr Ford that the use of a test for jurisdiction based upon whether a rule merely affects or impacts upon one of the listed matters would not be the correct approach to take. In this matter, I adopt the restrictive approach referred to in paragraph 48 of my decision in Lynch.

48. On the facts of this case, the rules allegedly breached are not on their face rules which deal directly with the appointment or removal of a person from office or to the balloting of members. I must therefore consider whether Mr Dawes can rely upon the breadth of the word "relate" to argue successfully that this is an exceptional case in which the rule allegedly breached is so closely connected with any of the prescribed matters that I can properly find that it "relates" to one or more of them.

49. It is plain from Mr Dawes' Registration of Complaint Form that the matters about which he wished to complain were his removal from Council and the decision that his nomination for election as deputy president was declared invalid. These are clearly matters that fall within section 108A(2) in a general sense. To make these complaints, Mr Dawes looked to the reason why he had been removed from office and his nomination was declared invalid, namely his removal from the Roll of Members. He correctly reasoned that in order to make good complaints that plainly would be within jurisdiction he would have to establish that his membership had been terminated wrongfully. He thus brought his claim for a breach of the rules on membership. Arguably, his claim should have been brought as a breach of Article VI(c)(a) of the Royal Charter (removal from Council) and bye-law 26 (rejection of nomination) but both of these provisions turn on a person's membership of the RCN and would require a determination of bye-law 2 and rule 3.1(i). It is in this context that I must determine whether the complaint made by Mr Dawes is within my jurisdiction. In making this determination, I find that it is material that Mr Dawes previously held office and was seeking nomination for an elected position. These facts are relevant to any finding I make as to whether alleged breaches of bye-law 2 and rule 3.1 fall within my jurisdiction. Absent the specific circumstances of Mr Dawes, a breach of bye-law 2 and/or rule 3.1(i) may or may not fall within my jurisdiction. That would depend upon the facts and circumstances of the particular case. I observe in passing that such a complaint is not one over which an employment tribunal would have jurisdiction under Chapter V of the 1992 Act. I do not consider that, on the facts of this case, the rules allegedly breached merely affect or impact upon the section 108A(2) matters, nor that their connection with such matters is "oblique and coincidental". In my judgment on the facts of this case, the connection between the rules allegedly breached and the matters mentioned in section 108A(2) is sufficiently clear and direct that I find they are rules which relate to the removal of a person from office and/or the balloting of members. I therefore find that this complaint is within my jurisdiction.

The substantive complaint

50. Mr Dawes submitted that the key to this complaint is rule 3.1(i) which provides as follows:-

> **Rule 3 Membership**
> Rule 3.1 "Under Bye-Law 2, the Council has the power to remove members from membership. However, in doing this, the following procedure applies (subject to 7.2(vi)):-
>
> > (i) If a member falls behind with their subscription they will receive at least one warning before their name is removed from membership. Proof that that warning was sent to the address on the Membership database is sufficient evidence that this requirement has been met."

51. In my judgment, the D11 letter received by Mr Dawes in November 2009 was not a warning letter in accordance with rule 3.1(i). It does not warn members that their names are about to be removed from membership, so alerting them to take action. However, it is common ground that the D10 letter is such a warning letter. The Marketing Letter conveys a mixed message. It is sent within three months of the arrears of subscription and therefore, in accordance with bye-law 2, the members names should not then have been removed from the Roll of Members. Nevertheless the letter states, "*your membership has expired recently ...*" before going on to give a date by which membership can be reinstated and after which date the member's records will be marked as deleted and they will have to reapply for membership. Members are encouraged to "*rejoin now*". In as much as the person's membership has "*expired recently*" and they can "*rejoin now*", the letter is plainly not a warning. Nevertheless, at the stage this letter is received the member's name is not removed from membership and members are warned that this will happen unless they take action. On this basis I find that the Marketing Letter is a warning letter, notwithstanding the fact that it is sent by the Marketing Department, not the Membership Department.

52. Whilst Mr Dawes maintains that he did not receive either the D10 letter or the Marketing Letter (or the letter from his bank alerting him that the December direct debit had been rejected) I find that the alleged breach of Rule 3.1(i) does not turn upon the receipt of these letters. The second sentence of the rule in effect deems that receipt has occurred if there is proof that the warning letter was sent to the address on the membership database. I reject Mr Dawes' submission that the required standard of proof is a "*proof of posting*" certificate from the Post Office or its equivalent. The rule could have said as much if that was the intention. I find that the standard of proof that is required is such proof that will establish on the balance of probability that the warning was sent. Such a test requires a consideration of all the relevant circumstances. On the facts of this case, there is plainly evidence that the D10 letter and the Marketing Letter were sent. There is a copy of the D10 letter on Mr Dawes' membership record. The computer batch files record Mr Dawes as having been sent the letters and a number of relevant screen shots were in evidence. There was no evidence of complaints to the RCN by other members that equivalent letters had not been received. I also find that there was no evidence that the Oscar Data Management System was defective in this regard. On the totality of the evidence I find that there is sufficient proof that the D10 and Marketing Letters

were sent to Mr Dawes before his name was removed from membership. I therefore find that there was no breach by the RCN of rule 3.1(i) of its rules.

53. I further find that, in accordance with bye-law 2, the RCN lawfully removed Mr Dawes' name from the Roll of Members in accordance with its long standing practice and the specific decision of its Council on 22 February 2008 in relation to the exercise of its power to remove members in these circumstances. I also find that Council properly exercised its discretion under bye-law 2 in deciding not to restore the name of Mr Dawes to the Roll of Members following its removal. In my judgment, the decision reached by Council in this regard was within the scope of its discretion on the facts of this case and followed a procedure which was appropriate in all the circumstances, this not being a disciplinary hearing.

54. For the above reasons I refuse to make the declaration sought by Mr Dawes that the Royal College of Nursing breached bye-law 2 and rule 3.1(i) of its rules on or about 23 June 2010 by allegedly not giving him any warning or following any set procedure prior to terminating his membership of the union.

Complaint 2

55. Mr Dawes second complaint is in the following terms:-

> "That on or around 23 June 2010 the union breached s47(1) of the 1992 TULR(C) Act in that the union unreasonably excluded Mr Dawes from standing as a candidate in the 2010 election for the position of Deputy President".

56. Section 47 of the 1992 Act provides as follows:-

> **Candidates**
> S.47 (1) No member of the trade union shall be unreasonably excluded from standing as a candidate.
> (2) No candidate shall be required, directly or indirectly, to be a member of a political party
> (3) A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all members are excluded by the rules of the union.
> But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded.

Summary of Submissions – Complaint 2

57. Mr Dawes accepted at the hearing that if I found that he had been correctly removed from the Roll of Members in accordance with bye-law 2 and rule 3.1(i), his complaint of a breach of section 47(1) of the 1992 Act must fail. However, if the RCN could not rely on section 47(3) of the 1992 Act, Mr Dawes argued that he had been prevented from standing for election to the position of deputy president unreasonably on the basis that his exclusion was in breach of rule and that he had

been unreasonably prevented from attending the Council meeting on 23 June 2010 to state his case.

58. Mr Ford, for the RCN, submitted that Mr Dawes' exclusion from standing as a candidate in the election for the position of deputy president was deemed to be reasonable under section 47(1) of the 1992 Act by virtue of section 47(3). He argued that at the time Mr Dawes' nomination was declared invalid he fell into a class of members all of whom were excluded by the rules of the RCN from standing as a candidate. Mr Ford submitted that the rule in question was bye-law 26 and the class of members to which Mr Dawes belonged was made up of those members who did not have continuous membership of three consecutive years at the date that nominations closed. He noted Mr Dawes' acceptance that there was a requirement of continuous membership of three or more consecutive years at the date of nomination. Mr Ford argued that even if the RCN had breached rule 3.1(i) the exclusion from Mr Dawes from standing as a candidate would still have been reasonable, although he accepted correctly that this argument would be more of an uphill struggle.

Conclusion – Complaint 2

59. Mr Dawes was excluded from standing as a candidate in the election for the position of deputy president of the RCN by virtue of Ms Clarke's letter of 14 June 2010. He was excluded on the grounds that at the date nominations closed, 11 June 2010, he did not have three years continuous membership of the RCN. His continuous membership had allegedly been broken between 1 November 2009, when his subscriptions went into arrears, and the date he rejoined, on 19 April 2010.

60. The relevant part of Bye-Law 26 provides as follows:-

> *"The president and deputy president shall be elected by the Members of the College from amongst Members who have been members ... of the College for such period as the Council may from time to time determine ..."*

It is common ground that the period determined by Council for this purpose is three years.

61. I have already found that the RCN acted within bye-law 2 and rule 3.1(i) in removing Mr Dawes' name from the Roll of Members when his subscriptions fell into arrears by four months on 1 March 2010. The RCN asserts that he then ceased to be a member with effect from 1 November 2009. Whilst it is not clear from the rules whether in these circumstances membership ceased on 1 November 2009 or 1 March 2010, Mr Dawes was unable to claim continuous membership of three consecutive years on 11 June 2010 in either event. In my judgment, Mr Dawes then fell into a class of members defined by the rules, all of whom were excluded from standing as a candidate in the deputy president election. Accordingly I find that section 47(3) of the 1992 Act was satisfied on the facts of this case so as to deem Mr Dawes' exclusion from standing as a candidate not unreasonable for the purposes of section 47(1).

62. For the above reasons I refuse to make the declaration sought by Mr Dawes that the RCN breached section 47(1) of the 1992 Act on or about 23 June 2010 by allegedly excluding him unreasonably from standing as a candidate in the 2010 election for the position of Deputy President.

David Cockburn
The Certification Officer