

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

Mr Michael Gates

v

Society of Chiropodists and Podiatrists

Date of Decision

16 July 2018

DECISION

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

I refuse Mr Gates’ application for a declaration as follows:

On or around 13 December 2017 Society of Chiropodists and Podiatrists breached bullet point 4 under the heading Deselecting an SCP Representative in Appendix B of the SCP Union Handbook. The rule was breached in that the Union refused to hold a de-selection ballot on the H&S post in NHS Highland as requested in the letter dated 4 December 2017 from Michael Gates, on behalf of the majority of the Union’s members in NHS Highland, to Martin Furlong, the Union’s Interim Head of ER & Business Services.

REASONS

1. Mr Gates brought this application as a member, at the time of the event complained about, of Society of Chiropodists and Podiatrists (“the Union”). He did so by a registration of complaint form which was received at the Certification Office on 30 January 2018.
2. Following correspondence with my office, Mr Gates confirmed his complaint in the following terms:

On or around 13 December 2017, Society of Chiropodists and Podiatrists breached bullet point 4 under the heading Deselecting an SCP Representative in Appendix B of the SCP Union Handbook. The rule was breached in that the Union refused to hold a de-selection ballot on the H&S post in NHS Highland as requested in the letter dated 4 December 2017 from Michael Gates, on behalf of the majority of the Union’s members in NHS Highland, to Martin Furlong, the Union’s Interim Head of ER & Business Services.

3. I investigated the alleged breach in correspondence and a hearing took place on 4 July 2018.
4. At the hearing before me Mr Gates represented himself and gave oral evidence. The Union was represented by Ms Victoria Phillips of Thompson Solicitors. Evidence for the Union was given by Mr Graham Pirie, Employment Relations Officer, Scotland and Northern Ireland for the Union. Both witnesses had provided written statements.
5. There were also in evidence the Union's Articles of Association and By-Laws, and a 223 page bundle of documents containing correspondence and other documentation as supplied by the parties.
6. At the hearing the parties gave their views on whether the SCP Union Handbook, cited in the complaint, was part of the rules of the Union as well as providing their views on whether the Union had breached the provision of the Handbook as alleged. I set out my decision on the preliminary issue with reasons in paragraph 34 to 35 below. It follows from my decision on this issue, that I need make no findings in respect of the substance of the complaint.

Findings of Fact

7. Having considered the written and oral evidence and the representations of the parties, I find the facts to be as follows:
8. Michael Gates was a member of the Highland Branch of the Society of Chiropodists and Podiatrists until he resigned his membership on 30 December 2017.
9. At some point during 2016 there was an election for trade union representatives in the Highland Branch. Three members stood for election and were elected uncontested.
10. There was conflict within the Branch which led to some members asking the Union how to deselect an elected representative. Some Branch Members attempted to organise a ballot to trigger a vote of no confidence in the trade union representatives. The Union's Employment Relations Officer for the Branch, Graham Pirie, and the then Director of Employment Relations, Brian Harris, provided advice on the process for deselection.
11. Following a Branch meeting, attended by Mr Pirie and Mr Harris, a ballot was held within the Branch, to identify whether there should be a vote of no confidence in the trade union representatives. The outcome of that ballot was that there should be a vote of no confidence.
12. Around January 2017 the interim Chief Executive of the Union, Dr Rosemary Gillespie, commissioned a governance review which was concluded in March 2017. It identified that the three union representatives had not been properly elected and, therefore, were not accredited union representatives. The vote of no confidence did

not go ahead. Fresh elections were held for two union representative posts. There were no candidates for the posts which remain vacant.

13. The Branch Health and Safety Representative remained in post. In November 2017 Mr Gates had discussions by email with the Interim Head of Employment Relations, Martin Furlong, around the role of the Branch Health and Safety Representative and indicated that there may be a push for de-selection.
14. On 4 December 2017 Mr Gates wrote to Mr Furlong asking that a ballot should be held to begin the deselection process. The letter was accompanied by the membership numbers of 17 Highland members in addition to Mr Gates. On 12 December 2017 Mr Gates, Mr Pirie, Mr Furlong and Mr Jamieson held a telephone conference to discuss that request. On 13 December 2017, Mr Furlong emailed Mr Gates to explain that the Union did not wish to run a de-selection ballot and proposed an alternative solution.
15. In early 2018 the Health & Safety representative post came up for re-election. That post is now filled by another member of the Union.

The Relevant Statutory Provisions

16. 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

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

The Union's Articles of Association (as amended by a special resolution passed at the AGM held on 4 July 2015) Clause 67 and 68

FUNCTIONS AND POWERS OF COUNCIL

General Powers

67. Subject to the provisions of the Companies Acts, the Articles of Association and to any directions given to Council by the Society in General Meeting, the affairs of the Society shall be managed by Council which may exercise all the powers of the Society provided that no alteration of the Articles and no such direction shall invalidate any prior act of Council which would have been valid if that alteration had not been made or that direction had not been given and that any such direction does not conflict with the fiduciary and statutory duties of Council members, whether under Chapter 2 of Part 10 of the Companies Act 2006 or otherwise.

Trade union affairs, by-laws and code of conduct

68. Notwithstanding Article 67 above, the Council shall have the following specific responsibilities and powers:

- (a) to conduct of the affairs of the Society as a Trade Union;*
- (b) to make, alter and repeal By-laws, rules and regulations for the better and more convenient government and management of the Society, the proper carrying out of its objects and the maintenance of its status and that of the profession of chiropody and podiatry;*
- (c) to make, alter and repeal By-laws, rules and regulations for regulating the training and examination of candidates for admission to the Society, the recognition of Schools and Teachers of Chiropody and Podiatry, for determining the fees examination fees payable by such candidates, the times and places at which examinations are to be held, the subjects which are to be comprised therein, the persons who may be admitted as candidates thereat, and the distinctions (if any) to be granted to successful candidates;*
- (d) to publish a code of conduct that shall be adhered to by members of the Society in the context of their professional activities and to determine appropriate sanctions for breaches of the code;*

provided that no By-law, rule, regulation or provision within the code of conduct may conflict with these Articles and where it conflicts with these Articles it shall not be effective and provided further that no By-law, rule, regulation or provision of the code of conduct shall be made or so altered under this power which would amount to an addition to or alteration of these Articles that would require a special resolution of the Society.

The Union's By-Laws, January 2016, Schedule D

Procedures for running elections of Accredited Staff Side Representatives, Health and Safety Representatives and Learning Representatives

- 1. The number of posts to be filled should be agreed before the election is called*

2. *Seek nominations for each post. Self-nomination is permitted. Heads of Service may not stand for election. Send a note to all members seeking nominations and specify a closing date for nominations.*
3. *In the event of more than one nomination being received than places to be filled, a secret ballot must be held.*
4. *To check membership status, issue a list of staff and ask them to add their Society membership number. This information can be verified by the Industrial Relations Department.*
5. *Appoint two scrutineers, who are not involved in the election, to supervise the production and distribution of the voting papers.*
6. *A ballot paper should be sent to each Society member in the workplace. To avoid irregularities, ballot papers should be numbered. Allow a closing date of at least two weeks for receipt of ballot papers*
7. *Candidates should be invited to provide a brief CV and election statement of a maximum of 150 words, to be circulated with the ballot papers.*
8. *Members should return their ballot paper in a sealed envelope, clearly marked as a ballot return.*
9. *Envelopes should be stored in a safe place and not be opened until the count takes place*
10. *The scrutineers should carry out the count. The result should be declared in writing and state:*
 - *Number of ballot papers issued;*
 - *Number of ballot papers received;*
 - *Votes cast for each candidate;*
 - *Number of spoilt ballot papers;*

Scrutineers should sign and date the declaration

11. *The declaration should be sent to each member or posted on the staff notice board*
12. *Retain the ballot papers in a safe place for at least three months in case of any queries about the conduct of the ballot.*

The relevant provisions of the SCP Trade Union Handbook

18. The relevant provisions of the SCP Trade Union Handbook (the Handbook) are, under Appendix B of the Handbook:

Deselecting an SCP Representative

As a member you will need to be aware that each representative is elected democratically by the members within the organisation that they work for. These elections are every two years (even years) in April which is the time to deselect the existing rep by standing against them.

If as member/s you are unhappy with the performance of your SCP Representative (Union, H&S, Union Learning, Green or Equality) please use the following process to discuss and act on these concerns.

- *In the first instance please raise the issues directly with the representative to discuss your concerns and seek a resolution.*
- *If no resolution can be agreed please then contact your Employment Relations Officer who will investigate the issues raised and try and agree a resolution.*
- *If this is not possible the ERO will contact the Director of Employment Relations & Business Services who will investigate and with a view to agreeing a resolution*
- *If after this there is still an issue then a representative can only be removed from post by a vote of no confidence by the group of employees who the representative was elected by.*

The Employment Relations Department will be responsible for organising this vote and reporting back to all members within the organisation.

CONSIDERATIONS AND CONCLUSIONS

Jurisdiction

Is the Union Handbook part of the Rules?

19. Ms Phillips told me that the Handbook is not part of the Rules and not, therefore, within my remit. She made a number of points on this as follows.
20. As a Special Register Body the Rules of the Union are contained within the Articles of Association and the By-Laws. Neither of those documents make reference to the Union Handbook which is only available in draft form and has not been approved by the Union's governing body. Without a reference to the Handbook in the Articles of Association it could not be incorporated into the Rules of the Union.
21. The case law usually referred to when considering this point for trade unions *Heaton's Transport (St Helens) Ltd v Transport and General Workers Union 1972 ICR 308*, *Porter v National Union of Journalists & Another 1980 IRLR 404* and *Jaques v Amalgamated Union of Engineering Workers (Engineering Section) 1986 ICR 683* may not be relevant given that the Articles have been legally and comprehensively drafted.
22. The introduction to the Handbook includes the following statements:
 - i. *"This SCP union Handbook has been produced and intended to act as a guide to help members, representatives and Council understand how the SCP undertakes its duties as a trade union".*

ii. *“Although this Handbook will be a comprehensive document it is impossible to include every detail of SCP activity as a trade union or detail or current trade union legislation within this document. Therefore this Handbook will need to be read alongside other relevant SCP documents such as the Articles of Association, bylaws, corporate governance, Union representative Handbook which are available on our website using the following link”.*

23. The Articles of Association and By-Laws should be read together and contain the Rules of the Union. The statements referenced at paragraph 22 (i & ii) above, together with the tone and language within the Handbook, demonstrate that it is clearly intended as a guide. There is no indication within the guide itself that it should be more than that.
24. The Handbook has only ever been available in draft form, is not available on the website and most Union Members and staff are unaware of its existence. When Mr Gates sought a copy of the Handbook, Mr Pirie, and other Union staff, had difficulty in locating it. That should not be the case if it formed part of the Rules of the Union.
25. Mr Gates told me that, in his view, the Handbook forms part of the Union Rules. He made the following points.
26. Rules are not always written into a constitution or rule book. Some are regarded as normal and acceptable behavioral constraints imposed within organisations and are not always written down. Such rules can exist in an unwritten format because they form a part of the logical argument or course of action implied by tacit assumptions.
27. When the Union halted the original no confidence vote in August 2016, which had been initiated by members themselves, they did so citing the process to be followed. This was the process within the Handbook. The manner of the Union intervention led members in the Highland Region to believe that the process constituted the rules around de-selection.
28. The Handbook is a guide to help members, union representatives, and Council Members understand the internal workings of the organisation's functions as a trade union. The handbook describes rules of the organisation in a manner accessible to the lay person.
29. Parts of the Handbook are direct quotes from the By-Laws and, at other times, the handbook fills in gaps from the By-Laws. For instance, the deselection procedure is contained in the Handbook but not the By-Laws; similarly the Handbook contains a procedure for deciding the result of a tied ballot and this is absent from the By-Laws. The Union has included both of these procedures in the Handbook and expects its members to adopt both of these procedures should the need arise.
30. The fact that the Union has committed this de-selection process to paper implies that it regards this as process that must be followed to the letter.

Is the complaint within the Certification Officer's jurisdiction?

31. Ms Philips told me that, even if the Handbook forms part of the Rules of the Union, this complaint is not about the appointment or election of a person to office, nor the removal of a person from office. In her view it is a complaint about whether or not the SCP Employment Relations Department should have organised a vote of no confidence. Removal from office may or may not have followed from that vote of no confidence. Consequently, the complaint does not fall within the Certification Officer's jurisdiction as set out in section 108A.

Did the Union follow the deselection process following the issues raised by Mr Gates?

32. Ms Philip's view was that the Union followed the process set out in the Handbook. Discussions had taken place between the Union and Mr Gates. Although Mr Gates had requested that a deselection ballot take place, the deselection process within the handbook is clear that the responsibility for the ballot lay with the Union. There was, therefore, no obligation for the Union to hold the ballot requested by Mr Gates. Mr Pirie explained to me how he followed the process once he became aware of the issues. His understanding was that the telephone call on 13 December between himself, Mr Furlong, Mr Jamieson and Mr Gates was part of the third stage of the process. The outcome of that was a proposal from Mr Furlong to hold a workshop in the Highland region. Mr Gates subsequently resigned from the Union and the Health & Safety Representative decided not to stand again for election. Consequently, there was no need to proceed further with the process.
33. Mr Gates's view was that the letter sent by him on 4 December 2017 to the Union was sufficient to trigger a deselection ballot. His view was that he had, with their permission, included the Union Membership Number for each of those Highland Members who supported the request for a ballot. He believed this demonstrated that more than 50% of the Highland membership were requesting a ballot. This was what had been required previously and was within the Handbook process. There was, therefore, an obligation for the Union to hold that ballot under the final stage of the deselection process. In Mr Gates's view, the Union had not complied with the process because there was no resolution of the issues he had raised and no vote of confidence was held.

Conclusions

34. I have some sympathy with Mr Gates and the other members of the Highland region. There has clearly been some conflict within the Region for some time and the efforts to resolve this conflict do not appear to have been successful. They initiated a process themselves to remove their union representative which was halted; first by an intervention from Mr Pirie to ensure that the Union's process was followed, and subsequently by an intervention from Dr Gillespie as she believed there was a defect in the original election. I can understand that members of the Highland Region may have felt frustrated by this and why they believed that the process, which is contained in the Handbook, formed part of the Rules of the Union.

35. This does not, however, outweigh the clear evidence in the paperwork provided by the Union and Mr Gates that the Handbook was a draft document which had neither been approved nor considered by the relevant Union Committee nor its Council. In addition the Handbook describes itself as a guide to help members and its drafting reflects the language of guidance. Not surprisingly, given that it is in draft form, there is no reference to the Handbook within the Articles of Association or By-Laws of the Union. I am satisfied, therefore, that the handbook, in its current form, does not form part of the Rules of the Union.
36. I have also considered whether the deselection process itself could form part of the Rules of the Union. I asked both Mr Gates and Mr Pirie whether they were aware of any deselection process going ahead elsewhere in the Union. Neither were aware of any such process. Nor were they aware of either the Handbook or the process until this issue first arose in 2016. It is clear from the papers, and from the evidence given by both parties, that nobody was familiar with this process nor knew where to locate it. The original author, Mr Harris no longer works for the Union. I was offered no evidence about the origins of the process other than Mr Pirie telling me that Mr Harris drafted it and that there was no predecessor policy.
37. It is also clear that the process was drafted, and followed, in a flexible way. To my reading the process is designed to enable members to bring about a resolution to issues with an elected representative. The first stage is for someone to stand against the representative in a routine election and the final stage, after other attempts at resolution have failed, is a vote of no confidence. There are no timescales for any of the steps nor any indication as to how that resolution should be achieved. Consequently, it is open to the Union and its members to decide how best to resolve the situation at each stage. This may be a sensible approach as it enables the attempts at resolution to be adapted to the particular situation which has arisen. In this case, it enabled the Union and its members to introduce what I would describe as a "trigger ballot". This was a vote amongst members, within the region, to gauge the need to hold a vote of no confidence. This seems entirely sensible and practical because of the unique geography of the region but may not be necessary in other regions. In my view, this demonstrates that the process is flexible and, to some extent, uncertain.
38. The flexibility and lack of knowledge about the process itself leads me to the conclusion that the Union's guidelines on the deselection process, like the Handbook in which they are contained, do not currently form part of the Union Rules.
39. Having reached the conclusion that the deselection process is not part of the Rules of the Union I cannot reach a finding on the complaint itself as it falls outside my jurisdiction.
40. I think it would be helpful to say what my view on the complaint would be had I reached a different conclusion. Firstly, I would have needed to hear more from Ms Philips about her argument that the deselection process itself falls outside my remit. On the face of it, I find it hard to agree that this process, which is designed to deal with circumstances in which Union members wish to deselect their elected representative outside of the usual election process, is not related to the removal of

that elected representative from office. Had I found that the Handbook, or the process itself, formed part of the Rules then my initial view is that I would regard it as being within my jurisdiction as it is capable of being related to the removal of a person from office.

41. Finally, had I decided that the complaint did fall within my jurisdiction then I would have found that the Union had not breached the process. As I have reflected at paragraph 37 above the process allows some flexibility for those using it to seek a resolution; there are no timescales for each step and it neither defines nor limits the methods which can be followed at each stage. Nor is there an obligation to hold a no confidence ballot. It appears that the decision as to whether to hold such a ballot lies with the Employment Relations Department of the Union. Mr Gates made the point that, without, a deselection ballot the relevant representative could have chosen to stand, self-nominated and been re-elected. That, of course, is true but I can see nothing within the process or the rules which would prevent this after a removal from office, following a vote of no-confidence.

A handwritten signature in black ink, appearing to read 'Sarah Bedwell', with a long horizontal line underneath it.

Sarah Bedwell
The Certification Officer