

D/1-3/22-23

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

Dawes

v

Royal College of Nursing of the United Kingdom

Date of Decision

29 June 2022

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## **Decision**

1. Upon application by Dave Dawes (“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 complaints 3 and 10, set out at paragraph 7, below on the grounds that the complaints, as advanced by the Applicant, have no reasonable prospect of success and/or are otherwise misconceived.

2. Complaint 8, also set out at paragraph 7, is dismissed upon withdrawal by the Applicant.

## **Reasons**

### **Background**

3. Mr Dawes made two applications, on 29 August 2021 and 10 January 2022, as a member of Royal College of Nursing of the United Kingdom (“the Union” or “the RCN”). This decision relates to three of the complaints contained in those applications; seven complaints have been listed for a Hearing on 3 and 4 October 2022.
4. The complaints relate to the Union’s disciplinary proceedings against Mr Dawes.
5. As part of the disciplinary proceedings, the Union undertook an investigation which began on 19 July 2021 and was concluded on 11 October 2021. That investigation was conducted on behalf of the Union by Yess Law. At the beginning of the investigation Pat Cullen, at that time the Union’s Acting Secretary General and Chief Executive, wrote to the Nursing & Midwifery Council (“the NMC”) referring some of the allegations against Mr Dawes. The allegations in question related to certain social media postings, or “tweets”, that Mr Dawes had been alleged to have made. Ms Cullen explained to the NMC that the complaints were under investigation and that there was no attempt to pre-judge the outcome of the investigation. She also explained that:

“The RCN proposes that these tweets breach both the expected conduct of a registrant as set out within ‘The Code: Professional standards of practice and behaviour for nurses, midwives and nursing associates (the Code)’ and the NMC’s ‘Guidance on using social media responsibly’.

6. The Union undertook a second investigation into additional allegations against Mr Dawes. This was by Irwin Michell LLP commencing on 22 September 2021 and concluding on 26 January 2022.
7. Following correspondence with my office, Mr Dawes, confirmed the complaints relevant to this decision as follows:-

**Complaint 3: alleged breach of union rules 2.4.1 and 5.6**

Rule 2.4.1

“Ensure a thorough investigation takes place and produce an investigation report in line with the agreed format, ensuring that all necessary steps are taken without any unreasonable delays”

The suspension notice was issued on the 14<sup>th</sup> July 2021 and the investigation was commissioned on the 19<sup>th</sup> July. The Investigation did not complete until the 11<sup>th</sup> October (90 days from the suspension). This is an unreasonable delay.

Rule 5.6

“The Investigating Officer should seek to complete the investigation within 25 working days. If the investigation cannot be completed within this time the Customer Relations Manager should be informed and the member updated.”

The suspension notice was issued on the 14<sup>th</sup> July 2021 and the investigation was commissioned on the 19<sup>th</sup> July. The Investigation did not complete until the 11<sup>th</sup> October (90 days from the suspension). This is a breach of the 25 day guidance.

**Complaint 8: alleged breach of rule 6.3**

The Union breached Rule 6.3 of the Member Resolution Policy in that,

“The investigation report was received by the RCN on the 11<sup>th</sup> October (email 5) and I was informed on the 10<sup>th</sup> November (email 7) of the hearing date on the 15<sup>th</sup> December. This is an unreasonable delay.

The net effect of all these delays is that the staff of a union were able to remove an elected member from office for 6 months under the pretext of a suspension and investigation.”

## **Complaint 10: alleged breach of rules 9.9 and 1.12**

### Breach of Rule 9.9 of the Member Resolution Policy

“9.9 If a member is a registrant of a regulatory body and following the process the incident has been proven and the sanction was one of misconduct or gross misconduct, consideration will be given to informing the relevant regulatory body. In some circumstances this may be a requirement of registration. The Chair of the Resolution panel will make this decision.”

1.12 In cases of alleged misconduct, no sanctions will be made until the case has been investigated thoroughly and a resolution hearing held

Pat Cullen made a referral to the NMC on the 19th July 2022 relating to a complaint about my conduct which had not yet been investigated. As this action was taken based on my conduct then this falls under the definition of disciplinary action. “Relevant disciplinary action” is defined at regulation 2(1) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 (“the Regulations”) as “action, short of dismissal, which the employer asserts to be based wholly or mainly on the employee’s conduct or capability, other than suspension on full pay or the issuing of warnings (whether oral or written)”. The referral to the NMC was clearly an action based wholly or mainly on my conduct or capability and therefore would fall under the legal definition of a disciplinary sanction.

The rules state that consideration of an NMC referral will be only be given once 2 conditions are met - that the incident has been proven and that the sanction was one of misconduct or gross misconduct. It further states that this decision will be made by the Chair of the Resolution panel. This infers that if these 2 conditions are not met then there should not be a referral to the NMC. This is also supported by rule 1.12 which states that no sanctions will be applied until the case has been investigated thoroughly and a resolution hearing held.

If the argument is that anyone within the RCN can make a referral to the NMC linked to a complaint before the incident is investigated or proven then this

would completely negate the existence of this rule. The existence of this rule is to provide the circumstances when a referral to the NMC can be made.

Rule 1.12 states that that "In cases of alleged misconduct, no sanctions will be made until the case has been investigated thoroughly and a resolution hearing held." and a referral to the NMC would be an extremely serious sanction - probably the most serious sanction available to the RCN. So a referral to the NMC before the investigation has completed and a hearing has taken place is a breach of 9.9 and 1.12.

## **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.

### **256ZA Striking out**

(1) At any stage of proceedings on an application or complaint made to the Certification Officer, she 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:-

Member Resolution Policy

Under 1 Principles

1.12 In cases of alleged misconduct, no sanctions will be made until the case has been investigated thoroughly and a resolution hearing held

1.7 Sanctions will only be applied when misconduct or gross misconduct are established on the balance of probability, or offered training or additional support has been ineffective.

1.14 The RCN will not impose any sanctions which are not specifically set out in this policy.

Under 2 Responsibilities

Rule 2.4 Investigators will:

#### 2.4.1

Ensure a thorough investigation takes place and produce an investigation report in line with the agreed format, ensuring that all necessary steps are taken without any unreasonable delays

#### Under 5 Investigation

##### Rule 5.6

The Investigating Officer should seek to complete the investigation within 25 working days. If the investigation cannot be completed within this time the Customer Relations Manager should be informed and the member updated.

#### Under 9 Determining Appropriate Action

##### 9.3 The resolution panel may decide to:

###### 9.3.1 No sanction applied

###### 9.3.2 Dismiss the case and not issue a sanction;

9.3.3 If the allegation(s) is upheld, the resolution panel has a range of sanctions available to them, which should be proportionate to the allegation(s). These include but are not limited to:

9.3.3.1 Member is required to attend relevant training, updating or support set within a time frame;

9.3.3.2 Removal from activist and/or governance role(s) for a maximum of 36 months

9.3.3.3 Suspension of the respondent from all or any benefits of the membership for a maximum of 36 months;

9.4 Any sanction imposed will not take effect until expiry of the time limit within which the respondent can submit an appeal or, if an appeal has been submitted, until such time as the appeal has been determined.

##### 9.5 First written warning may be given if:

9.5.1 misconduct/behaviour is minor; or

9.5.2 similar issues have previously been addressed informally.

9.5.3 Warning is retained for a period of up to 6 months, after which it will be removed if no further action is required.

##### 9.6 Final written warning may be given if:



9.6.1 Further misconduct or behaviour occurs; or the misconduct is sufficiently serious to warrant only one written warning. This might occur where actions have had or are likely to have a serious or harmful impact on the RCN.

9.6.2 Gross misconduct is established but with insight from the respondent and significant mitigating circumstances.

9.6.3 Warning is retained for a period of up to 12 months, after which it will be removed if no further action is required.

9.7 Expulsion from membership of the RCN (time limited or not time limited).

9.7.1 Some acts, termed gross misconduct, are so serious or have such serious consequences that they may call for suspension or expulsion without notice for a first offence.

9.7.2 Any decision to exclude or expel individuals will be in accordance with Trade Union and Industrial Relations Act 1992s. 174 TULR(C)A 1992 or the Trade Union and Labour Relations (Northern Ireland) Order 1995 s.31 -34.

9.8 Any sanction should be confirmed in writing to the member by the Panel Chair. This written notification should include:

9.8.1 the nature of the misconduct

9.8.2 if appropriate, the improvement in conduct that is expected and the time period given for such improvement

9.8.3 time period of any sanction 9.8.4 the action being taken and how long that action or warning will remain in place

9.8.5 the consequences of further misconduct during this time, or of failure to comply with the sanction. 9.8.6 their right to appeal, how it should be made and to whom

9.9

If a member is a registrant of a regulatory body and following the process the incident has been proven and the sanction was one of misconduct or gross misconduct, consideration will be given to informing the relevant regulatory body. In some circumstances this may be a requirement of registration. The Chair of the Resolution panel will make this decision.

## Considerations and Conclusions

### Complaint 3

10. Mr Dawes was suspended by the Union on 14 July 2021. The first investigation was commissioned on the 19 July 2021 and completed on 11 October 2021. The second was commissioned on 22 September 2021 and completed on 26 January 2022. Mr Dawes believes that both investigations breached Rule 2.4.1 because they were not completed without unreasonable delay and Rule 5.6 because they not completed within 25 days.
  
11. Mr Dawes told me that both investigations took too long and that there was no intention that they be completed within 25 days. In his view, a reasonable trade union member would regard an investigation of over 4 months and an entire disciplinary process of over 6 months as being unreasonable given the intent of the rules. He made particular reference to the second investigation by Irwin Mitchell LLP which he told me involved only two interviews but took 87 working days. He drew my attention to another investigation, which he believed to be comparable, and which was completed within 29 days.
  
12. Dealing first with Rule 2.4.1, I note that the Rule requires that the investigator should ensure that the investigation is thorough, that the report is in line with the agreed format, and that all necessary steps are taken without any unreasonable delays. Mr Dawes' complaint is that there was an unreasonable delay; however, he has not provided any information or evidence to support this position. Clearly, the investigations took longer than he would have preferred but I have not seen anything which supports his position that the delay was unreasonable. I note that he has identified another investigation which was completed more quickly; however, he has not offered any evidence to support his position that the delay in his case was unreasonable.

13. Rule 5.6 requires that the Investigating Officer should aim to complete the investigation within 25 working days. Clearly both investigations took longer than 25 days; however, the Rule does not require them to be completed within that time period. The 25 day period could, therefore, be treated as a guideline. Mr Dawes told me that the interview schedule for the first investigation showed that there was no intention for the investigation to be completed within that time period. The Union told me that this investigation covered seven complaints and involved significant work. Their view was that it was not possible to complete the investigation within 25 days without risking its integrity and undermining the process.
14. Mr Dawes told me that a reasonable union member would expect the union, and the investigator, to comply with the timescale set out in Rule 5.6. He would also expect that they would agree that the investigation in his case took too long because of the intent of the Rules. I agree that a reasonable union member would expect the union to follow its rules. This would, however, include Rule 2.4.1 in addition to Rule 5.6. There should, therefore, be an expectation that the investigator would proceed without unreasonable delay, undertake a thorough investigation, produce a report in the required format and aim to complete the investigation within 25 days.
15. As I have explained above Mr Dawes has not provided any evidence or information to support his view that the Union breached Rule 2.4.1. The Union have described the reasons why the investigation took longer than the 25 days referred to in Rule 5.6 and explained the risks to the thoroughness and integrity of the investigation had it been completed in a shorter period. Mr Dawes has not provided any evidence which contradicts this or which supports his argument that the investigation could have been completed more quickly without risking its thoroughness or integrity. Consequently, I do not believe that this complaint has any reasonable prospect of success.

## **Complaint 10**

16. Ms Cullen referred some of the allegations about Mr Dawes' conduct to his professional regulator, the NMC, on the same day the Union commissioned the investigation by Yess Law. He argues that this is a breach of Rule 9.9 and Rule 1.2.
17. Mr Dawes' position appears to be that Rule 9.9 is the only route by which a referral to the NMC can be made during the disciplinary process. Ms Cullen was not, therefore, in a position to make the referral to the NMC as the process had not been completed, there was at that stage no relevant finding against him and only the Chair of the Panel could make that referral. In his view, this is supported by Rule 1.12 which requires that a sanction can only be imposed once the investigation has been completed and there has been a Resolution Hearing. He has subsequently argued that Rule 1.7 and Rule 1.14 support his position as they limit the circumstances in which sanctions can be applied.
18. My reading of Rule 9.9 is that it requires the Chair of the Resolution Panel to consider whether to refer a Member to their regulatory body where the relevant incident has been proven and there is a finding of misconduct or gross misconduct. It does not appear to prevent a referral in other circumstances. I cannot, therefore, see that Mr Dawes' position is sustainable on the wording of the Rule itself. Looking more widely, however, his interpretation could lead to a delay in the Union making an urgent referral to a regulatory body where the Union, or its staff or officials, believed that patients or the public may be at risk. That would be contrary to the public interest and cannot be the intention of this Rule.
19. Mr Dawes told me that his position is supported by Rules 1.12, 1.7 and 1.14. His complaint refers only to Rule 1.12; however, as Rules 1.7 and Rule 1.14 support his argument that Rule 9.9 and Rule 1.2 have been breached I have taken these into account in my decision. These Rules apply where the Union

imposes a sanction following a disciplinary process and limit the circumstances in which a sanction can be applied. As Mr Dawes acknowledges, they are relevant only if a referral to a professional body is a disciplinary sanction.

20. The Rules are silent as to whether a referral to a regulatory body is a sanction. Mr Dawes told me that a referral is a sanction and relied on previous decisions by myself and my predecessors to support his position. His view was that a referral should be treated as a sanction for the following reasons:

- a) A referral to the NMC has a severe detrimental effect on any nurse, their wellbeing, their career, their finances and their reputation.
- b) This specific referral to the NMC is an action that flowed directly from the start of the disciplinary process.
- c) This specific referral to the NMC was made by the Resolution Officer after the disciplinary process had been initiated and for the same actions that were the subject of the disciplinary investigation.
- d) A referral to the NMC is an action that directly relates to a member's conduct.

21. I agree with Mr Dawes that this referral was made at the beginning of a disciplinary process, flowed directly from allegations that were made as part of that process and were related to his conduct. Similarly, I understand that a referral could have a severe impact on any nurse which might impact on their wellbeing, career, finance and reputation. I am not persuaded, however, that this could be sufficient to show that a referral is a disciplinary sanction.

22. There are two reasons for this. The first is that the purpose of a referral to a regulatory body is to enable the regulator to consider whether there are circumstances which require it to consider the registration of the person concerned. It is the beginning of a formal process which may, or may not, result in regulatory sanctions; however, the referral itself does not impose any restriction or

penalty on the person being referred. That decision rests with the professional regulator.

23. My second is that treating a referral to a regulatory body as a sanction would result in the position set out at paragraph 18 above. The Union would not be able to make a referral until the end of the disciplinary process which could prevent the Union from making an urgent referral where they believed patients or the public might be at risk. Reading the Rules in that way would be contrary to the public interest.

24. Consequently, I do not believe that this complaint has a reasonable prospect of success. In reaching this decision I have taken into account that Ms Cullen was clear, in her referral, that the RCN was undertaking an investigation, that the outcome should not be prejudged and that the referral was being made because of the potential for a breach of the NMC's code of Conduct.

25. Section 256ZA of the Act 1992 Act requires me to send notice to the party against who the strike out order shall be made giving them an opportunity to show cause why the order should not be made. My office wrote to Mr Dawes on 27 May 2022. This letter stated that having considered the applications and further correspondence, I was minded to exercise my powers under section 256ZA of the 1992 Act to strike out their complaints on the grounds that they had no reasonable prospect of success or were otherwise misconceived. The letter invited Mr Dawes to provide written representations as to why I should not strike out the complaints. In response, Mr Dawes raised a number of points which I have addressed above. He did not provide me with any additional evidence or argument which showed that these complaints had a reasonable prospect of success.

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

Sarah Bedwell

The Certification Officer