

D/16/22-23

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

Eager

v

Equity (Incorporating the Variety Artistes' Federation)

Date of Decision

26 October 2022

Contents

Decision 3

Reasons 3

 Background..... 3

The Relevant Statutory Provisions 4

The Relevant Rules of the Union 5

Considerations and Conclusions 6

Decision

1. Upon application by Dave Eager (“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 Mr Eager’s complaint, set out at paragraph 5 below, on the grounds that the complaint, as advanced by the Applicant, has no reasonable prospect of success.

Reasons

Background

2. The Union conducted a referendum of its members on certain proposed rule changes. The referendum closed on 3 December 2021.
3. Mr Eager complained to the Union on 1 December 2021 about the issue he later brought to me. The complaint was dismissed by the Union as confirmed in an e-mail to Mr Eager of 28 February 2022.
4. Mr Eager made his complaint to me, by an application dated 20 June 2022, as a member of Equity (Incorporating the Variety Artistes’ Federation) (“the Union” or “Equity”) stating that the Union had breached its rule 40.2 on 3 December 2021.
5. The complaint is as follows:-

Three questions were put to the members in [a] referendum. Questions 1 and Question 2 gave no summary of arguments against [the] rule change proposal. The referendum paper in both cases stated [that], “No statements against the question were made either at the Council or the Conference. Therefore, no statement has been submitted.” I believe that this constitutes a breach of this rule's requirement.

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:-

40 Referendum

40.1 The Council has power to conduct a vote of the entire Union (in these Rules called a "referendum") on any question, proposal, resolution or motion whenever the Council deems it necessary.

40.2 A referendum shall be decided by a simple majority of the votes cast for and against and the result thereof shall be binding in accordance with its terms. A summary of arguments for and against the question, proposal, resolution or motion which is the subject matter of the referendum shall be included in the referendum paper circulated to the membership in such form as the General Secretary considers appropriate in accordance with the Rules of the Union.

40.3 Any question, proposal, resolution or motion decided or passed at a referendum other than a Rule change which is governed by Rule 46 shall remain binding unless and until it is altered or reversed by a further referendum taken in accordance with this Rule.

40.4 In these Rules any reference to the time of holding of a referendum shall refer to the last date for the return of ballot papers in that referendum.

40.5 The General Secretary shall announce the result of the referendum at the first meeting of the Council after he or she shall have received the same.

Considerations and Conclusions

8. Mr Eager's complaint is that the Union breached Rule 40.2 by failing to provide on the referendum paper a summary of arguments against two of the questions that were put to members in the referendum.

Rule 40.2 sets out that:

A referendum shall be decided by a simple majority of the votes cast for and against and the result thereof shall be binding in accordance with its terms. A summary of arguments for and against the question, proposal, resolution or motion which is the subject matter of the referendum shall be included in the referendum paper circulated to the membership in such form as the General Secretary considers appropriate in accordance with the Rules of the Union.

9. Mr Eager's view is that the use of the word "shall" in the Rules creates an "expectation of certainty". He explained that the Union's practice was to always include a summary of an argument against a question on a referendum paper which, alongside the wording of the Rule, established "custom and practice".
10. Mr Eager argued that it is the General Secretary's responsibility to invite Council to provide statements from Council which summarise the arguments for or against a proposal. In his view, this extended to canvassing union members where no arguments against a proposal had been made at the relevant Council meeting. He told me that this had happened previously, and that the Union should have followed a similar course of action in this instance.
11. Mr Eager provided me with a copy of an email from a previous General Secretary in which she explained that she was looking for an author to write a statement

against a proposed rule change and asked if he would be willing to do so. He also provided an extract from the Council Minutes of 5 October 2021 as follows:

“...Points made in discussion:

- A Councillor said we would normally ask for speakers against the motions from Council as well.

Reply – the General Secretary said he was not aware that there were any people against the question, and would be taking advice on what we needed to do in this event.”

12. Mr Eager stated that the Union may be trying to hide or withhold relevant information from him using legal privilege. He did not explain why this would be the case but suggested that he would be concerned if I were to rely on the minutes quoted above as giving a true and fair record of the meeting. He also suggested that Council members may have been unwilling to speak against the recommendation at Council if the General Secretary and Officers had recommended that it should be accepted.

13. My office asked Mr Eager if he had any evidence to support his position that the Union always provided a summary of arguments against a proposal even where no such arguments had been made at Council. He has not provided any evidence although he has told me that the Equity archives are held offsite and may become available soon. My office asked if he needed additional time to provide evidence but he replied, by an e-mail of 7 October 2022, that he was not making such a request.

14. Mr Eager has not, therefore, provided any documents or evidence to support his view that the Union's custom and practice is to provide a summary of the arguments against a proposal even where no such arguments have been made in Council. Consequently, I can only conclude that he has no realistic prospect of success should his complaint proceed to a Hearing.

15. In reaching this conclusion I have taken into account relevant case law which established that a trade union's rules must not be construed as though they were statute. In the House of Lords decision *Heatons Transport (St Helens) v Transport and General Workers' Union* [1972] I.C.R 308 ("Heatons"), Lord Wilberforce sets out on page 393:

"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."

16. For his complaint to be successful Mr Eager would need to provide evidence, at a Hearing, that the Union's custom and practice was always to circulate a summary of the arguments against a proposal and that this extended to those instances where no arguments against a proposal had been made. Mr Eager provided me with two pieces of information which he believed supported his view.

17. Mr Eager provided me with an email from a previous General Secretary. This email, however, simply stated that the General Secretary was looking for an author. It gave no information as to the circumstances of the proposal. It does not, therefore, show that the General Secretary was arranging for a statement to be produced following a debate at Council where no arguments had been made. Nor does it show that she was canvassing the wider membership of the union.

18. Mr Eager also provided the minutes from the Council meeting of 5 October 2021. These show that the issue was discussed, that a Council Member indicated that there would normally be a statement from a Council Member and that, in the absence of any arguments against the proposal, the General Secretary would seek advice. I cannot see that this supports Mr Eager's view that there would always be a summary of the arguments against a proposal. I would add that Mr Eager has not provided me with any evidence to support his view that the minutes

may not be accurate. Nor has he provided any evidence which suggests that Council Members were reluctant to speak against the recommendation.

19. I have also considered the wording of Rule 40.2 itself. I understand Mr Eager's position that the word "shall" creates an expectation of certainty; however, the Rule does not go on to explain how the Union should deal with a situation where no arguments have been made against a proposal. It does not, for instance, explain how the statement should be produced nor define who should produce it. That is why I have turned to Heaton's for guidance on how the rule should be interpreted and sought evidence from Mr Eager to support his position. He has not been able to provide me with any evidence which supports his position.
20. Finally, I note that the Union included, with the relevant referendum papers, a statement that no arguments had been made against the proposal at Council. My office invited Mr Eager to comment on whether this could be considered to be a summary of the arguments. Mr Eager's reply on this point is summarised in paragraphs 9 to 12 above.

21. Section 256ZA of the 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 Eager on 2 September 2022. This letter stated that having considered the application and further correspondence, I was minded to exercise my powers under section 256ZA of the 1992 Act to strike out the complaint on the grounds that it had no reasonable prospect of success or was otherwise misconceived. The letter invited Mr Eager to provide written representations as to why I should not strike out the complaint. In response, Mr Eager raised a number of points which are summarised in paragraphs 8 to 12 above. As I have explained at paragraph 13 above, Mr Eager's points included a suggestion that additional evidence may have been available at a future date. My office offered Mr Eager additional time to provide further evidence but he confirmed he was not making such a request.

A handwritten signature in black ink, appearing to read 'Sarah Bedwell', is written over a horizontal line. The signature is cursive and somewhat stylized.

Sarah Bedwell
The Certification Officer