

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

Mr W G Thurbin

v

Prison Governors Association

Date of Decision:

9 October 2008

DECISION

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

1. I declare that the Prison Governors Association (“the PGA” or “the Association”) breached rule 5(e) of its rules by expelling the Claimant from membership of the Association on 8 November 2007 without affording him the opportunity to respond to the allegation of misconduct against him.
2. Where I make a declaration I am required by section 108B(3) of the 1992 Act to make an enforcement order unless I consider that to do so would be inappropriate. I find that it is appropriate to make an enforcement order. The order I make is that the decision of the NEC of 8 November 2007 to expel the Claimant from membership of the Association shall forthwith be treated as null and void and of no effect. The Claimant is to be treated as having been a member throughout the period of his wrongful expulsion and as a continuing member.

REASONS

1. The Claimant was a member of the Prison Governors Association (“the PGA” or “the Association”). By an application received at the Certification Office on 13 March 2008, the Claimant made a complaint of a breach of rule against the PGA, arising from his expulsion from the Association by a decision of its National Executive Committee (“NEC”) on 8 November 2007. Following correspondence with the Claimant’s solicitors, the complaint was confirmed by them in the following terms:-

'The Prison Governors Association, at a meeting on 8 November 2007, voted to expel Mr Thurbin from the union without affording him the right to answer the charges of misconduct against him and thus acted in breach of the right which is implied into rule 5(e) of the rules of the Prison Governors Association that a member of the Association has the right to be heard in answer to charges of misconduct before any such disciplinary action is taken.'

2. I investigated the alleged breach in correspondence. A hearing took place on 25 September 2008. At the hearing, the Claimant was represented by Mr Bruce Henry, in-house counsel, and Ms Joanne Taylor, solicitor, both of Lees Lloyd Whitley solicitors. The Claimant did not give evidence. The Association was represented by Mr Peter Quinn, of Peter Quinn, Consultancy Services. Ms Paddy Scriven (General Secretary of the PGA) and Ms Vicky Baker (PGA Parkhurst Branch Representative) gave evidence. They did not provide witness statements. Mr Henry, for the Claimant, provided a written skeleton argument. A joint bundle of 160 pages was before me, which had been prepared by my office from documents supplied by the parties and correspondence with them.

Findings of Fact

3. Having considered the oral and documentary evidence and the submissions of the parties, I find the facts to be as follows:
4. Mr Thurbin became a member of the Prison Officers Association ("the POA") in 1992 and a member of the Prison Governors Association in 2000. Since 2001 Mr Thurbin has been employed by the Prison Service in a 'governor grade' at HMP Parkhurst, Isle of Wight. At all relevant times he was the Deputy Head of Residence at that prison.
5. The PGA was established in 1987 and has approximately 1,200 members. Ms Scriven has been on its NEC since the outset and became its General Secretary in October 2007. As such, she is the Association's only full-time employee. The Association has only twice before commenced disciplinary proceedings against members but on each occasion the matter did not proceed to a hearing. Accordingly, the NEC has no experience of conducting a disciplinary hearing, although the members of the NEC no doubt have experience of disciplinary hearings in their professional lives.
6. Both the PGA and POA have collective agreements with the Prison Service which are legally binding between the parties and which prohibit both unions from inducing, authorising or supporting any form of industrial action.
7. In 2007, the Prison Service Pay Review Body recommended a 2.5% pay increase for Prison Service staff for 2007/8. The Prison Service decided to implement the pay increase in stages reducing its effect, the union's claimed, to 1.9%. In protest, the POA organised a 24 hour strike on 29 August 2007. As a member of the POA, Mr Thurbin withdrew his labour at HMP Parkhurst. The strike had a considerable effect upon the Prison Service as prisons had to be run mainly by governor grades and non-union staff. During the afternoon of 29 August, the Prison Service obtained an injunction from the High Court requiring

the POA to cease its industrial action and to inform its members that the industrial action must end immediately.

8. The PGA representative at Parkhurst Prison was and remains Ms Baker. In August 2007 she was aware that Mr Thurbin was a member of the POA but unaware that he was also a member of the PGA. Ms Baker discovered Mr Thurbin's dual membership on 5 October 2007. She was appalled that a member of the PGA should have gone on strike. She wrote to Mr Thurbin that day informing him of her strong feelings and that she had made a formal complaint to the General Secretary, asking that disciplinary action be taken against him. She also informed him that she was not prepared to represent him or accord him the benefits of PGA membership until the matter was resolved.
9. Ms Baker also wrote to Ms Scriven on 5 October 2007, asking if this matter could be referred to the disciplinary committee of the Association "to take the necessary action".
10. On 10 October 2007 Mr Thurbin wrote to Ms Scriven, having unsuccessfully tried to contact her by telephone. His letter is headed "Re: Bullying by Deputy Governor Vicky Baker". It begins by setting out a chronology of the events of 5 October from Mr Thurbin's perspective. It then has a heading "Unwanted Behaviour" under which there are six bullet points critical of the way he alleged he had been treated by Ms Baker. Amongst other issues, he complained that he had been found guilty of something before a hearing was conducted and said that he felt humiliated and discredited. The final heading in the letter is "Outcomes Sought". The primary outcome sought by Mr Thurbin was an apology from Ms Baker and a re-instatement of his rights as a PGA member. The letter also states that he would be willing to discuss with the NEC any issues that they may have with his membership of another union. Alternatively Mr Thurbin sought assistance under the Association's legal aid scheme on "this matter". He requested that Ms Baker be made accountable for her actions and asked that no disciplinary committee be convened against him.
11. Ms Scriven gave evidence that she spoke to Mr Thurbin on the telephone after receipt of his letter of 10 October 2007 and that she may also have had an e-mail exchange with him. However, her recollection of the content and the date of the telephone call and e-mail exchange was not clear. On the balance of probabilities I find that the telephone conversation occurred on or shortly before 7 November, as Ms Scriven wrote to Mr Thurbin on 7 November stating that she had only recently seen Mr Thurbin's letter of 10 October. There was no evidence before me that anything of significance was said in that telephone conversation. Specifically, Ms Scriven did not give evidence that she was then told by Mr Thurbin that she was to treat his letter of 10 October as being his written representations in the Association's disciplinary process.
12. In Ms Scriven's letter to Mr Thurbin of 7 November, she informed him that she had received a letter of complaint from the Parkhurst branch that claimed that he had taken part in unlawful strike action on 29 August 2007 and which went on to assert that "... *by doing so [he had] not only failed to support [his] Governor Grade colleagues but also breached the terms of the Voluntary Agreement*

between the PGA and the Prison Service and acted in a manner which brings discredit on the Association". The terms of rule 5(e) were set out as follows. "The Executive Committee has the power to expel any member, or members, who fail to comply with the rules or who act in such a manner as to bring discredit to the Association". Ms Scriven informed Mr Thurbin in the letter that the matter would be discussed at the NEC the following day, 8 November, and that his letter of 10 October would be circulated to the NEC.

13. Also on 7 November 2007, Ms Scriven caused e-mails to be sent to each member of the NEC, attaching the papers to be considered at the NEC. Included on the agenda was a consideration of disciplinary action against Mr Thurbin. The only two documents that were attached in relation to this item were Ms Baker's letter to Ms Scriven of 5 October and Mr Thurbin's letter to Ms Scriven of 10 October.
14. At the meeting of the NEC on 8 November 2007 it was decided that Mr Thurbin be expelled by 11 votes to 1. Mr Thurbin was not invited to the meeting and was not present. The only relevant materials the NEC had before them were Ms Baker's letter of 5 October and Mr Thurbin's letter of 10 October.
15. Ms Scriven informed Mr Thurbin of the decision that he be expelled with immediate effect by a letter dated 12 November 2007. This letter also informed Mr Thurbin that he could appeal in writing to the Annual Conference to be held between 7-9 October 2008. At the time of the hearing Mr Thurbin had not appealed.
16. On 6 December 2007 Mr Thurbin wrote to the Association seeking various documents relating to his expulsion and asking for an explanation as to why he was not called to the disciplinary hearing. There is no response to that letter in the documents submitted by the parties for inclusion in the joint bundle.
17. Mr Thurbin commenced this complaint by submitting a registration of complaint form which was received at the Certification Office on 13 March 2008.

The Relevant Statutory Provisions

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

Section 108A Right to apply to Certification Officer

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

(2) The matters are -

- (a) ...*
- (b) disciplinary proceedings by the union (including expulsion);*
- (c)-(e) ...*

Section 108B

(3) Where the Certification Officer makes a declaration, he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements -

(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

(b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

The Relevant Rules of the Association

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

Rule 5 Executive Committee

(e) The Executive Committee has the power to expel any member, or members who fail to comply with the rules or who act in such a manner as to bring discredit on the Association. Any member so expelled shall have the right to appeal to the next Annual Conference, but this right will not have the effect of making the expulsion ineffective in the intervening period.

(f) The National Executive Committee has the power to give rulings on any matter upon which the rules are silent.

Summary of Submissions

20. For the Claimant, Mr Henry submitted that the rules of natural justice are to be imported into trade union rule books as an implied term where a member is being disciplined for alleged misconduct. He went on to state that the principles of natural justice include the right of the accused person to respond to the charges that had been put against him or her. He supported this legal submission by reference to the following cases: *Burn v. National Amalgamated Labourers Union* (1920) 2 Ch 364; *Russell v Duke of Norfolk* (1949) 1 AER 109, *Pett v Greyhound Racing Association* (1969) 1 QB 125, *Edwards v. SOGAT* (1970) 1 AER 905, *Radford v NatSOPA* (1972) ICR 484 and *Foster v Musicians' Union* (D/13-17/03 (22 May 2003)). On the facts of this case, Mr Henry submitted that Mr Thurbin had been denied any opportunity to put his case to the NEC prior to his expulsion. He argued that this not only amounted to a breach of natural justice but also to a breach of a term to be implied into rule 5(e) of the rules of the Association that a member would not be expelled without having the opportunity to put his or her case to the NEC.

21. For the Association, Mr Quinn accepted that the rules of natural justice applied to the disciplinary process of a trade union and that they operated as an implied term of the rules of the union. He also accepted that the rules of natural justice gave an accused person the right to put his or her case to the adjudicating body. He submitted, however, that the Association was not in breach of this implied term. First, he argued that the implied term was not a right to an oral hearing but to make representations, whether these be in person or in writing. He argued that the right to make oral representations depended upon the circumstances of the case, particularly the detriment that might be

suffered by the accused. In this case, it was submitted that Mr Thurbin would suffer no great detriment from his expulsion, as he would continue to be represented by the POA and continue to enjoy the same terms and conditions as when he was a member of the Association. Secondly, he submitted that Mr Thurbin had been afforded the right to make representations by means of his letter of 10 October 2007 which had been before the NEC and had been treated by the NEC as his representations. Thirdly, Mr Quinn argued that the facts of Mr Thurbin's disciplinary offence were not in dispute. He stated that it was common ground that Mr Thurbin did go out on strike on 29 August 2007 and that this was in breach of the legally binding collective agreement that the PGA had with the Prison Service. He further stated that prison governors had been left in a difficult and potentially dangerous position as a result of the strike action taken by prison staff that day. Fourthly, Mr Quinn argued that Mr Thurbin's letter of 10 October had put forward his arguments in mitigation, namely that he had been instructed by the POA to take strike action and had felt obliged to obey that instruction and that he had taken his radio and telephone with him that day so that he could send staff into the prison if there was an alarm bell (which there was and which he did). Mr Quinn also submitted that the absence of any specific rule with regard to the rights of accused members to make representations was covered by rule 5(f) which gives the NEC the right to make rulings on any matter upon which the rules are silent. He argued that the NEC could use this power to call persons before the NEC if it was considered appropriate. Mr Quinn observed that Mr Thurbin had had the opportunity to appeal in writing to Annual Conference but had not done so. In summary, Mr Quinn argued that the Association had throughout acted in good faith, that there had been a fair hearing of the complaint and that the decision to expel was understandable, fair and proportionate.

Discussion and Conclusion

22. Mr Thurbin complained that the Association had breached an implied term of rule 5(e) of its rules by failing to give him an opportunity to make representations to the NEC prior to its decision to expel him from the Association on 8 November 2007.
23. Rule 5(e) of the rules of the Association is in the following terms:

(e) *The Executive Committee has the power to expel any member, or members, who fail to comply with the rules or who act in such a manner as to bring discredit on the Association. Any member so expelled shall have the right to appeal to the next Annual Conference, but this right will not have the effect of making the expulsion ineffective in the intervening period.*

Rule 5(e) is the only rule within the rules of the Association which deals with its power to discipline members. It contains no procedural provisions and in particular, it is silent on the right of members to make representations to the NEC prior to any decision to expel. Further, the Association has no prior experience of having conducted a procedure which culminated in the expulsion of a member under this rule.

24. As I observed in *Foster v Musicians' Union*, the rights of union members are to be found in the rules of the union, both express and implied rules, and in various statutes. The implied rules of a union include the duty to conduct its disciplinary processes in accordance with judicially recognised principles of fairness, sometimes referred to as natural justice. Amongst these principles are the rights of a person accused of a disciplinary offence to be given notice of the charges and the right to respond to those charges.
25. In certain circumstances, the requirements of fairness may be met by the accused being given a right to respond to the charges in writing. In deciding whether such a limited right of response is sufficient, each case will turn on its own facts. However, where a trade union is contemplating the expulsion of one of its members, it will be a rare case where this is sufficient. Even though many of the early trade union cases concerning natural justice were determined in the context of the closed shop and a potential loss of livelihood (a feature absent from the present case), membership of a trade union still carries with it a variety of protections for an employee at his or her place of work, both under the rules of the union and, in certain circumstances, under legislation. Further, it is to be supposed that a person who chooses to be a member of an organisation and pays regular subscriptions to it values that membership. There can be no more serious punishment by an organisation of a member than his or her expulsion for a disciplinary offence. In my judgment the expulsion of a member by a trade union for a disciplinary offence will normally be a serious detriment to that person, meriting the right of the accused to respond to the charges in person.
26. On the facts of this case, I find that no charge as such was ever formally put to Mr Thurbin which would have enabled him to respond effectively. Ms Baker's letter of 5 October 2007 merely informed him that she had written to the General Secretary asking her to consider taking disciplinary action against him. Ms Scriven's letter of 7 November informed Mr Thurbin of the terms of the complaint made against him by his branch and that the matter would be discussed by the NEC the following day in the context of rule 5(e). Although this letter made plain the nature of the branch's complaints and that the NEC was to consider expulsion, it did not formally charge Mr Thurbin with any offences, did not invite his response and was clearly sent too late to enable him to respond effectively.
27. I accept the primary submission advanced on Mr Thurbin's behalf that it is an implied term of rule 5(e) of the rules of Association that an accused person has the right to make representations to the NEC prior to any decision to expel the member under that rule. Indeed, the Association does not dispute that submission. In Mr Thurbin's case, I find that he had the right to make oral representations, should he so choose. In my judgment, expulsion from the Association was a potentially serious detriment to Mr Thurbin. The fact that he has retained the same terms and conditions, or that he has incidentally remained a member of a different union, the POA, does not adequately offset the loss of benefits and protection afforded to him by membership of the dedicated union for his current employment as a prison governor. At an oral hearing, the outline facts of his case may not have been in dispute, but there

may have been surrounding circumstances which Mr Thurbin could have developed which may have influenced the NEC's decision on liability. In any event, Mr Thurbin should have had the opportunity expressly to address the NEC on mitigation, should he have so chosen, rather than the NEC assuming that all his potential arguments were contained in his letter of 10 October. Ms Scriven gave evidence that the discussion of his case was lengthy and that one person voted against expulsion. These facts suggest that the case against Mr Thurbin was not as open and shut as was suggested at times and there were possibly issues on which Mr Thurbin could have assisted his case. As Mr Thurbin was not afforded the opportunity of making oral representations, it follows that the Association breached rule 5(e) of its rules, read subject to the implied right of an accused to make appropriate representations prior to expulsion.

28. Should I be wrong about the right of Mr Thurbin to make oral representations prior to his expulsion, I have considered the Association's submission that he did in fact make written submissions in his letter of 10 October 2007. I note firstly that no charge had been put to Mr Thurbin at the time that he wrote this letter and that he had not then spoken on the telephone to Ms Scriven. The letter of 10 October therefore could not have been prepared as his response to a specific charge of misconduct. Secondly, I note that the letter of 10 October is headed "Re: Bullying by Deputy Governor Vicky Baker" and, by its terms, is clearly not a letter written to be considered at a disciplinary hearing which could result in his expulsion. Whilst the letter does contain material which gave the NEC food for thought at its meeting on 8 November, it was, I find, not constructed for that purpose. In my judgment, Mr Thurbin's letter of 10 October was not and could not reasonably have been considered to be his written representations to the alleged disciplinary offence. Accordingly, I find that the NEC breached rule 5(e) of its rules, read subject to the right of an accused to make appropriate representations, in as much as it relied upon that letter as being his representations.
29. For the above reasons I declare that the Association breached rule 5(e) of its rules by expelling the Claimant from membership of the Association on 8 November 2007 without affording him the opportunity to respond to the allegations of misconduct against him.
30. Where I make a declaration I am required by section 108B(3) of the 1992 Act to make an enforcement order unless I consider that to do so would be inappropriate. On the facts of this case, I have found that Mr Thurbin was expelled in circumstances in which he was unable to put his case to the NEC on liability or mitigation. This is a serious breach of an important rule. Further, the sanction decided upon by the NEC of expulsion was the most serious that it could impose. In these circumstances, I find that it is appropriate to make an enforcement order to put Mr Thurbin back into the position he was in prior to the breach. I order that the decision of the NEC of 8 November 2007 to expel Mr Thurbin from membership of the Association shall forthwith be treated as null and void and of no effect. Mr Thurbin is to be treated as having been a member throughout the period of his wrongful expulsion and as a continuing member.

31. Should the Association decide to subject Mr Thurbin to a further disciplinary process for the strike action he took on 29 August 2007, it will no doubt provide him with a specific charge stating the offence with which he is accused and afford him the opportunity of making oral representations.

DAVID COCKBURN

The Certification Officer