

D/4-11/22-23

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

Evans (2)

V

Prospect

Date of Decision

1 July 2022

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Decision

1. Upon application by Mr Andrew Evans (“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 the claimant’s complaints below on the grounds that the complaints, as advanced by the claimant, have no reasonable prospect of success.

Background

2. Mr Evans submitted an application to make a complaint on 5 December 2021. He submitted further complaints on 31 January and 22 March 2022.
3. Mr Evans is a member of Prospect (the Union). The Union began disciplinary action against him in 2021 which included suspending him from office on 23 June 2021. Complaints 1 to 6 relate to that disciplinary process.
4. Prospect held an election for the role of General Secretary in 2021. Complaints 7 and 8 relate to that election.
5. Following correspondence with my office, Mr Evans, confirmed the complaints as follows:-

Complaint 1

That on 23 June 2021 the Union breached Union Rule Appendix 1, Section 1.3 when I was suspended from office by the disciplinary subcommittee without having been given the opportunity of making representations on the matter to the National Executive Committee. It is not possible for this to occur under any circumstances.

Complaint 2

That on 23 June 2021 the Union breached Union Rule 2.5(1) when I was suspended from office by the disciplinary subcommittee. Rule 2.5(1) relates to the disciplinary processes because the disciplinary standing orders, which are part of the disciplinary processes, attempts to “suspend the member” – which is not possible except “subject to any restriction imposed by these rules” as stated

in Rule 2.5(1). Restrictions imposed by these rules as described in Rule 2.5(1) would relate to disciplinary proceedings as well as other matters. These rules meaning rules in the rulebook rather than rules made up by the NEC without approval of conference. Note that the standing orders only seem to give the NEC the power to suspend the member, presumably from membership, rather than from office.

Complaint 3

That on 26 September 2021 a meeting of the Sector Executive Committee occurred and made decisions whilst I was suspended from office by the disciplinary subcommittee, contrary to Appendix 1, Section 1.3

Complaint 4

That on 30 January 2022 a meeting of the Sector Executive Committee occurred and made decisions whilst I was suspended from office by the disciplinary subcommittee, contrary to Appendix 1, Section 1.3

Complaint 5

That on 26 September 2021 a meeting of the Sector Executive Committee occurred and made decisions whilst I was suspended from office by the disciplinary subcommittee, contrary to Rule 2.5(1).

Complaint 6

That on 30 January 2022 a meeting of the Sector Executive Committee occurred and made decisions whilst I was suspended from office by the disciplinary subcommittee, contrary to Rule 2.5(1).

Complaint 7

That on 15 September 2021 the Union breached Section 7 of the Code of Conduct for Elections when Eleanor Wade the President of Prospect sent out a letter to members stating:

I think members should know that in preparation for March NEC meeting I said:

“I am sure we all reflect positively on how the union has grown in membership and influence during Mike’s tenure as General Secretary and the strong relationships he has forged with the NEC and across the union. The last 12 months have been extraordinarily challenging and the fact that we are in such good shape organisationally and financially, illustrates the qualities of his leadership which will be invaluable as we hopefully move into recovery across the economy.

I know Mike wants to devote his considerable energy and focus for another five years and your NEC welcomes his decision to stand again. “

This statement was clearly designed to promote Mr Clancy’s nomination as a candidate and very likely affected whether other candidates put themselves up for nomination. It is clear Mr Clancy became a candidate in the election when he was nominated. The rules talk about an “uncontested election” and Mr Clancy eventually was the only candidate in this election.

Complaint 8

That on 18 September 2021 the Union breached sections 14 of the Code of Conduct for Elections when I made a complaint on this matter to Deputy General Secretary, Sue Ferns. However, Ms Ferns refused to call the Appeals Committee as required under section 14 of the code.

The Relevant Statutory Provisions

6. 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

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

Rulebook

Rights and duties

2.5 (1) Subject to any restrictions imposed by these Rules, a Working Member shall be entitled to take part in all of the activities of the Branch to vote on any matter requiring decisions by ballot, and shall be qualified to hold any office in the Union, and shall be entitled to such benefits and privileges as are provided by these Rules or as may from time to time be determined in accordance with these Rules.

Part 9: National Executive Committee

Functions of the committee

9.1 (1) There shall be a National Executive Committee (in this Part referred to as “the Committee”) elected in the manner hereinafter provided and which shall conduct the business of the Union in conformity with the policy from time to time laid down by National Conference and shall have such other functions as are provided by these Rules.

(2) The Committee shall between National Conferences be solely responsible for interpreting policy laid down by Conference and determining policy if no such policy exists. The Committee shall also be responsible for the interpretation of these Rules between National Conferences.

(3) The Committee shall manage and transact all matters and business arising in the affairs of the Union between meetings of National Conference.

Powers of the committee

9.2 (1) The Committee shall have such powers, authorities and discretions as are necessary for or incidental to its functions and, without prejudice to the foregoing generality, shall have power:

(j) to appoint from time to time such committees (hereafter in this Rule referred to as “Sub Committees”) as it may think necessary for the dispatch of its business and to delegate to them such of its functions or refer to them such matters as it may in its discretion determine;

(3) Any Sub-Committee shall conduct its business in accordance with such procedure as the Committee may direct or failing such a direction in accordance with such procedures as the Sub-Committee may itself decide.

Proceedings of the National Executive Committee

9.15 (1) The Committee shall meet and conduct its business as it shall from time to time by resolution determine and shall have power to regulate its own procedure.

Appendix 1

Disciplinary Regulations

1.1 Subject to the provisions of the Union's Rules, the National Executive Committee may by resolution reprimand and/or fine and/or remove from office and/or prohibit from holding office for such specified period as it thinks fit or suspend from membership for such specified period as it thinks fit or expel from membership any member if in its opinion: (1) that member has individually or in concert with others (whether in connection with the business of a Section or Branch or of the Union or otherwise) taken any action or been guilty of any conduct which is derogatory to the interests of the Union; or (2) that member has persistently failed to comply in any respect with the Union's Rules

1.3 A resolution under Regulation 1.1 may be passed only after the person shall have been informed of the complaint and afforded an opportunity of making representations on the matter to the National Executive Committee; and in accordance with such other procedure as the National Executive Committee may determine.

Disciplinary Sub-Committee: Standing Orders

1. The National Executive Committee (NEC) has exercised its powers under Rules 9.2(1)(j) and 9.15(1) to delegate certain of its functions to a Disciplinary Sub-Committee. The Disciplinary Sub-Committee shall operate in accordance with the following Standing Orders introduced by the NEC pursuant to Appendix 1 Regulation 1.3.

2. These Standing Orders apply to situations where serious disciplinary concerns are raised involving a breach of the Rule Book or behaviors inconsistent with the values or Objects of the Union, where the matter is not appropriate to be addressed on an informal basis by means of counselling, training, or advice.

Disciplinary Sub-Committee

3. The NEC shall appoint a Disciplinary Sub-Committee (“the Sub-Committee”). The Sub-Committee shall consist of seven persons which will include:

3.1 Five members of the NEC;

3.2 The General Secretary (or a member of the Senior Management Team as nominated by the General Secretary);

3.3 The President (or a member of the Presidential Team).

4. Any decision of the Sub-Committee requires a quorum of four (which shall not include the General Secretary). The General Secretary or the President (or their nominees) shall have authority to convene a meeting of the Sub-Committee following reference to the NEC but subject to the circumstances requiring precautionary suspensions under the terms of paragraphs 11-13. The NEC shall be kept informed of any step or decision taken by the Sub-Committee.

....

Precautionary Suspension

11. The Sub-Committee shall have the power to suspend a member on a precautionary basis where this is considered to be appropriate and necessary in the interests of the member, or the Union generally, or to enable the matter to be investigated expeditiously.

12. This power is to be exercised sparingly, where the alleged behaviour of the member is incompatible with their holding of Union office or other position, or participation in Union affairs or activities (for example in cases involving alleged misappropriation of Union resources or in cases of discrimination or harassment). The Sub-Committee shall review the appropriateness of any precautionary

suspension at four week intervals. It shall inform the NEC of any exercise of this power and the NEC has the power to end or modify any such suspension as it considers appropriate.

13. Precautionary suspension will continue until the conclusion of both the investigation process and any resulting disciplinary process, unless otherwise stated. Precautionary suspension is in no way conclusive of any allegations or evidence to be considered in the subsequent disciplinary process.

....

Code of conduct for General Secretary election

1. This Code of Conduct is designed to ensure fairness and equality of opportunity between one candidate and another.
2. Each candidate will be given a copy of the Code and will be required to give a written undertaking that they will abide by the terms of the Code.

Nomination/Selection of Candidates

3. Rule 10.2(2) will operate where the NEC are not nominating an incumbent General Secretary, in which case the National Executive Committee shall select a candidate for their nomination in the election after advertising for candidates for such nomination to members of the Institution.
4. Candidates for the election must be a Working or Unemployed Member, or an employee of the Union or any other person except as detailed in Rule 10.2(6), and must be nominated by the National Executive Committee or by a Branch of the Union (in the latter case in such a manner as the National Executive Committee shall determine) provided that, in the event of the position of General Secretary becoming vacant due to death, resignation, dismissal or retirement of an incumbent General Secretary, the National Executive Committee may choose to advertise for and select a candidate who is neither a Working or Unemployed Member nor an employee of the Union to be the National Executive Committee's nominee in the election held to fill the vacant position. The nomination shall in all cases be accompanied by an undertaking signed by the nominee to act in all

respects in accordance with the Code of Conduct from time to time laid down by the National Conference and to accept office if so elected on the terms and conditions laid down by the National Executive Committee in accordance with these Rules if so elected.

Candidates' Statements

5. Each candidate will be requested to provide a photograph and may make a statement which, including biographical details, must not exceed one thousand words. The statement and photograph (if one is to be received) must be received by the closing date and time for the receipt of nominations.

6. The statements of all candidates shall be issued to all members eligible to vote in the election.

Election Campaigns

7. No Union funds or other resources shall be used by any candidate or by any candidate's supporters in the promotion of their nomination/candidacy, other than that required for the official circulation of the authorised candidate's election statement. Similarly, no Union funds or other resources shall be used by any candidates or any candidate's supporters in denigrating any other candidates.

8. Candidates shall not spend any of their own funds, nor shall they or their supporters use any funds, or official resources, in any election campaign. This shall include spending on travel, subsistence, entertainment, stationery, postage, telephone, or use of faxes or e-mail, with the object of promoting any nomination/candidacy.

9. Candidates shall not attend Branch or workplace meetings for the purpose of canvassing for nominations or votes but this shall not prevent them carrying out their normal responsibilities as representatives of members.

10. Branches may advise their members of the name of the candidate in an election who has been nominated by that Branch. Branches may also advise members to participate in a ballot (to "use their vote"); but branches must not

make any other comment on any other aspect of a candidate, whether nominated by them or not.

Membership Ballot

11. The General Secretary of the Union shall be elected in a ballot of the membership for a period of five years, the term of office of five years being calculated from the date of election.

12. There shall be no requirement to hold a ballot at an uncontested election.

Breaches of the Code

13. Any member may complain of a breach of the Code.

14. Such complaints will be investigated by the Appeal Committee appointed by National Conference to deal with appeals against disciplinary action taken by the National Executive Committee.

15. Any complaint that there has been a violation of this Code must be submitted not later than seven days after the declaration of the result of the election and the Appeal Committee will arrange to complete the process of considering the complaint within three weeks from the date of receiving the complaint.

16. If the Appeal Committee upholds the complaint that the candidate by their own acts or by the acts of any other person has caused a violation of the Code the candidate may be debarred from the election and/or their election may be declared null and void.

17. The decision of the Appeal Committee shall be final

Considerations and Conclusions

Complaint 1

8. On 23 June 2021 the Union suspended Mr Evans from holding office. The Union describe this as a precautionary suspension and have explained that the decision was taken by the Disciplinary Sub-Committee under paragraph 11 of the Standing Orders.

9. Mr Evans' position is that the Union had no power to suspend him under the Standing Orders. He told me that the Union's only power to suspend a member is set out in Rule 1.3 of Appendix 1. That Rule requires the Union to give him the opportunity to make representations to the NEC before imposing the suspension. As this did not happen the Union must, in his view, have breached Rule 1.3 of Appendix 1.
10. Mr Evans told me that the NEC is able under, Rule 9.2 (1) and Rule 9.3, to regulate its own procedure and to delegate some of its functions to a sub-committee. He does not believe, however, that this power extends to imposing a suspension without the safeguards set out in Rule 1.3 of Appendix 1. Consequently, his suspension could only have been imposed under Rule 1.3 of Appendix 1 and, as he was not offered the opportunity to make representations, the Union must have breached that Rule.
11. The Union explained to Mr Evans, at the time of his suspension, that the decision to suspend him was made by the Disciplinary Sub-Committee under the Standing Orders. Mr Evans has not provided me with any evidence or information which suggests that the Union attempted to take, or took, a decision under Rule 1.3 of Appendix 1. I can only conclude, therefore, that the decision was taken under the Standing Orders rather than under Rule 1.3 of Appendix 1.
12. Consequently, it is difficult to see how the Union can have breached Rule 1.3 of Appendix 1 in the manner set out in Mr Evans' complaint. I would add that Mr Evans appears to focus his arguments on the NEC's power to regulate its own procedures and to delegate functions to a sub-committee. His view is that this does not extend to the creation of a process for imposing a precautionary suspension. His complaint as set out above does not, however, include a breach of Rule 9 which means that this decision is limited to considering whether the Union breached Rule 1.3 of Appendix 1. As the Union did not impose his suspension under that Rule then I can only conclude that the Rule was not breached.

13. I note Mr Evans' view that Rule 1.3 of Appendix 1 must have been breached because the Union did not have a power to impose a suspension by any other means. It is clear, however, that the Union has adopted separate procedures under their Standing Orders which enable the Disciplinary Sub-Committee to impose a precautionary suspension. In the absence of a complaint about the implementation or operation of those procedures I can only consider whether there has been a breach of Rule 1.3 of Appendix 1.

14. Consequently, I am satisfied that the complaint to me has no reasonable prospect of success.

Complaint 2

15. Mr Evans' complaint is that the Union breached Rule 2.5(1) by restricting his branch activities following his suspension under the Standing Orders. His view is that Rule 2.5(1) prevents members from being excluded from such activities unless a decision has been taken under the Rules contained in the Rulebook. He accepts that the decision to suspend him was part of a disciplinary process but, because it was taken under the Standing Orders, it should not have led to him being restricted from participating in the activities set out in Rule 2.5(1). He also told me that, in his case, Rule 2.5(1) is part of the disciplinary process because his activities were limited following a decision taken during the disciplinary process.

16. The relevant issue here appears to be whether a suspension which is made under the Standing Orders can be considered to have been made under the Rules of the Union. Mr Evans' position is that the Standing Orders should not be considered to be part of the Rulebook.

17. In considering this complaint I am, of course, bound by case law and, in particular, ***Heatons Transport (St Helens) Limited v Transport General Workers Union***. In that case, Lord Wilberforce concluded that a union's rules are not restricted to those express terms set out in its rulebook. I have set out the relevant extracts below:

“The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf. What the members understand as to the characteristics of the agreement into which they enter by joining a union is well stated in the section of the TUC Handbook on the Industrial Relations Act which gives advice about the content and operation of unions' rules. Paragraph 99 reads as follows:

'Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union.'”

18. Mr Evans has told me that Heatons is not relevant to his case because custom and practice cannot contradict the rules of a union and because the standing orders were drafted in secret and were not known to members. In this case, however, the disciplinary procedure is well documented and has been adopted by the NEC under Rule 9. Mr Evans has not drawn my attention to a Rule which prevents the Union from introducing a precautionary suspension under Rule 9. Nor has he included an allegation that Rule 9 has been breached in the terms of his complaint; only that the disciplinary action, which was taken under Standing Orders, was in breach of the disciplinary procedure set out in Appendix 1. Finally, on this point I have not been provided with any information or evidence which supports his position that the Standing Orders were drafted in secret. Bearing in mind that I am bound by Heatons, and that there is a documented procedure which has been adopted under the Rules, I can only conclude that the disciplinary procedures set out in the Standing Orders form part of the Rules of the Union and that this complaint has no reasonable prospect of success.

19. In reaching this decision I have noted that the Standing Orders are clear that a precautionary suspension should only be imposed where the alleged behavior of a member is incompatible with their holding of union office or other position, or participation in union affairs or activities. It therefore follows that a precautionary suspension is given with the sole purpose of limiting, a member's participation in union activities. If the Standing Orders do not form part of the Rules, then the Union may find themselves in a position where a precautionary suspension could not be implemented even where it was in the interests of the Union and its members to do so. That cannot be the intention behind the Standing Orders and so the Union must have intended them to form part of the Rules.

20. Furthermore, reading Rule 2.5 in the manner which Mr Evans suggests would deny members their statutory right to bring a complaint to me where the Union had not followed the procedures set out in the Standing Orders when imposing a precautionary suspension. This would enable the Union, and potentially other Unions, from restricting their Members' statutory rights by creating additional procedures which did not form part of the Rules.

Complaints 3-6

21. These complaints relate to the restriction of Mr Evans' rights following his precautionary suspension. They can only be successful if there has been a breach of the Rules identified in complaints 1 or 2. For the reasons set out above, I have found that neither Appendix 1 nor Rule 2.5(1) can have been breached in the way that Mr Evans alleges.

22. Consequently, I am satisfied that these complaints have no reasonable prospect of success.

Complaint 7

23. Eleanor Wade, the Union's President, issued an NEC circular to Members on 15 September 2021 which included the following text.

I think members should know that in preparation for March NEC meeting I said:

“I am sure we all reflect positively on how the union has grown in membership and influence during Mike’s tenure as General Secretary and the strong relationships he has forged with the NEC and across the union. The last 12 months have been extraordinarily challenging and the fact that we are in such good shape organisationally and financially, illustrates the qualities of his leadership which will be invaluable as we hopefully move into recovery across the economy.

I know Mike wants to devote his considerable energy and focus for another five years and your NEC welcomes his decision to stand again. “

24. Mr Evans believes that this Circular breached section 7 of the Code of Conduct for General Secretary elections because Ms Wade used the Union funds or resources to promote Mr Clancy’s candidature. In his view the Circular may have “very likely affected” candidates from standing.
25. The Union have told me that the Code of Conduct is designed to ensure fairness and equality of opportunity between candidates and that this is explicit in Rule 10.5 and in paragraph 1 of the Code. They explained that the Code is relevant only where there is more than one candidate. Once two candidates have been properly nominated the Union will provide each candidate with a copy of the Code and require them to give a written undertaking that they will abide by it. As Mr Clancy was the only candidate on 15 September 2021 the Code did not apply and there could not have been a breach of paragraph 7.
26. Mr Evans believes that a candidate, and their supporters, are bound by the Code of Conduct as soon as they become a candidate. He believes that this is supported by Paragraphs 3 and 4 of the Code which relate to circumstances where the NEC is not nominating an incumbent General Secretary.
27. It is clear from Rule 10.5 and paragraphs 1 and 2 of the Code that it is intended to ensure fairness and equality between candidates. It is not clear to me how that purpose could be fulfilled where there is only one candidate. This is supported by the Union’s practice of requiring candidates to give an undertaking, under

Paragraph 2, once two candidates have been properly nominated. It is also supported by references to “candidates” in Paragraphs 4 to 8.

28. Mr Evans has drawn my attention to paragraph 4 which requires all candidates to give a written undertaking to comply with the Code of Conduct when submitting their nomination. The Union appear to have adopted a practice which requires that the undertaking be submitted only after two nominations have been submitted. This does not form part of the complaint as set out by Mr Evans and so I cannot consider whether that is consistent with the Rules. It does not, however, appear to be relevant to this complaint as it does not affect the point at which the Code is engaged. The purpose of the Code is to ensure fairness and equality between two candidates; it can only, therefore, be engaged once there are two candidates whether or not those candidates have already undertaken to comply with the Code.

29. For the reasons give above, I am satisfied that the complaint to me has no reasonable prospect of success.

Complaint 8

30. Mr Evans complained to the Union in September 2021 as he believed that Ms Wade’s NEC Circular amounted to a breach of the Code of Conduct for General Secretary elections. The Union did not follow the process set out in paragraph 14 of the Code for dealing with complaints under the Code.

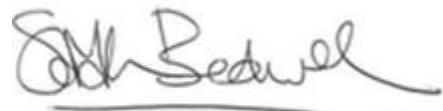
31. This complaint is dependent on the Code of Conduct being in force at the time of Ms Wade’s NEC Circular. As I have set out at paragraph 27 above, the Rules and Code are clear that the Code is designed to ensure fairness and equal opportunity between candidates and is not, therefore, engaged until two candidates have been nominated. Mr Clancy was the only candidate on 15 September 2021 when Ms Wade sent out the Circular and so the Code was not engaged.

32. Consequently, this complaint has no reasonable prospect of success.

Conclusion

33. Section 256ZA of the Act 1992 Act requires me to send notice to the party against whom 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 Evans on 26 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 his complaints on the grounds that they had no reasonable prospect of success or were otherwise misconceived. The letter invited Mr Evans to provide written representations as to why I should not strike out the complaints. In response, Mr Evans 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 dark ink, appearing to read 'Sarah Bedwell', written over a horizontal line.

Sarah Bedwell
The Certification Officer