

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

Mrs Jan Chisholm

v

Unite the Union

Date of Decision

15 January 2018

DECISION

Upon application by Mrs Jan Chisholm ("the claimant") under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

1. I refuse the claimant's application for a declaration that on or around 17 January 2017 the Union breached rule 6.5 in that Jan Chisholm was removed as Branch Secretary of the Union's branch WM 7681 before her three year tenure in office, as provided for under that rule, had expired.
2. I refuse the claimant's application for a declaration that on or around 17 January 2017 the Union breached rule 17.7 in that the meeting held on or around 17 January 2017 purported to hold an election for, amongst other posts, that of Branch Secretary.

REASONS

1. Mrs Chisholm brought this application as a member of Unite the Union ("the Union"). She did so by a registration of complaint form which was received at the Certification Office on 7 March 2017.
2. Following correspondence with my office, Mrs Chisholm confirmed her complaints in the following terms:

On or around 17 January 2017 the Union breached

(i) rule 6.5 in that Jan Chisholm was removed as Branch Secretary of the Union's branch WM 7681 before her three year tenure in office, as provided for under that rule, had expired. As she was appointed in June 2015 her tenure should have expired in June 2018;

(ii) rule 17.7 in that the meeting held on or around 17 January 2017 purported to hold an election for amongst other posts that of Branch Secretary. The election was less than three years from the election in June 2015.

3. At the hearing before me, Mrs Chisholm was represented by herself. Oral evidence for Mrs Chisholm was given by herself and Ms Emma Seville both of whom produced written witness statements. A written witness statement was also provided by Ms Karen Western but she did not attend to give oral evidence. The Union was represented by Mr Michael Potter of Counsel who was instructed by Mr Neil Gillam of the Union's Legal Department. Oral evidence for the Union was given by Ms Sarah Carter, Secretary of the Union's WM 7681 Branch, Mr Peter Coulson, the Union's Regional Officer and Mr Oliver Richardson, the Union's National Officer responsible for the Civil Air Transport Section. All three also provided written witness statements. The evidence also included the Rules of the Union and a bundle of documents containing correspondence and other documentation, as supplied by the parties for use at the hearing. At the outset of the hearing the Union applied to have late documents added to the bundle. Mrs Chisholm raised no objections to the inclusion of 6 of the documents and they were inserted into the bundle. I refused to admit one document into evidence as it was unreadable in parts, the Union were unable to identify the author and, Mrs Chisholm had no previous knowledge of the document and had concerns about its provenance. Another document produced by the Union was a duplicate that was already in the bundle. Taking into account the extra documents the bundle consisted of 428 pages.

Findings of Fact

4. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows:
5. Branch 7681 is a National Branch of the Union it is made up of the Union's membership in the airline FLYBE and has approximately 500 members.
6. On 31 October 2012 the Standing Orders of BASSA Branch 7681 of the Union came into effect. Its provisions included those relating to the business to be transacted at the first meeting after the period of election for representatives as follows:
Business to be transacted at the meeting shall be:-
(i) The Nomination and Election, from among the committee members of the Branch Officials
7. These Standing Orders had not been approved by the Union's National Executive Committee
8. Mrs Chisholm was elected as Branch Secretary of WM7681/CAT Branch on 18 June 2015. This was at a meeting of the elected Workplace Representatives of the Branch and not open to the wider Branch membership.
9. On 26 April 2016 there was an incident at the Unite Regional Office in West Bromwich involving some members of the WM7681 Branch. Following this on 24 May 2016, Gerard Coyne, the Union's West Midlands Regional Secretary announced that a Regional Investigation would be carried out into the incident. As part of the outcome of the investigation, new Standing Orders were produced for the Branch. These provided, among other things, that:-

'Negotiating Committee Elections

The following in no way applies to the elections held by Unite for Branch positions, which continue to be conducted under Unite Rules.'

'Officers of the Branch – Officers of the Branch which shall include Chair, Vice Chair, Branch Secretary, Treasurer and Equalities Officer who shall be elected at every third AGM in line with the Union's Triennial Cycle.'

10. On 5 January 2017 Peter Coulson, Regional Officer sent out a minute to all members of the Branch giving a date for meeting to elect Branch Chair, Branch Secretary, Treasurer (if different from Branch Secretary) and Equalities Officer. The meeting was to be held on 17 January 2017 at Diamond House, Birmingham Airport.
11. A Branch 7681 newsletter dated 19 January 2017 set out the result of the Branch Elections.
12. At some point after the elections in 2017 Mrs Chisholm left the Union.

The Relevant Statutory Provisions

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

108A Right to apply to Certification Officer

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

(2) The matters are –

- (a) the appointment or election of a person to, or the removal of a person from, any office;*
- (b) disciplinary proceedings by the union (including expulsion);*
- (c) the balloting of members on any issue other than industrial action;*
- (d) the constitution or proceedings of any executive committee or of any decision-making meeting;*
- (e) such other matters as may be specified in an order made by the Secretary of State.*

The Relevant Rules of the Union and the relevant Branch Standing Orders

14. The rules of the Union which are relevant for the purposes of this application are:

Rule 5.1 (under Obligations of Members)

A member of the Union must comply with these rules and with any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder of a lay office or as a full time officer.

Rule 6.5 (under Rule 6, Lay Office)

The electoral period to hold lay office shall be three years unless otherwise provided for under these rules

Rule 6.6

The Executive Council shall issue guidance to establish the right of recall to members elected to lay office.

Rule 17.7

Each Branch shall have for its management a Chair, a Treasurer, an Equality Officer and a Secretary and such other officers as the Branch may elect. They shall be elected at a Branch meeting by a show of hands, or by ballot, if so decided by the meeting. The election shall take place at a branch meeting held between 1st January and 31st March in each third year and elected candidates shall take office for three years. Casual vacancies may be filled at an ordinary Branch meeting, but notice of the impending election must be given to members of the Branch on the notice convening the meeting. The positions of Secretary and Treasurer may be held by the same member if the Branch so chooses.

Rule 17.8

The Executive Council shall issue standing orders to regulate the conduct of Branch meetings and business and may amend the standing orders from time to time. Those standing orders may only be varied in respect of a Branch with the prior approval of the Executive Council. The quorum for a Branch meeting to make a decision on any matter shall be 5 members and all matters should be decided by a simple majority of those voting. If the votes are equal the proposition before the meeting shall fail.

15. The relevant Branch Standing Orders (which apply from 31 October 2012) state in part as follows:

The first meeting of the Committee after the period of election for Representatives shall take place (within 21 days of the date of the election) or as the Committee may have determined prior elections.

Business to be transacted at the meeting shall be:-

*(i) The Nomination and Election, **from among the committee members of the Branch Officials** [my emphasis];*

(ii) The Nomination and Election of a Negotiating committee;

(iii) the adoption of a timetable of meetings of the Branch Committee;

(iv) On a casual vacancy arising in any of these offices, a Nomination and Election to fill the vacancy shall be held as soon as practicable at a meeting of the Branch and placed on the Agenda

CONSIDERATIONS AND CONCLUSIONS

Complaint One

16. Mrs Chisholm's first complaint is as follows:

On or around 17 January 2017 the Union breached rule 6.5 in that Jan Chisholm was removed as Branch Secretary of the Union's branch WM 7681 before her three year tenure in office, as provided for under that rule, had expired. As she was appointed in June 2015 her tenure should have expired in June 2018.

17. Section 108A(1) and (2) of the 1992 Act provides 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.

18. Rule 6.5 provides as follows:

The total period to hold lay office shall be three years unless otherwise provided for under these rules

Summary of Submissions

19. Mrs Chisholm argued that her election to the position of Branch Secretary in June 2015 was valid and in accordance with well-established Branch protocols such as the Standing Orders, Terms of Reference and Constitution. In particular, she argued that the Branch Standing Orders had been adopted by the Branch in 2009 at a training course for Branch Representatives. At the time the Branch was number WM 590. During the training course the lay Union representative and the Trainer, acting for the Union, provided three examples of Standing Orders that were in use elsewhere in the Union. The representatives of the Branch subsequently produced their own Standing Orders, drawing on these examples. The Union official and Trainer, at the course, raised no objections to the Standing Orders that were produced.
20. Mrs Chisholm submitted that the process that resulted in the creation of the Branch Standing Orders, which involved active participation of a Union official and a Union appointed Trainer, effectively constituted an approval of these Standing Orders by the Union. In addition, she argued that they had been in use since 2009 and the Union had made no effort to question their validity until 2016. In effect, Mrs Chisholm contended that the Branch Standing Orders had become Rules of the Union by virtue of custom and practice. She also argued that the Standing Orders that the Union refer to as "De facto", that is those Orders that the Union claim are compliant with their Rule Book and available on their website, did not exist at the time of her election and therefore the Branch could not apply them retrospectively or at all.
21. Mrs Chisholm also argued that the 2009 and 2012 Branch Standing orders were not inconsistent with National Rule 17.7. She submitted that all members had been entitled to stand for and vote in the Branch Elections for Workplace Representatives. Consequently, the members of the branch were involved in the election of the Branch Officers that took place at a meeting of the Branch Workplace representatives at which a vote, by way of show of hands, as required by rule 17.7, had taken place. She did, however, accept that only Workplace Representatives of the Branch (rather than all of the members of the Branch) could

be nominated for the Branch Officer posts, attend the meeting to elect Branch Officers and cast a vote.

22. For the Union Mr Potter argued that under the Unite Rulebook (and in particular Rule 17) Branch members are entitled, as of right, to participate in Branch Officer elections as follows:
 - a. They have the right to be notified of Branch Officer elections,
 - b. They have the right to stand for election; and,
 - c. They have the right to vote in the election.
23. Mr Potter relied on the following wording in Rule 17.7, '*They shall be elected at a Branch meeting by a show of hands, or by ballot, if so decided by the meeting.*' He submitted that the plain meaning of these words '*Branch meeting*' was that all members of that Branch had an opportunity to participate in the meeting fully. He said that points a. – c. above were clearly essential elements.
24. Mr Potter submitted that the purported election of Ms Chisholm was carried out pursuant to the Branch Standing Orders that became effective on 31 October 2012. He said that these Standing Orders appeared to be what he described as a 'legacy' from a union, most likely the Transport and General Workers Union. The latter, together with other unions, amalgamated to form Unite the Union in 2007. He said that these Standing Orders were not compliant with Rule 17.7 in that they provided for the election of Branch Officers from an electoral college of elected Workplace Representatives. He submitted that this was contrary to Union Rules and the requirements of democracy and inconsistent with the requirement for the Branch members to elect the Branch Officers. He argued that the effect of the Branch Standing Orders was to create a different and invalid electoral college.
25. Mr Potter referred me to extracts from Harvey on Industrial Relations and Employment Law (Harvey) in respect of Union elections. He submitted that this showed that, '*it is in principle a matter for the union to define for itself, in its constitution, all matters relating to union elections: whether and when an election is necessary, its timing and timetable, what shall be the qualification for standing for office, who shall be entitled to vote at the election, the method and place of voting. That is, however, subject to one very important qualification: election to the national executive committee or to the office of president, general secretary or other office which carries a seat thereon is regulated by TULR(C)A 1992 [Harvey Division M4 768]... The election process is also a matter for the rule book. Every voter should be given a fair opportunity of voting. Union practices vary considerably*' [Harvey Division M4 779].
26. He submitted that in this case a key issue was whether the Union, by its National Executive or other appropriate organ, may lawfully decide to *cancel* an election and re-run it or hold a completely fresh election. He again referred me to Harvey which states, '*much depends upon the circumstances. In principle it is a question of the proper construction of the union's own rule book in the light of those circumstances. In broad terms, and subject always to what the rule book may say, it may be ventured that an election should not be cancelled upon a whim or caprice;*

cancellation should be contemplated only if some defect or malpractice comes to light—and some significant defect or malpractice at that’. (Harvey Division M4 804]

27. Mr Potter went on to refer to Harvey in relation to the Union’s power to cancel an election *‘If there is cause for cancellation, the next question is whether there is power to cancel. On general principle, and in the interests of good governance, it ought to be competent for a union for good cause to cancel a defective election, at least if the result of the election has not been declared (Brown v Amalgamated Union of Engineering Workers [1976] ICR 147, Walton J) (Harvey Division M4 805] .*

28. Additionally, Mr Potter referred me directly to the case law in *Brown v Amalgamated Union of Engineering Workers [1976] ICR 147 specifically to para 160 of that judgement in which the Court stated:-*

‘Thereafter, so it appears to me, unless some factors emerge which demonstrate that the whole election was a nullity — for example, that the candidate declared elected was not duly qualified, or that a sizeable slice of the votes had been cast by persons, not members of the union (or even members thereof who had no right to cast them at all) then there appears to me to be no rule under which the candidate declared elected can be deprived of his office.’

29. Mr Potter submitted that I could apply this authority to a situation where the electorate was restricted to a cohort rather than the full electorate of all Branch members, as in this case. He said that this made the election a nullity and allowed the Union to call a new election carried out in compliance with its rules.
30. In response to Mrs Chisholm’s argument that the Union had in effect validated the Branch Standing Orders by virtue of their involvement in the production of the Orders in 2009 he said that this was not the case. He contended that Rule 17.8 clearly set out that Branches could vary the Standing Orders issued by the Executive Council. However, Rule 17.8 makes it clear that ‘these standing orders may only be varied in respect of a branch with the prior approval of the Executive Council.’ He submitted that the Union Official and Trainer present at the 2009 training session, at which the Branch Standing Orders were first produced, did not have the authority of the Executive Council to give prior approval to any variation. He also pointed to the lack of evidence of any approval for variations – neither Mrs Chisholm nor Emma Seville had been able to point to such an application or approval in their witness testimony.
31. Mr Potter submitted that, during the course of the investigation into the 26 April 2016 incident, the Union had discovered that the 2015 election had been conducted improperly and contrary to the Union’s Rules Mr Potter asserted that in response to this the union had rightly notified all members of a fresh elections on 5 January 2017, in compliance with rule 17.7 and given Branch members the opportunity to participate, i.e. stand and/or vote.
32. He explained that this resulted in an election that was held in accordance with Rule 17.7 on 17 January 2017. The Claimant did not stand and Sarah Carter was elected. He submitted that the January 2017 election was valid and consistent with the Union’s Rules. However, the purported election of the Claimant in 2015 was invalid as it did not comply with the Union’s Rules for electing Branch Officials.

Considerations and Conclusions

33. In determining the issues in this application I need to consider the relevant rules of the Union at the time of the election of the Branch Officers of Branch WM 7681 in 2015. The Union's case is very clear- that the 2015 election process was contrary to the requirements of the National Unite the Union Rule Book. By contrast, Mrs Chisholm argues that the Standing Orders adopted by the Branch, firstly in 2009 and then on 31 October 2012 were valid and also regulated the 2015 election. Alternatively, she argues that the election was in fact held in compliance with Rule 17.7 in that all members of the Branch had been able to nominate, stand for and vote in the election of Workplace Representative's. Subsequently, these Representatives had elected, by way of a show of hands, the Branch Officers including the Branch Secretary and this was sufficient to meet the requirements of Rule 17.7.
34. I would have found in Mrs Chisholm's favour if she had been able to produce evidence that the Branch Standing Orders had received the prior approval of the Executive Council and, specifically, that the Executive had approved a variation that permitted Branch Officers to be elected by an electoral college of the Branch Workplace Representatives. However, there was no evidence before me of the Executive Council giving prior approval to any request to vary the model Standing Orders. It would appear that the Union does not retain any central records of the Standing Orders operated by each Branch or for that matter of any variations that the Executive Council has approved. I would have been able to attach significant weight to evidence indicating that the Executive had approved a variation to the Branch Standing Orders: neither Mrs Chisholm nor her witnesses were able to provide such evidence.
35. I do not consider that the involvement of a Union official and a Union appointed trainer during the training course in helping to devise the Branch Standing Orders can be treated as meeting the requirements of prior approval for a variation of the model Standing Orders issued by the Executive Council. Put simply, I accept Mr Potter's submission on behalf of the Union that the Official and the trainer did not have the authority of the Executive Council to give prior approval to such a variation.
36. On the basis of my reasoning in paras 34 and 35 above, it follows that I cannot find that the Branch Standing Orders were the relevant rules under which the 2015 election should have been held. Having said that I have considerable sympathy for the position Mrs Chisholm found herself in and her reasons for believing that the Branch Standing Orders were valid. The Branch had been operating under these Standing Orders since their adoption, with some involvement of the Union, since 2009. I have no doubt that Mrs Chisholm genuinely thought that these were the appropriate Rules. However, it is clear that they are not consistent with the Union's National Rules nor had the Executive Council given prior approval for the variations adopted by the branch.

37. Rule 17.7 constitutes an express rule relating to the process for electing Branch Officials and in the absence of appropriate evidence documenting a variation of this Rule, I cannot accept Mrs Chisholm's argument that the Branch Standing Orders were implied into the Union's Rule Book by virtue of custom and practice.
38. All of this came to light at a time that the Branch was experiencing significant difficulties and at a point at which Mrs Chisholm had found herself in conflict with the Regional Officer, Mr Coulson. This must have added to her frustration and led her to question the Union's motivation as both Mrs Chisholm and Ms Seville had stated in their witness evidence. That said, despite my understanding of Mrs Chisholm's position, it is my role to determine the issue by reference to the legal position of the Rule book. In this case I find that the relevant rule in relation the Branch Officer elections was rule 17.7 in the National Rule Book.
39. I now consider what appeared to me to be Mrs Chisholm's alternative argument that the June 2015 election did comply with Rule 17.7. As I understand it she says that the requirement that Branch Officers '*shall be elected at a Branch meeting by a show of hands ...*' was satisfied. She said that all Branch members were invited to nominate, stand for and vote in the election of Branch Workplace Representatives. Thus the whole Branch was involved at this stage of the process. Subsequently, Branch Officers were elected by those Workplace Representatives at a meeting at which only they could attend, nominate and vote for the Branch Officers. I do not accept this reasoning. Rather I accept Mr Potter's argument that Rule 17.7 requires the full involvement of Branch members, including the ability to nominate, stand for and vote in the election of Branch Officers. I do not accept that an indirect/electoral college form of election satisfies this requirement.
40. For the above reasons I accept the Union's submissions that the June 2015 election was invalid. I also accept their submissions that the election of Branch Officers by way of an electoral college rather than a Branch Meeting amounts to a fundamental flaw in the process. This entitled the Union to take the view that the election was null and void and that a re-election was required. I find, therefore, that there was no breach of rule 6.5 when Jan Chisholm was removed as Branch Secretary of the Union's branch WM 7681 before her three year tenure in office, had expired.
41. For the above reasons I dismiss Mrs Chisholm's complaint one.

Complaint Two

42. The claimants' second complaint is as follows:

On or around 17 January 2017 the Union breached rule 17.7 in that the meeting held on or around 17 January 2017 purported to hold an election for amongst other posts that of Branch Secretary. The election was less than three years from the election in June 2015.

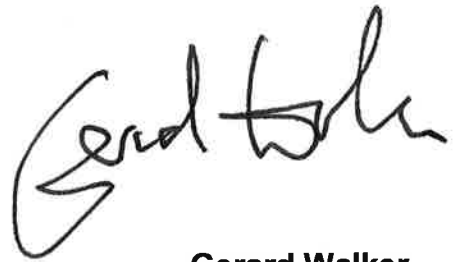
43. Rule 17.7 provides as follows:

Each Branch shall have for its management a Chair, a Treasurer, an Equality Officer and a Secretary and such other officers as the Branch may elect. They shall be elected at a Branch meeting by a show of hands, or by ballot, if so decided by the meeting. The election shall take place at a branch meeting held between 1st January and 31st March in each third year and elected candidates shall take office for three years. Casual vacancies may be filled at an ordinary Branch

meeting, but notice of the impending election must be given to members of the Branch on the notice convening the meeting. The positions of Secretary and Treasurer may be held by the same member if the Branch so chooses.

Summary of Submissions

44. Both Mrs Chisholm and the Union relied on the same submissions for both complaints. In my view they were right to do so. The issue addressed in both complaints was that Mrs Chisholm was not allowed to complete her three year term of office.
45. For the reasons set out in paragraphs 33 to 40 I find that there was no breach of rule 17.7 by the meeting held on or around 17 January 2017 electing, amongst other posts, that of Branch Secretary even though that election was less than three years from the election in June 2015.
46. For the above reason I dismiss Mrs Chisholm's complaint 2.

A handwritten signature in black ink, appearing to read 'Gerard Walker', with a large, stylized initial 'G'.

Gerard Walker
Assistant Certification Officer