D/11/19-20

Decision of the Certification Officer on an application made under Section 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992

Watkins

V

British Medical Association

Date of Decision 29 July 2019

Contents

Decision

1. Upon application by Dr Stephen Watkins ("the applicant") under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"):

   Pursuant to section 256ZA of the 1992 Act, I strike out Complaint 7 of the applicant's application on the grounds that it has no reasonable prospect of success.

Reasons

Background

2. Dr Watkins is a member of British Medical Association ("the Union") and was elected to the Union's Council, the Union's governing body. A complaint was made against him which led to a Union disciplinary hearing on 12 October 2017. The outcome of this hearing was that he was to be suspended from all BMA committees and other elected BMA roles for a period of 12 months from 24 October 2017. Dr Watkins appealed this decision. The original decision was upheld by the appeal panel on 29 January 2018.

3. Professor Allyson Pollock, also a member of the Union, was the subject of a separate complaint which proceeded to a separate disciplinary hearing which was also held on 12 October 2017. Professor Pollock did not attend this hearing. Professor Pollock appealed the decision of the panel and her appeal statements, which I refer to later in this decision, were submitted to this office by Dr Watkins in support of his submissions. One of her grounds for appeal, set out in her appeal statement of 7 November 2017, was that:

   > "There was a failure to accommodate a first and reasonable request by Dr Pollock to be able to attend the hearing. Holding a hearing in absentia was unfair and contrary to natural justice and basic principles of fairness to the accused."

4. Dr Watkins applied to my office on 26 July 2018. He made a number of complaints against the Union in relation to the Union disciplinary proceedings against him. Following correspondence with my office, Dr Watkins confirmed seven complaints. All of these are set in the attached annex. This decision considers only Complaint 7 which is set out as follows:

> On 12 October 2017 the BMA breached Principle 2 of the Living our Values Support and Sanctions Process and also an implied rule to the same effect and also a rule to be implied from the fact that the Support and Sanctions Process is stated to be compliant with the ACAS Code of Conduct by refusing to allow Professor Pollock to call Dr Watkins as a witness, the grounds for the refusal being that the hearing was being held at a time when Professor Pollock was unable to attend. Although Professor Pollock was the prime victim of this injustice it also had an impact on Dr Watkins as the decision of the panel implied that Dr Watkins was disbelieved in his evidence and those hearing of the outcome would be unaware of the fact that Dr Watkins had not in fact been heard.

5. In its response to Dr Watkins' complaints dated 19 March 2019 the Union submitted that Complaint 7 was out of time, writing that, "this breach is alleged to have taken place on 12 October 2017, whereas Dr Watkins' complaint to the Certification Office was lodged on 26 July 2018. Therefore, the complaint is outside the six month period in section 108A(6)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992."

6. In correspondence with my office Dr Watkins argued that his complaint was within time because Professor Pollock's appeal to the Union, which was submitted on 7 November 2017, dealt with the point that he had been unable to give evidence at the hearing. He has also told me that he raised the issue with the Union in conversations with the Union's Chair and the Union's Director of Corporate Development.

7. Dr Watkins has provided me with a copy of Professor Pollock's appeal statement and his own written statement. The appeal statement covered, amongst other matters which are not relevant to this decision, alleged procedural irregularities by the Union including, "a failure to accommodate a first and reasonable request by Dr Pollock to be able to attend the hearing." Later on in the appeal Professor Pollock quotes from Dr Watkins' witness statement although he is not named. I can find no direct reference to the matter of Dr Watkins' Complaint 7 in Professor Pollock's appeal statement.

The Relevant Statutory Provisions

8. 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.

…

(6) An application must be made—

(a) within the period of six months starting with the day on which the breach or threatened breach is alleged to have taken place, or

(b) if within that period any internal complaints procedure of the union is invoked to resolve the claim, within the period of six months starting with the earlier of the days specified in subsection (7).

(7)Those days are—

(a) the day on which the procedure is concluded, and

(b) the last day of the period of one year beginning with the day on which the procedure is invoked.

256ZA Striking out

(1) At any stage of proceedings on an application or complaint made to the Certification Officer, he may—

(a) Order the application or complaint, or any response, to be struck out on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived,

(b) order anything in the application or complaint, or in any response, to be amended or struck out on those grounds, or

(c) order the application or complaint, or any response, to be struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant

or complainant or (as the case may be) respondent has been scandalous, vexatious, or unreasonable.

(4) Before making an order under this section, the Certification Officer shall send notice to the party against whom it is proposed that the order should be made giving him an opportunity to show cause why the order should not be made.

The Relevant Rules of the Union

9. The Rules of the Union which are relevant for the purposes of this application are:-

Principle 2 of the Living our Values Support and Sanctions Process

The process is fair, documented and applied consistently to all members

Considerations and Conclusions

10. Section 256ZA (4) of the 1992 Act requires me to send notice to the party against whom the strike out order shall be made giving an opportunity to show cause why the order should not be made. My office wrote to Dr Watkins on 19 June 2019. This letter stated that my preliminary view that his Complaint 7 was lodged at this office outside of the time limit set out in section 108A(6) of the 1992 Act. Consequently, it appeared to me that the complaint had no reasonable prospect of success and/or was otherwise misconceived. The letter invited Dr Watkins to provide written representations as to why I should not strike out Complaint 7.

11. Dr Watkins responded by an e-mail of 4 July 2019. In this e-mail he made, in summary, the following points:

    a) The appeal by Professor Pollock was the only procedure available for making his complaint

b) An internal complaints procedure was invoked as a result of Professor Pollock's complaint

c) That procedure does not have to be invoked by the Applicant

d) The Act does not require the internal complaint to be framed in particular terms and does not require the subject matter of the complaint to the Certification Officer to be contained within the internal complaint

e) The only requirement is that, if successful, the formal procedure would have resolved the complaint; he submitted that the procedure would have resolved the complaint.

f) The direct subject matter of his complaint was within Professor Pollock's appeal. Professor Pollock's complaint was about being prevented from presenting her case. Dr Watkins stated, "An important element of her case was the evidence I gave. She makes that explicit by referring to it in her written complaint. She actually says that it was so important that it should have led to the case not going forward."

g) The threshold for an argument to bring a complaint to a hearing rather than striking it out is not high. He argued that his submission of how the complaint is in time is "an argument that a reasonable hearing could accept".

h) Dr Watkins made an application to the Employment Tribunal under section 66 of the 1992 Act ("Right not to be unjustifiably disciplined") and sought to access conciliation through Acas. He described various difficulties with this and eventually decided not to continue with it. However, he submitted

that this complaint was invoked, included the subject matter of Complaint 7 and that there is documentary evidence of it.

12. Section 108A (6) and (7) of the 1992 Act sets out the statutory time limits for complaints to me. The Act requires that applications are made within six months of the alleged breach or, if an internal complaints procedure is invoked, the earlier of the two following dates:

    a) six months from the conclusion of that complaint or
    b) six months starting at the end of 12 month period if the complaint to the Union is not resolved.

13. The Employment Appeal Tribunal in UNISON v BAKHSH (EAT/0375/08) has provided guidance on what is meant by "invoking an internal complaints procedure" stating that whilst the phrase can be given a fairly wide meaning "it is essential that some recognisable formal procedure should be being followed". I have no discretion to vary the statutory time limits in section 108A.

14. Dr Watkins' Complaint 7 states that the rule was breached on 12 October 2017 and was brought to my office on 26 July 2018. Therefore, it would be out of time unless an internal procedure had been invoked within six months of 12 October 2017. Dr Watkins relies on three arguments as to why an internal procedure had been invoked. These are:
    i. the appeal by Professor Pollock originally lodged in November 2017 and then updated the following March
    ii. the "informal representations" made by him to Union colleagues and
    iii. his attempt to seek conciliation through Acas as part of his attempt to bring an application under section 66 of the 1992 Act.

15. I am satisfied that the informal conversations described by Dr Watkins do not qualify as an internal complaints procedure as required by the 1992 Act and as clarified by

the EAT. Such conversations could not be considered to be part of a formal recognised procedure.

16. Nor do I consider Dr Watkins' aborted attempt to seek conciliation as part of his application under section 66 of the 1992 Act to be an internal complaints procedure within the Act. The attempt to seek conciliation, as a necessary precursor to bringing a case to the Employment Tribunal cannot, in my view, be an internal complaints procedure since its aim is to seek to resolve the issue through a third party. Dr Watkins has indicated that the Union may not have been aware of him having involved Acas; however, I do not think this is relevant to my decision as an application under section 66 of the Act and the consequent involvement of Acas cannot be an internal procedure.

17. That leaves me to consider whether the appeal brought by Professor Pollock, in the complaint against her, is sufficient to enable Dr Watkins to rely on the extended time limit for Complaint 7. I agree that the 1992 Act does not specify that the complaint must be invoked by the complainant. In principle, therefore, Dr Watkins could rely on Professor Pollock's appeal provided that the appeal procedure was invoked to resolve the underlying issue.

18. Dr Watkins' view appears to be that the internal complaint needs only to be capable of potentially resolving the matter of the complaint to me. My reading of section 108A, however, is that the internal complaints procedure must be invoked to resolve the complaint. In my view, this can only be the case where the complaint which is raised through the internal procedure includes, and refers to, the substance of the complaint to me and is intended to resolve the substance of the complaint to me.

19. I take the view that Professor Pollock's appeal does not do this. It is clear from the correspondence and supporting evidence that Professor Pollock was unhappy about the setting of a hearing date that she could not attend and that she

complained to the Union about this by way of her appeal statement. This gave the Union the opportunity to address her complaint about the hearing going ahead without her. I understand that the Union addressed this point in its consideration of her appeal.

20. I have, however, seen no evidence that Professor Pollock raised the point that she was unable to call Dr Watkins as a witness. Whilst I understand the logic of Dr Watkins' argument that the failure to call him as a witness flows from the fact that Professor Pollock could not attend, or be represented, at the hearing I am not satisfied that this is sufficient to enable him to rely on her appeal so that he gains the benefit of the extended time period in section 108A (6) (b) of the 1992 Act. For this to be the case I would need to see evidence that Dr Watkins, or Professor Pollock, made an explicit complaint about the fact that Dr Watkins was not called as a witness. Without this, my view is that Professor Pollock did not make a complaint to resolve the issue identified in Dr Watkins's Complaint 7 and, consequently, Dr Watkins cannot rely on Professor Pollock's appeal to enable him to meet the time limit within the 1992 Act.

21. I agree with Dr Watkins that the test for striking out a complaint is not high. In this case the test is whether there is a reasonable prospect of success. In view of my conclusion that Dr Watkins cannot reply on Professor Pollock's appeal, and in the absence of any power for me to extend the relevant period, the only decision I can reach is that Dr Watkins' complaint has no reasonable prospect of success.

Sarah Bedwell

The Certification Officer

Annex

Complaint 1

On 24 October 2017, 29 January 2018 and 12 February 2018 and other dates the British Medical Association breached Article 14(7) of its rules by applying a suspension from office to Dr. Stephen Watkins before his appeal had been heard by an appeal panel properly constituted under the Article.

Complaint 2

For the whole of the period from 9 January 2018 to 30 January 2018 the Union breached Principle 17 of the BMA Living our Values Support and Sanctions process which states, *The process should not be used to stifle constructive debate or deter members from seeking election.* The breach occurred in that the Union continued to entertain a complaint by Sir Sam Everington about Dr Watkins' involvement in preparing the document *Manifesto for a Better BMA* and that the Union also declined opportunities to confirm that the complaint could not be extended to co-authors not under suspension. The effect of this was to deter the co-authors of the document from continuing with their intention to distribute it widely and use it as a basis for negotiating consensus about various issues and influencing the contents of election manifestos. The rule was also breached because there was a significant risk that individuals would be deterred from seeking election. One member did tweet that he had been deterred although he later changed his mind and stood anyway.

Complaint 3

On or around 12 February 2018 the British Medical Association breached bye law 58 by not accepting Dr. Stephen Watkins' nomination for Council even though it met the criteria set out in that bye law.

Complaint 4

On 12 October 2017, and also on various earlier dates on which procedural decisions were made which affected the hearing on 12 October 2017, the BMA breached Principle 2 of the Living our Values ('LOV') Support and Sanctions Process (which requires that the process is fair, documented and applied consistently to all members) and also rule 7.5 of the Support and Sanctions Process (which requires a fair process to be followed before suspension) and

also an implied rule to similar effect within Article 14 and also a rule to be implied from the fact that the Support and Sanctions Process is stated to be compliant with the ACAS Code of Conduct. The BMA breached these rules by operating an unfair process. The rule was breached because the process was unfair as a result of the cumulative impact of the following irregularities:

1. The inclusion in the complaint of a highly prejudicial attack on UNITE (see para 1 in section VI of 'Appendix A Document 1 – the notice of appeal submitted against the Living our Values Panel decision: Appeal by Dr Stephen Watkins against the findings of a Living our Values Panel held on 12 October 2017', henceforth called 'The Notice of Appeal')

2. The untrue statement at the start of the complaint that Dr Watkins had previously caused great harm by his e mails – it has been confirmed by the BMA that this is untrue (see para 2 of section VI of The Notice of Appeal)

3. The submission of prejudicial material to the LOV Panel, which Dr Watkins had not been permitted to see, as a result of a request by Dr. Dearden for advice about his conduct (see para 3 of section VI of The Notice of Appeal)

4. The circulation of the complaint together with the prejudicial material to the LOV Panel over a week before the circulation of Dr Watkins' response (see para 4 of section VI of The Notice of Appeal)

5. The process has failed to state coherent and well framed charges (see para 5 of section VI of The Notice of Appeal)

6. The LOV Panel asked no questions of Dr Watkins' evidence but appears to have rejected it in its entirety without showing any signs of considering it (see para 6 of section VI of The Notice of Appeal)

7. The LOV Panel's reference to "the central message of the posting" is fundamentally misconceived as it fails to address Dr Watkins' evidence as to what it was meant to say. It accepted a particular interpretation based on taking extracts from the posting out of context (see para 7 of section VI of The Notice of Appeal)

8. Preparation of Dr Watkins' defence and preparation for the hearing were disrupted by bullying (see para 8 of section VI of The Notice of Appeal)

9. Dr. Dearden (the complainant) failed to declare a significant conflict of interest (see para 9 of section VI of The Notice of Appeal)

10. The LOV Panel failed to consider the considerable evidence that the conduct being considered, interpreted as they interpreted it, was out of character. They should have asked themselves whether this might not suggest that in fact Dr Watkins' motivation was not the one that they described but rather the one that Dr Watkins put forward by way of explanation, which was entirely credible and in character (see para 10 of section VI of The Notice of Appeal)

11. The LOV Panel failed to consider the considerable evidence that Dr Watkins acted in a unifying and conciliatory way towards divisions in Council. This should have alerted them to the fact that the motivation for Dr Watkins' posting was genuinely, as it stated, to support Dr. Nagpaul and Dr. Hedderwick in addressing disunity, not to undermine them and create disunity (see para 11 of section VI of The Notice of Appeal)

Complaint 5

On 23 January 2018, and also on various earlier dates on which procedural decisions were made which affected the hearing on 23 January 2018, the BMA breached Principle 2 of the Living our Values) Support and Sanctions Process (which requires that the process is fair, documented and applied consistently to all members) and also rule 7.5 of the Support and Sanctions Process (which requires a fair process to be followed before suspension) and also an implied rule to similar effect within Article 14 and also a rule to be implied from the fact that the Support and Sanctions Process is stated to be compliant with the ACAS Code of Conduct. The BMA breached these rules by operating an unfair process. The rule was breached because the process was unfair as a result of the cumulative impact of the following irregularities:

1. Although at the hearing on 23 January 2018 which preceded and contributed to this decision one member of the Appeal Panel showed an interest in the appeal and seems to have considered it fairly, the

Chairman was clearly biased and the third member of the Panel was basically silent This bias would, on the balance of probabilities, carry forward into the actual decision

2. The Appeal Panel has rejected out of hand the complaints of irregularity and the complaints of disproportionality, although they were carefully argued and deserved a response

3. The Appeal Panel has stated that none of the new evidence is new evidence. In fact it clearly is. The Appeal Panel therefore improperly failed to consider it.

4. Part of the reasoning of the Appeal Panel is that the original Panel did not state its reasons and the Appeal Panel cannot speculate as to what they are. This effectively negates the appeal process.

5. The Appeal Panel stated that nothing that Dr Watkins did to make amends after the original conduct was of any relevance. No reasonable Appeal Panel would take that view, certainly in relation to penalty

6. The Appeal Panel said that Dr Watkins had not apologized but this is untrue and there was evidence before both the original Panel and the Appeal Panel to show that it was untrue

7. The Appeal Panel rejected the legal appeal on the Article 14 issue on the basis that Dr Watkins should have queried this when the matter was discussed at Council, but there was no clarity at Council that this was how the matter would be interpreted and in any case this is not a valid ground for rejecting an appeal on the interpretation of the rules

8. The Appeal Panel took into account issues unrelated to the subject matter of the Appeal including a confidentiality issue which was not the subject of the proceedings and on which in any case the BMA has subsequently apologized to Dr Watkins, and also including his raising the legal appeal.

9. Having reversed the finding of the original Panel that Dr Watkins had behaved out of a wish to harm Dr. Hedderwick, no reasonable Panel would have failed to reduce the penalty

Complaint 6

For the whole of the period from 17 August 2017 (when the complaint against Dr Watkins referred to in complaints 1, 3, 4 and 5 above was lodged) to 29 January 2018 (when the purported appeal against Dr Watkins' suspension was purportedly dismissed) the BMA breached Principle 17 of the Support and Sanctions Process and also a rule to be implied from the fact that the Support and Sanctions Process is stated to be compliant with the ACAS Code of Conduct by accepting in the complaint, and refusing to strike out from the complaint, a passage attacking UNITE.

Complaint 7

On 12 October 2017 the BMA breached Principle 2 of the Living our Values Support and Sanctions Process and also an implied rule to the same effect and also a rule to be implied from the fact that the Support and Sanctions Process is stated to be compliant with the ACAS Code of Conduct by refusing to allow Professor Pollock to call Dr Watkins as a witness, the grounds for the refusal being that the hearing was being held at a time when Professor Pollock was unable to attend. Although Professor Pollock was the prime victim of this injustice it also had an impact on Dr Watkins as the decision of the panel implied that Dr Watkins was disbelieved in his evidence and those hearing of the outcome would be unaware of the fact that Dr Watkins had not in fact been heard.