

D/12/21-22

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

(on remission from the Employment Appeal Tribunal)

Date of Decision

3 November 2021

Decision

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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 Act”) and the remission of Dr Watkins’ Complaint 2 by the Employment Appeal Tribunal I make the following declaration:

I do not uphold Dr Watkins’ Complaint 2.

Reasons

2. The application to which this decision relates was originally made to me by Dr Watkins on 26 July 2018. Dr Watkins made a number of complaints to me about the BMA. I considered these at a hearing on 25 and 26 September 2019 and gave my decision on 14 October 2019. The Union conceded one of those complaints and I did not uphold the remaining complaints. Dr Watkins appealed to the Employment Appeal Tribunal (EAT). Bourne J’s judgment was handed down on 6 April 2021 when he remitted one complaint back to me.
3. I have set out below the relevant parts of Bourne J’s judgment in inset paragraphs 74 to 88:

Ground 4(b)

74. This issue differs from the rest of the appeal because it is not about Dr Dearden’s complaint against Dr Watkins. That is why I have dealt with it separately as a second part of Ground 4.

75. During the run-up to the BMA Council elections in January 2018, a group of individuals who were considering standing for election met to consider a joint manifesto. Dr Watkins’ appeal was pending at that time and therefore it was possible that he might be eligible to stand. He took part in drafting and circulating the “Manifesto for a better BMA”.

76. On 9 January 2018, Sir Sam Everington, a BMA Council member, made a complaint against Dr Watkins. He questioned whether Dr Watkins should

be engaging in this activity while under suspension, and complained about the content and tone of the manifesto.

77. Ms Jayesinghe, who is the Respondent's Director of Corporate Development, shared this complaint with Dr Watkins on 12 January 2018. She considered the complaint with reference to the LOV process, taking advice from the Respondent's legal team. On 30 January 2018 she informed Dr Watkins of her conclusion that the complaint did not raise any issues which needed to be considered further. No further action was taken on it.

78. That, one might think, would have been the end of it. Dr Watkins, however, told the co-authors of the manifesto about the complaint and warned them that part of it, at least, might be levelled against them. He feels that debate was or could have been stifled, or candidacy deterred, by these events, not least because the co-authors decided to stand for Council individually rather than on their joint manifesto. Dr Watkins complained to the CO that the act of Sir Sam Everington was an intentional breach of Principle 17 and that, because Sir Sam is a senior member of the Respondent, the Respondent should be "liable" for it.

79. The CO said at paragraph 55 of her decision that she had no evidence about Sir Sam's motives. She considered that the period of three weeks taken to assess and dismiss his complaint was not unreasonable. She considered that Dr Watkins had not actually demonstrated that debate was stifled, not least because none of the allegedly affected candidates attended the hearing before the CO to give oral evidence.

80. The CO added:

"59. ... in my opinion the wording of Principle 17 is clear in that it seems to ensure that the LOV process is not used to stifle debate. In my view there must, therefore, be an intention to stifle debate for this principle to be breached. I cannot see how a Union Member or a Council member could infer any other interpretation of the words used.

60. In my view, I do not need to consider whether the BMA should be liable for Sir Sam's actions in making the complaint. It seems to me that the liability of a Union for any member's activities will depend on the circumstances of each individual case. In this case, I have no evidence of motivation on the part of Sir Sam Everington. I have evidence from Ms Jayasinghe that she was attempting to reach a conclusion as quickly as possible and did so within a reasonable timescale, and I have not been able to test the written evidence as to whether, and if so how, debate was stifled. Consequently, I do not believe that there is any question of liability on the part of the BMA.

61. For these reason I refuse to make the declaration requested by Dr Watkins."

81. In oral argument, the Appellant accepted that the three week timescale would not have been sufficient to infringe Principle 17 if these events had not occurred during an election campaign. During that campaign, three weeks was a significant period.

82. In argument before me it was agreed, rightly, that vicarious liability was a red herring. The question was whether the fact that the complaint remained alive for three weeks, during an election campaign, instead of being immediately rejected, constituted an infringement of Principle 17.

83. Lord Hendy argued that what matters was the intention of the Respondent, not of Sir Sam, and that even if Principle 17 could be infringed unintentionally, there was no evidence that this had happened.

84. I respectfully do not agree with the CO that Principle 17 is not engaged unless there is an intention to stifle debate or deter candidacy. Instead, I consider that Principle 17 is comparable to provisions such as Article 10 of the European Convention on Human Rights which can be engaged when public authorities take enforcement action of a kind which could affect freedom of expression. Principle 17, when engaged, imposes a filter on the

disciplinary process. The principle states that the process “should not be used” to stifle constructive debate or deter candidacy. There may be cases where that principle is engaged but where there is nevertheless an important disciplinary issue. In such a case, it seems to me that a decision maker may have to balance any actual or potential stifling effect against the importance of the disciplinary issue. The latter must be capable of outweighing the former in some cases. But if it does not, Principle 17 means that the process should proceed in such a way as to avoid the stifling effect or, if that is not possible, should cease.

85. It seems to me that the erroneous finding about intention, and the distraction of vicarious liability, stood in the way of the right questions being asked. It was necessary for the CO to decide whether, regardless of intention, this was a complaint which should not have proceeded because of an actual or potential stifling effect engaging Principle 17 and, if so, whether dismissal of the complaint after a three-week period was sufficient to achieve compliance with the Principle.

86. It is not clear to me whether Dr Watkins’ point about the importance of the three week period being in an election campaign was articulated to the CO. Also, it may be that when these questions are reconsidered, the conclusions of the CO will not change. She has already identified a lack of evidence about the alleged stifling effect, and she has already found that the three week period was not unreasonable. However, those questions must be considered (and therefore reconsidered) in the right legal context

Conclusion

87. The appeal succeeds on ground 4(b) only.

88. The parties agreed, and I concur, that in this event the Principle 17 issue must be remitted for the CO to make a new decision.

4. A hearing took place by Video Conference on 14 October 2021. Dr Watkins represented himself and was assisted by Mrs Elizabeth Watkins. Dr Watkins re-

submitted his witness statement for the original hearing in 2019 and provided a revised witness statement received in September 2021. Dr Watkins also resubmitted the original written witness statements of Dr Thabo Miller and Professor Allyson Pollock. Dr Watkins and Dr Miller provided oral witness evidence at the hearing. Professor Pollock attended but neither I nor the Union had any questions to put to her and she provided no relevant oral evidence.

5. The Union was represented by Lord Hendy QC of Counsel, instructed by Mr Reuben Davidson, a solicitor of the Union's legal department. The Union resubmitted the written witness statement of Ms Nicky Jayesinghe, the Union's Director of Corporate Development and Social Responsibility. Ms Jayesinghe did not attend to provide oral evidence.
6. Also in evidence was a bundle of 182 pages including documents relevant to the matter to be determined. The witness statements formed part of this bundle.
7. Ahead of the hearing Dr Watkins indicated that he may wish to refer to additional documents at the hearing. As the bundle of documents had been agreed by both parties at a Case Management Meeting on 8 September 2021 and these new documents appeared not to be relevant to the complaint, I did not agree to them being added to the bundle. As the documents had been included in the bundle for the original hearing, I asked both parties to have copies available and directed that, should they wish to make reference to them, they should seek my agreement to do so and explain why they were relevant.
8. On the morning of the hearing Dr Watkins sought to add additional evidence to the bundle which related to an appeal statement made by another Council Member during the BMA's consideration of a complaint about them. I refused permission for this to be added to the bundle on the basis that it was not relevant to the complaint before me.

Findings of fact

9. The following facts were agreed by the parties. I will resolve any disputed facts as part of this decision.
10. On 8 January 2018 nominations opened for the BMA Council elections.
11. On 9 January 2018 Dr Watkins sent an email to a number of people, including a BMA Council Member, Sir Sam Everington, seeking support for a document entitled "A Manifesto for a Better BMA".
12. Later that same day, Sir Sam Everington made a complaint to the BMA about Dr Watkins' conduct in circulating the Manifesto. Ms Jayesinghe sent a copy of the complaint, on 12 January 2018, to Dr Watkins.
13. Ms Jayesinghe wrote, on 30 January 2018, to Dr Watkins to explain that the BMA was satisfied that Sir Sam Everington's complaint did not raise an issue which should be pursued further and that the BMA would not be taking any further action.
14. On 12 February nominations closed for the BMA Council Elections.

The Relevant Statutory Provisions

15. 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

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

BMA Living our Values support and sanctions process

Principles

17. The process should not be used to stifle constructive debate or deter members from seeking election.

Consideration and Conclusions

Background

The Manifesto for a Better BMA

17. Ahead of the BMA Council elections in early 2018 Dr Watkins, together with a group of BMA members, produced a document entitled “Manifesto for a Better BMA”. On 9 January 2018, Dr Watkins circulated the Manifesto to a number of people with the following email:

“A number of us who are concerned at the divisions currently unnecessarily present in the BMA have written a manifesto which we believe would command wide support and which we believe a wide range of candidates in the coming Council elections might be interested in supporting.

Please consider supporting this manifesto and also please forward it to as many potential candidates as possible.”

18. In evidence Dr Watkins told me that the aim of the manifesto was to bring greater unity to the BMA. The authors’ intention was that candidates for Council could adopt it, in whole or in part, as part of their election address in the upcoming Council elections. Their aim was also to circulate it widely to encourage a diverse range of candidates to stand for Council.
19. At the Hearing Dr Watkins sought to introduce oral evidence that he had also intended to personally circulate the document to a wide range of doctors in the North West and to colleagues with a wide range of views. His aim would have been to stimulate debate and to encourage others to stand in the elections.
20. Dr Watkins had been a Council Member of the BMA. A complaint was made about him by another Council Member in August 2017 which resulted in him being suspended from Council and barred from holding office for 12 months. He appealed that decision. Although the appeal was ultimately unsuccessful it had not concluded at the time of the elections and so it was possible that Dr Watkins would be able to stand for Council.

The Complaint to the BMA

21. One of the recipients of Dr Watkins’ email, Sir Sam Everington, made a formal complaint to the BMA about the email. Sir Sam made the complaint by email on 9 January 2018 to Nicky Jayasinghe and Keith Ward, the BMA’s Chief Executive and returning officer for the election. I have set out the wording of the complaint below:

“Dear Nicky and Keith,
Please see enclosed an email I have just received from Dr Watkins. It was sent to 22 other council members. I have a number of concerns.

1. Dr Watkins is suspended from Council and I understood that the terms of the suspension would be that he should not involve himself in BMA Council business. I understand that he is appealing against this suspension but a process of appeal does not negate the suspension and the conditions imposed. I am sure Dr Watkins is fully aware of this, as he signed up to the LOV process as a Council member and as I recollect was actively involved in drafting the process. He specifically states the process is being used as an instrument to suppress debate. He adds "The current culture in the BMA is poor, lacking in transparency and often undemocratic. The new Living Our Values process has been used badly.

2. I have been a medical politician for many years and used to robust debate and direct emails, but I have to say I found the approach in this email quite intimidating and am very concerned that potential doctors wanting to stand and offer their time to the BMA would find it more so.

3. I find the open challenge to the LOV process when you signed up to it unacceptable and undermining of the appeal process, as it risks having undue influence on those hearing the appeal. In criminal law, in this country, it is why there are restrictions on reporting prior to a trial, to ensure fair and due process.

4. Some of the comments are highly derogatory of the BMA of which he has been a Council member for years.

5. There are clear rules surrounding the election process to Council which are based on enabling any person standing to have a fair and equal chance of being elected. I believe emails like this undermine the process.

6. A long email with a request to sign up to all or nothing is undermining of a cooperative and developmental approach to policy

development that has been a key feature of the BMA. I note the authors of the manifesto are not listed.

7. I agree entirely in his comment about supporting women's rights. However I personally believe he did entirely the opposite with his original challenge to the fair election of our present deputy chair of Council.

I wish to put this forward as a formal complaint for the reasons I list above.

Best wishes,

Sam Everington”

Correspondence between Dr Watkins and Ms Jayasinghe

22. Ms Jayasinghe was out of the office at the time the complaint was made. On her return, on 12 January 2018, she emailed Dr Watkins to let him know that the complaint had been made and that her colleague would be in touch with regard to next steps. At the Hearing Dr Watkins told me that I had seen copies of all email exchanges between Ms Jayasinghe and him and that he had no exchanges with anyone else at the BMA on this issue. He also told me that he recalls that he may have had a telephone conversation with Ms Jayasinghe but could not recall that conversation. I have, therefore, relied on the email exchanges as being a contemporaneous, and comprehensive, account of the interaction between the BMA and Dr Watkins on this issue. I think it helpful if I set these out in detail here as some considerable time has passed since the period in question.

23. Dr Watkins replied to Ms Jayasinghe at 07:45 on 15 January 2018 copying his reply to the Returning Officer for the election. I have set out the text of his email below:

“It has obviously been necessary to discuss Sam's complaints with the co-authors.

There are a number of aspects of the complaint which concern us and we will write to you about them in due course.

However, there is one that is urgent. In considering the complaint the BMA could well expose itself to a risk of being seen to interfere with the election campaign contrary to s47 and s48 of the Trade Union and Labour Relations Act 1992. I am happy to explain further if you wish.

I think it is necessary for the BMA to protect itself against a risk which could cost it hundreds of thousands of pounds if the election is annulled.

I believe it needs to refuse to consider the complaint and to suspend Sir Sam, and anybody else who incited or supported the complaint or contributed to its drafting, from all offices they hold until voting has closed.”

24. Ms Jayasinghe replied, at 09:34 on the same morning, to say that she would wait to hear from Dr Watkins about the aspects of the complaint that concerned him and asked him to explain the matter he had raised as urgent.

25. Dr Watkins replied at 11:49 on the same morning explaining that section 48 of the Act prohibited a trade union from restricting the election statement of a candidate except by making rules on certain specific matters authorised in that section. He went on to explain that the issues about which Sir Sam had complained were not contrary to the BMA’s Rules and that Sir Sam may be personally harassing Dr Watkins, which would be a breach of the LOV (Living Our Values) process or that he may be seeking to assert illegal control over the production of election statements.

26. Dr Watkins added that, having informed his co-authors of the complaint, one co-author had concluded that it would be unsafe to stand. He explained that this could be a breach of section 47 of the Act which prohibits the unreasonable exclusion of candidates. He also highlighted an exchange

between himself and another Council Member which had resulted in some suggested changes to the manifesto but which, when presented to the co-authors, resulted in one person suggesting that they should now abandon the process rather than proceed in defiance of the complaint. He explained that this was unfortunate because the process that the co-authors had tried to initiate, and the Council Member had responded to in good faith, was intended to be a unifying process of identifying consensus. Dr Watkins felt that, if the BMA allowed the situation to continue it would be exposed to complaints of breaches of section 47 and section 48 of the Act which could lead to the election being annulled. He felt that, if the complaint were allowed to proceed through the normal LOV process it would have “this stultifying impact for the whole of the remainder of the nomination process”, adding that this is why the BMA needed to reject the complaint summarily and immediately as “considering it at all exposes the BMA to risk”.

27. Dr Watkins went on to explain that, because of Sir Sam’s position at the BMA, and to avoid all risks “you should take active steps to repudiate his action in case the mere act of making the complaint could be seen to be action by the BMA”. He felt that this was especially the case if Sir Sam was not acting alone.

28. On 18 January Ms Jayasinghe replied, thanking Dr Watkins for his explanation. She also explained that she had heard from two other Council Members. One had told her that he had received an “unusual manifesto” from Dr Watkins and provided her with a copy of the email he had sent to Dr Watkins. Another had told her that they were also minded to make a complaint. She explained that:

“All of this will be taken into account in our consideration of the complaint/s and any investigation of whether there is a case to answer that should go before a “Living Our Values Panel”. Naturally, we will also have regard to the points you have already made and anything further that you may wish to add as part of that consideration.”

29. Dr Watkins emailed Ms Jayasinghe and the Returning Officer on 22 January 2018 referring to their previous email exchange and noting that the BMA had not taken the action he had sought. He explained that “Yesterday the authors of the manifesto decided to discontinue its circulation until after the BMA decision on this question so it is now clear that that the complaint is affecting the election campaign”. He also explained that he was not personally concerned by the complaint which he believed to be nonsense for two reasons. The first was because election campaigning was manifestly not Council business. The second was because the complaint was clearly a breach of the principle that the LOV process must not be used to stifle debate. He went on to explain he was seeking summary dismissal of the complaint because of his concern for the risk the BMA was running. He explained that the Manifesto had been aimed at a wide group of candidates which meant that it was not just the authors who might complain about its suppression. He felt that there was a realistic prospect of a complaint from any disappointed candidate who wished to include a reference to the manifesto in their election statement but was unable to do so.

30. Ms Jayasinghe replied later that day explaining that the BMA had considered the points in Dr Watkins’ emails and had taken a view from their legal department. Her view was that Dr Watkins’ points did not give her cause to set aside the complaint that had been made. She explained that Dr Watkins’ points related to election addresses; however, the complaint was about Dr Watkins’ behaviour in a particular set of circumstances rather than about any candidates or addresses. She told him that the complaint should properly be considered under the Code of Conduct and any wider potential impacts would be addressed and managed as part of this process. She then explained;

“It’s important to point out that we have not begun a formal investigation at this point; given the particular circumstances we thought it best to inform you of the fact that a complaint was made and that we would let you know about next steps. This still stands and we will be back in touch in due course.”

31. Dr Watkins replied shortly afterwards:

“If what you are saying is that those of my co-authors who are candidates in the election are free to continue the circulation of the Manifesto without any fear of your entertaining a complaint against them then that is an entirely adequate response to my point. However that needs to be said explicitly and quickly as they currently do not see it that way and much of the complaint would be equally applicable whoever circulated it.”

32. Ms Jayasinghe replied at 16:13 as follows:

“My comments below merely confirm that the statutory right to make an election address in accordance with section 48 of TULRCA is unaffected by Sam’s complaint. Members making such addresses will, naturally, need to ensure that they comply with a whole range of laws that govern the same, including the law on defamation, confidentiality and rules pertaining to professional conduct. I hope that members will also bear in mind the provisions of the BMA’s Code of Conduct and adhere to the same. It is not my role to prejudge the outcome of Sam’s complaint and I shall not be doing so, these are matters that the BMA has (rightly) reserved to a process, potentially culminating in a hearing by a panel upon which I do not sit.”

33. Dr Watkins next emailed Ms Jayasinghe at 08:16 on 25 January 2018 stating as follows:

“I write on behalf of those of the co-authors of Manifesto for Better BMA who are intending to be candidates in the Council elections. I write on their behalf because they are afraid to write themselves, a matter you might wish to reflect on. Those of the co-authors who do not intend to be candidates have withdrawn from any role in relation to the document, save only that I act as a conduit for communication.

The remaining co-authors have ceased circulation of the manifesto. They ask you to confirm that they may resume circulation (amended to include

edits) without fear of consideration being given to any LOV complaint against them for doing so.

Unless they receive that assurance by the end of this week they will regard the Manifesto as having been suppressed and will consider what to do next.”

34. Ms Jayasinghe replied later the same morning:

“I would reiterate the points I made in the email I sent you at 4:13pm on 22 January. The fact that we have received a complaint from Sam Everington does not affect the statutory rights of you or any prospective candidates. They will, of course, need to comply with all applicable laws and rules, including those set out by the BMA. For example, candidates can use social media for canvassing but should not use BMA resources to do or send unsolicited messages. They are not prohibited from referring to other material in their statements.

Candidates are also, as members, subject to the BMA Code of Conduct and should act accordingly, regardless of any complaints that have been made about the behaviour of other members. I cannot and will not pre-judge what will come of the complaint about your conduct and it would not be appropriate to make statements or offer assurances about any action that might be taken on hypothetical complaints about the behaviour of unknown members. We have had no contact with any of the members to whom you refer, having only heard of them from you, and do not know who they are. The complaint we received was about your actions in your particular circumstances, is yet to be responded to and should not be an impediment to anyone behaving in accordance with their rights and responsibilities.”

35. Ms Jayasinghe next wrote to Dr Watkins on 30 January 2018. She explained that the BMA would not be taking any action on the complaint. The text of her email follows:

“We have now considered the complaint that we received from Sir Sam Everington (SE) on 09 January 2018 about an email you circulated on the same date, that asked recipients to “consider supporting this manifesto and also please forward it to as many potential Council candidates as possible.” The attachment referred to was titled “Manifesto for a Better BMA” that you co-authored. The document was subsequently shared by at least one of the recipients with members of their committee.

We reviewed the points you made in your emails about legislation pertaining to trade union elections but, as I explained previously, we are satisfied that the concerns were to do with your individual conduct (as a member who is subject to suspension) and that it was legitimate and appropriate in all the circumstances for us to consider this without impinging on the rights of candidates.

The concerns that were raised by SE (and others, albeit not formally) were that, as a currently suspended member, it was not appropriate for you to involve yourself in Council elections and that some of the content of the email and attached document was not in keeping with BMA policy and/or the BMA’s values and standards of member behaviour.

Having taken into account the fact that you were not using BMA resources to canvas, and the content of the manifesto is compatible with the Code of Conduct; notably that “we want every member to feel able to contribute, knowing that their points of view will be valued and differences of opinion will be respected”, we have come to the conclusion that the complaint does not raise issues that should be pursued further.

We will therefore be contacting SE to explain that we are satisfied that your email was not in breach of the Code of Conduct and that we will not be taking any further action on his complaint.”

Consideration

36. My consideration of this complaint is limited by the terms of the complaint itself and by the issues remitted back to me by Bourne J. In essence, I need to consider whether Sir Sam's complaint was one which the BMA should have identified as one which engaged Principle 17 because of the real or potential risk that debate would be stifled in the lead up to the Council elections. If I find that is the case, then I must consider whether the decision to close the complaint on 30 January 2018 was sufficient to comply with Principle 17.

Was Principle 17 engaged?

37. The BMA's position is that Sir Sam's complaint, as set out at paragraph 21 above was made about Dr Watkin's conduct as a Council Member who had been suspended from Council. It is clear from Ms Jayasinghe's emails above that the BMA addressed only Dr Watkins' conduct and did not consider the conduct of any other member of the BMA. I have seen no evidence which suggested that the BMA considered extending this complaint to other Members or that anyone, other than Dr Watkins, raised this possibility with them.

38. Dr Watkins told me, however, that he was concerned that it was possible that Sir Sam's complaint could, in part, be extended to the co-authors of the document. Consequently, he felt an obligation to share the fact of the complaint with his co-authors. He told me that this was to ensure that his co-authors were aware that a complaint had been made which could be extended to them, and also because he felt he may be further criticised by Sir Sam Everington if he did not do so. It is important to note, however, that both Dr Watkins and Dr Miller told me, at the hearing, that Dr Watkins did not share the detail of the complaint with them. The co-authors were, therefore, relying on Dr Watkins' description of the complaint and the action being taken by the BMA.

39. Dr Miller told me that, following the discussions with Dr Watkins, he was fearful that continuing to circulate the manifesto might result in a complaint against him which might lead to him being seen as aggressive at the beginning of his career with the BMA. Consequently, he was initially wary about being identified as a co-author. He acknowledged, however, that he had identified himself by tweeting about the situation and that he had subsequently stood as a candidate.

40. I have not seen any evidence that, on receipt of Sir Sam's complaint, the BMA considered that this was a complaint which might stifle debate and that they should, therefore, consider whether it should not proceed. Instead, it seems Ms Jayasinghe shared the complaint with Dr Watkins and explained that her colleague would be in touch with the next steps. In her written statement, Ms Jayasinghe explained that the BMA was obliged to consider the complaint but that it was not used to stifle debate or to impede the elections. She added that the BMA did not suggest that the fact that the complaint had been received should impede the actions of the co-authors. This is supported by the email exchanges above; I can see no suggestion, from the BMA, that anybody, including Dr Watkins, should change their behaviour following the complaint. It seems to me that the BMA's approach, on receipt of the complaint was reasonable. Consequently, I do not agree with Dr Watkins that, at that stage, the BMA should have identified that Principle 17 might be engaged.

41. Dr Watkins first raised concerns about the complaint with Ms Jayasinghe on 15 January 2018 (paragraph 23 above). In Dr Watkins' view this e-mail should have highlighted to the BMA that Sir Sam's complaint was likely to have the impact of stifling debate during the nomination period. The Union should, therefore, have considered whether Principle 17 was engaged. I note, however, that this is not explicit within Dr Watkins' email; he refers specifically to the risks of a breach of section 47 and section 48 of the Act before referring to "this stultifying impact". He also refers to one co-author concluding that it

would be “unsafe to stand” and another suggesting that they should abandon the process rather than proceeding in defiance of the complaint.

42. In the next email exchange, on 22 January 2018, Dr Watkins told Ms Jayasinghe that the co-authors had now ceased circulation of the manifesto until the question had been resolved. That question appears to be his request for the complaint to be dismissed. Ms Jayasinghe replied to say that the BMA had taken the view that Sir Sam’s complaint could not be set aside as requested and should properly be considered under the Code of Conduct. As set out at paragraph 30 above she explained that the complaint was about Dr Watkins and not about candidates and election addresses. She also pointed out that no formal investigation had begun and that the position remained as set out in her original email covering the complaint; a complaint had been received and the BMA would write with next steps.

43. Dr Watkins told me that he had initially found Ms Jayasinghe’s response to be reassuring because it appeared to limit consideration of the complaint to him. Consequently, he sought clarification that his co-authors were free to circulate the manifesto without any fear of the BMA entertaining a complaint about them. Ms Jayasinghe replied, as set out at paragraph 32 above, to say that she could not offer such assurances.

44. In my view, Dr Watkins’ first email of 22 January should have alerted the BMA to the fact that the behaviour of potential candidates might be changing following the complaint. I have considered whether the references, in Dr Watkin’s earlier email, to a member concluding it was unsafe to stand, a co-author suggesting that the manifesto should be withdrawn, and that the complaint was having a stultifying effect should have alerted the BMA to the risk of a breach of Principle 17. On balance, however, I am persuaded that it was reasonable for the BMA to read these in the context of Dr Watkin’s concern about section 47 and section 48 of Act. This was the concern he had expressed as being urgent and he had not, at that stage, raised the issue of a potential breach of Principle 17.

45. I think it worth reflecting that I have seen no evidence that the BMA shared the complaint with anyone other than Dr Watkins. Nor have I seen any evidence that suggests that the BMA sought to change anyone's behaviour whilst they dealt with the complaint. Ms Jayasinghe shared the complaint with Dr Watkins as soon as it was possible for her to do so (paragraph 22). She shared the approaches made to her by other Council Members (paragraph 28) and replied to Dr Watkins points around section 47 and section 48 of the Act. She also clarified the BMA's process for considering the complaint including the fact that it was a complaint solely about Dr Watkins as a Member suspended from Council.
46. Dr Watkins is clear about his reasons for sharing the fact of the complaint with his co-authors. I understand why he did so as it was possible that parts of the complaint could also have been made about the co-authors. It is worth noting that, for confidentiality reasons, he did not share the complaint itself which meant that the co-authors were relying on a description of the complaint. Dr Miller reflects this in his witness statement where he says that he had no knowledge of the disciplinary proceedings.
47. It is also worth noting that Dr Watkins told me that he did not share the emails, between himself and Ms Jayasinghe, with the co-authors. Nor did he offer any reassurance to his co-authors that, should a complaint be made about them, it was unlikely to be taken forward even though, in his view, the complaint made by Sir Sam was "nonsense". This is consistent with Dr Miller's evidence. I find this surprising bearing in mind that Dr Watkins was clearly having conversations with the co-authors, whether by email or in person, during January 2018.
48. Nevertheless, the e-mail of 22 January should have been sufficient to highlight to the BMA that some members may be changing their behaviour because the complaint remained open. From the evidence before me, it appears that this behavioural change arose from conversations between Dr Watkins and his co-authors to which the BMA was not party; however, Dr

Watkins had alerted them to the impact of those conversations and the potential for debate to be stifled. Bearing in mind Bourne J's interpretation of Principle 17 it seems to me that, by 22 January, there was at the very least, the potential for consideration of Sir Sam's complaint to stifle debate in the run up to the BMA Council Elections.

Was the closure of the complaint on 30 January 2018 sufficient to prevent a breach of Article 17?

49. Dr Watkins is clear that the fact that the complaint against him remained open was stifling debate. Because the manifesto was no longer being circulated, the opportunities for debate which the manifesto was designed to provoke and which might unite the BMA Council as well as the opportunities to extend that debate to a wider circle of potential candidates was lost. This is the argument he made in written submissions. At the hearing he sought to introduce oral evidence that he was also being prevented from circulating the manifesto and encouraging others to stand. He told me that, by the time the complaint was closed, the moment had passed and there was no longer time to attract BMA members beyond the usual activists. Many members had already submitted their nominations and written their election addresses and so were no longer able to include their manifesto in their election statement. This is also what Dr Miller told me; however, I have not seen any evidence from the other co-authors. Nor have I seen any evidence that the BMA suggested to Dr Watkins that he should cease circulating the manifesto.

50. Dr Miller told me that, because of the risk of the complaint being extended to him and other co-authors, he and others decided to stand using their own, individual, election addresses. Although he did not reference the manifesto by name, his own address included some of the points made in the manifesto.

51. I remain unclear, however, as to why Dr Watkins and the co-authors thought that there was a real risk of the complaint being extended to the co-authors. Sir Sam's complaint relates only to Dr Watkins. Whilst I agree with Dr Watkins that some of the points made by Sir Sam were capable of being made about

others, I have seen no evidence indicating that this was likely to happen. The BMA addressed correspondence only to Dr Watkins and I have seen no evidence that they shared that correspondence more widely or made others aware of the complaint. It is clear from Ms Jayasinghe's email of 18 January (paragraph 28) that there had been some discussion between other Council Members about Dr Watkins' original emails; however, this appears to relate only to Dr Watkins and, in any event, I have no evidence that anyone other than Sir Sam made a formal complaint.

52. Dr Miller told me that he believed that Sir Sam's complaint may have been politically motivated and designed to prevent wider circulation of the manifesto. I have seen no evidence, however, that this was the case. Nor have I seen any suggestion by the BMA that the complaint would be extended to include the co-authors. In her emails dealing with the point around election addresses Ms Jayasinghe was clear that Sir Sam's complaint was about Dr Watkins' conduct in his own particular circumstances. She was also clear that the complaint was not about the content of election addresses. For instance, in her email at 16:13 of 22 January (paragraph 32), she explained that members seeking election would need to comply with a range of laws and rules as well as the BMA Code of Conduct. She also explained that she could not prejudge the outcome of the complaint.

53. It appears, however, from Dr Watkins' email to Ms Jayasinghe, on 25 January 2018 (paragraph 33 above) that the co-authors were so concerned that they were afraid to write to her themselves and had ceased to circulate the Manifesto. Dr Watkins wrote on their behalf to seek the BMA's confirmation that they could circulate the document without fear of consideration being given to any LOV complaint for doing so. He explained that if this confirmation was not given by the end of the week the co-authors would regard the manifesto as having been suppressed and consider what to do next. Ms Jayasinghe replied on the same day reiterating the points she had already made and explaining that the BMA did not know who the co-authors were. Her final sentence also made it clear that the complaint related only to Dr

Watkins by saying “The complaint we received was about your actions in your particular circumstances, is yet to be responded to and should not be an impediment to anyone behaving in accordance with their rights and responsibilities”. I think it worth noting here that Dr Watkin’s email was sent on Thursday 25 January and the deadline he gave for a reply was, effectively, the following day.

54. In my decision dated 14 October 2019 I explained that it was reasonable for Ms Jayasinghe not to give the assurance which Dr Watkins sought. I have seen no evidence, or heard any argument, which persuades me to change that view. It seems to me that Dr Watkins was seeking an assurance which could not reasonably be given. Ms Jayasinghe had been clear in her emails to Dr Watkins that they were treating Sir Sam’s complaint as being about Dr Watkins in his position as a Member who had been suspended from Council. No complaint had been made about any of the co-authors. The BMA did not know who the co-authors were and so could not know what their individual circumstances were (e.g. whether they too had been suspended from the Council).
55. In addition, at this stage, no formal investigation had begun into the complaint. Ms Jayasinghe explained this in her emails of 22 and 25 January (paragraphs 30, 32 and 34 above). The BMA had not decided whether Sir Sam’s complaint should be taken forward under the LOV process and so had not taken a decision on the substance of the complaint. Consequently, it is hard to see what reassurance Ms Jayasinghe could give without prejudging the outcome of a process which had not begun.
56. The decision as to whether the complaint should proceed to an investigation was, however, taken shortly after the exchange of emails on 25 January because Ms Jayasinghe wrote to Dr Watkins on 30 January 2018 (paragraph 35) to explain that the complaint was being closed and no action was being taken.

57. I think it helpful to restate the timeline here. Sir Sam's complaint was disclosed to Dr Watkins on Friday 12 January. On Monday 15 January Dr Watkins emailed Ms Jayasinghe to identify the risk, as he saw of it, of potential breaches of section 47 and section 48 of the Act. Later that day, he suggested that one of his co-authors might not stand and another felt they should withdraw the manifesto because of the complaint. On Monday 22 January Dr Watkins sent the email which, in my view, should have alerted the BMA of the risk of a breach of Principle 17. On the same day, and on Thursday 25 January Ms Jayasinghe offered reassurances about the BMA's approach to the case and the rights and responsibilities of candidates. On Thursday 25 January she explicitly stated that the fact that the complaint had been made should not be an impediment to other candidates. On Tuesday 30 January Ms Jayasinghe informed Dr Watkins that the complaint had been closed.

58. If I am right that the BMA should have been alert to the Principle 17 issue on Monday 22 January then there was a period of 7 working days (including 22 and 30 January) before the complaint was closed. Bearing in mind that the complaint was solely about Dr Watkins and there was no evidence that it might be extended to others I am satisfied that this is a reasonable period of time to reach a decision. Ms Jayasinghe had explained the approach the BMA was taking and I have seen no evidence that the BMA took any steps to restrict or change the behaviour of Dr Watkins or any of his co-authors. In fact, she gave an explicit assurance that the complaint should not be an impediment to anyone behaving in accordance with their rights and responsibilities.

59. In reaching this decision I recognise that Dr Watkins has argued that the BMA should have identified the complaint as one with the potential to breach Principle 17 at the outset. I have set out at paragraph 40 above why I do not accept this argument. He also argued that, at the very latest, the BMA should have identified the risk of a breach following his email at 07:45 on 15 January. I have dealt with this at paragraph 44 above. Having said that I am mindful

that the complaint was received during the nominations period for the Council elections and so I have considered the timeline in that wider context.

60. Nominations period for Council opened on Monday 8 January 2018 and closed on Monday 12 February 2018. Dr Watkins was aware of the complaint from Friday 12 January and became aware of its closure on Tuesday 30 January. In his view this prevented him, and others, from circulating the manifesto, encouraging others to support it and motivating a wider range of candidates to stand for 19 days of the 28-day period during which nominations were open. In his view this meant that the opportunities for debate with others, for building consensus and for reaching a diverse range of candidates were lost. He told me that it was not possible to do this in the remaining 9 days during which nominations remained open.

61. Even if I accepted that Dr Watkins is right and that the BMA should have identified its potential stifling effect on receipt of the complaint on 9 January, I cannot accept that the fact of the complaint itself was enough to prevent either Dr Watkins or his co-authors from continuing with their aims. I have seen no evidence that the BMA suggested that Dr Watkins or his co-authors should cease campaigning, or circulating the manifesto, because of the complaint. Nor did they suggest that the complaint might be extended to co-authors. In my view the BMA dealt promptly with Dr Watkins' concerns around section 47 and section 48 of the Act and the circulation of the manifesto. Ms Jayasinghe also explained that the complaint related only to Dr Watkins as a Member who had been suspended from Council. And, as the complaint was closed before it proceeded to the formal LOV process, the BMA did not undertake any investigation or begin any disciplinary proceedings.

62. In my last decision I reflected that the only person who appeared to have shared details of the complaint to others was Dr Watkins. I have seen no evidence to suggest that this was not the case. I have, however, been told by Dr Watkins, at the hearing, that whilst he shared the fact of the complaint with

his co-authors he did not share his subsequent correspondence with Ms Jayesinghe with them. This is consistent with Dr Miller's evidence that he was not aware of those emails. I can only conclude, therefore, that the reassurances offered by Ms Jayesinghe did not reach the co-authors. Dr Watkins is the only person who could have passed this correspondence to his co-authors. The BMA did not know who the co-authors were had no means of communicating with them other than through Dr Watkins. In those circumstances I do not think the BMA could have done any more themselves to deal with a potential breach of Principle 17. On that basis I find that the BMA's actions between 12 January and 30 January were sufficient to mitigate the risk of a potential breach of Principle 17.

63. In reaching this view I recognise that some candidates and potential candidates felt unable to circulate the manifesto following the complaint made about Dr Watkins; however, I believe that the steps taken by the BMA should have been sufficient to prevent this had they been shared with the co-authors of the manifesto.

64. I also recognise that Dr Watkins argued that the debate that he was having with another Council Member about the content of the manifesto ceased when that Member became aware of Sir Sam's complaint. As Dr Watkins himself acknowledged, however, there is no evidence as to whether the debate ceased because of the complaint.

65. Dr Watkins also argued, in his submissions, that the BMA could have summarily dismissed those parts of the complaint which could have been made about all co-authors and considered only those which related to his position as a Council Member who had been suspended from office. I understand his argument; however, as I have concluded that the steps taken by the BMA were sufficient to prevent any potential stifling of debate I do not need to consider this point.

Conclusions

66. For these reasons I refuse to make the declaration requested by Dr Watkins.

Evidence

67. It is worth noting that Dr Watkins submitted a witness statement from Professor Allyson Pollock in support of his case. This statement was part of his original case but Professor Pollock did not give oral evidence. The Union objected to the statement being included, as it had at the previous Hearing, because the contents related to another set of disciplinary proceedings not related to Dr Watkins' case. As is my usual practice, I admitted the statement on the understanding that I would discount any parts of the statement which were not relevant. At the Hearing I intervened in Dr Watkins' questioning of Professor Pollock as it related to the BMA's handling of complaints against other BMA Members rather than Dr Watkins' complaint. Professor Pollock did not, therefore give any oral evidence.

68. There was much debate at the hearing about the reference to "disciplinary proceedings" in Dr Miller's witness statement. The BMA position was that no disciplinary proceedings had begun because the BMA decided on 30 January 2018 that the complaint was not one which should be considered under the LOV process. Dr Miller could not recall whether Dr Watkins had used the phrase "disciplinary proceedings" or simply said that a complaint had been received. Both Dr Miller and Dr Watkins said that they were not aware of the distinction between the complaint having been received and disciplinary proceedings. In my view this is a red herring; the core issue was whether the existence of the complaint, and the fact that it not been closed was, sufficient to engage Principle 17.

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

Sarah Bedwell
The Certification Officer