

**DECISION OF THE CERTIFICATION OFFICER ON AN APPLICATION MADE UNDER
SECTION 108A(1) OF THE TRADE UNION AND LABOUR RELATIONS
(CONSOLIDATION) ACT 1992**

Mr M Sharma

v

Equity (incorporating the Variety Artistes Federation)

Date of Decision

15 February 2012

DECISION

Upon application by Mr Sharma ("the claimant") under section 108A (1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")

1. I refuse to make the declaration sought by the claimant that Equity breached rule 40.2 of its rules on or around May 2011 by holding a referendum on the alteration of its rules in which the referendum booklet which included the ballot paper did not contain statements for and against the new rules that were being proposed.

REASONS

1. Mr Sharma is a member of Equity (incorporating the Variety Artistes Federation) ("the Union" or "Equity"). By an application received at the Certification Office by email on 7 July 2011, Mr Sharma alleged a breach of the rules of the Union in relation to the referendum of Equity's members on proposed rule changes, which took place in April/May 2011.
2. Following correspondence with the claimant the complaint was confirmed by him in the following terms:

That on or around May 2011 my trade union (Equity), as represented by the General Secretary (Chief Executive) and the President (the most senior officer of the governing body, the Council), breached its rule 40.2 because in conducting a referendum on proposed alteration to existing rule 3.2.17 (Objects, Powers and Duties) and proposed new rules 4.8.1, 4.8.2 and 4.8.3 (Qualification and Application for Membership) it issued a referendum booklet (including a ballot paper) which did not have statements for and against proposed new rules 4.8.1, 4.8.2 and 4.8.3 .
3. I investigated the alleged breaches in correspondence. A hearing took place on 31 January 2012. At the hearing, the claimant represented himself. Evidence for the claimant was presented by himself, Ms Barbara Hyslop and Ms Yvonne Joseph.

Each produced a written witness statement. A written witness statement from Mr Peter Plouviez was also submitted. The Union was represented by Ms Rebecca Tuck of counsel. Evidence for the Union was presented by Ms Christine Payne, its General Secretary, who also submitted a written witness statement. Mr Sharma and Ms Tuck each provided skeleton arguments. There was also in evidence a 183 page bundle of documents consisting of letters and other documentation supplied by the parties, which included the 2009 rules of the Union.

Findings of Fact

4. Having considered the oral and documentary evidence and the representations of the parties, I find the facts to be as follows:
5. Mr Sharma has been a member of Equity for nearly 50 years. He served on the predecessor body to what is now the Council of Equity in the late 1970s but holds no current position within the Union.
6. In or about January 2007 there was some publicity in the national press about Simone Clarke, a ballerina, arising out of her membership of the British National Party. Ms Clarke was also a member of Equity and a Deputy (the Union's equivalent to a shop steward). The Union felt unable to discuss her membership of the BNP with her as it was advised that to do so might be seen as a breach of rule 3.2.17, which is one of the powers/duties of the Union and provides as follows:

"To acknowledge the right of individual members to hold and express their personal political and other beliefs both in their private and professional capacities."

Nevertheless the Union offered her assistance to deal with the protests outside her place of work.

7. In May 2007 the Union held its Annual Representative Conference in Cardiff. A motion was submitted to Conference by the Union's Minorities and Ethnic Members Committee ("MEM Committee") which would have removed rule 3.2.17. This motion was defeated. The MEM Committee submitted a further motion which called for a referendum to add rules 3.1.1.7 and 3.1.1.8 to the rules of the Union. The former proposed rule would include the promotion of equality as an object of the Union and the latter would similarly include active opposition to all forms of harassment, prejudice and unfair discrimination. This resolution was successful and the proposed rule change was accordingly put to a referendum at which it was approved.
8. The holding of referenda by the Union is a longstanding practice and was much valued by all those who gave evidence. I was informed that the nature of the work performed by Equity members makes it difficult for them to attend regular meetings and so the ability for major issues to be decided by a referendum has particular importance. Indeed, rule 46.3 provides for 14 rules which can only be amended if the amendment is made or approved by a referendum. One of these rules which is so protected is rule 3, dealing with the Union's objects, powers and duties.

9. In the spring of 2010 the MEM Committee revisited this general subject matter. It proposed a motion to the Annual Representative Conference that year which would have added words to rule 3.2.17. The words it proposed adding were as follows: *“except where the expression of those beliefs incites hatred or discrimination on grounds protected by equalities legislation”*.
 10. Upon receipt of this motion, the Union took legal advice. Its advice was to the effect that the wording proposed in the motion would not achieve its intended purpose. It was said to confuse hate crimes in criminal law with “equalities legislation” and so restrict the coverage of the types of discriminatory conduct to race and religion.
 11. The Union’s Annual Representative Conference in 2011 was held on 24 May. At that Conference there was a heated debate of the motion proposed by the MEM Committee. In essence, there were those who believed in freedom of expression and saw no reason for the Union to go beyond the law of the land in these matters. On the other hand, there were those who believed in the freedom of association and that members had a right not to associate with those who had conducted themselves in a certain way. Towards the end of this debate the General Secretary explained to the Conference that the Union had obtained legal advice that the proposed motion was worded inappropriately and Conference decided to remit the motion to Council for further consideration.
 12. Council considered this matter in the coming months and obtained further legal advice. It was advised that different words should be added to the end of rule 3.2.17, namely:

“as long as the expression of personal political and other beliefs or other conduct or activities relating to those beliefs do not cause a breach of rule 3.1.1.8 by unfairly discriminating against, harassing or victimising other persons because of their sex, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age, or other status or personal characteristic”.
 13. It was further advised that there was no point in being able to expel a member for such conduct if the same person could immediately reapply for membership and could not be refused. Accordingly the Union was advised to insert rules 4.8.1, 4.8.2 and 4.8.3. The proposed rule 4.8.1 was in the following terms:

“The Council may reject an application for membership if in its opinion the conduct or activities of the applicant have at any time been such as would amount to a breach of Rule 3.2.17 had the applicant for membership been a member at the time”.
- Rules 4.8.2 and 4.8.3 were procedural rules that Council would follow in its application of rule 4.8.1.
14. At its meeting in November 2010, Council decided to hold a referendum on these matters and at its meeting in December 2010 it decided upon the precise rule changes to be put in the referendum. Although the additions to rule 4 did not require a referendum, it was decided that the most cost effective and democratic way to proceed was to include the proposed additions to rule 4 in the same referendum as the rule 3 amendment as they were inter-dependent and related to a single matter of principle.

15. On 25 January 2011 Council voted to accept a motion from the MEM Committee calling for the Union to campaign to persuade members to vote "Yes" in the forthcoming referendum.
16. In February 2011 Council approved a timetable for the referendum. Rule 40.2 provides that in any referendum a summary of arguments for and against the question, proposal or resolution shall be included in the referendum paper circulated to the membership. In accordance with past practice, members of Council were invited to write either the statement on behalf of Council in Approval of the rule change or the Statement in Disapproval. Two members of Council, Peter Barnes and Sanita Simms (the MEM Council member) volunteered to write the Statement in Approval. Barbara Hyslop (a former Council member) volunteered to write the Statement in Disapproval.
17. In or about late March 2011, the General Secretary held a meeting with those who had drafted the Statements in Approval and Disapproval, as was usual in these circumstances. The General Secretary checked the statements for accuracy and defamation and to ensure that they covered the subject of the proposed rule changes. After a number of amendments of fact were agreed by the parties, the General Secretary approved the Statements for publication.
18. The referendum documents were despatched to members on 6 April 2011, together with the Spring edition of the Union's journal, 'Equity'. The referendum material was composed of an 11 page A5 referendum booklet which included the voting paper. The booklet contained a letter from the General Secretary, the Statements in Approval and Disapproval, the proposed new rules and the voting paper. The letter from the General Secretary informed members that the Council of Equity urged them to vote "Yes" in the referendum. The Statements in Approval and Disapproval were set out underneath the question that was being put, namely "*Do you approve of making changes to the Equity rules as set out on page 10 of this document?*" The voting paper set out the same question with a box for "Yes" and a box for "No". The Statements in Approval and Disapproval each contained arguments which refer to the position of people seeking to join the Union.
19. The Spring edition of 'Equity' contained an article by the General Secretary in which she commented that Council had for the first time decided to urge members to vote "Yes" in a referendum on a proposed rule change. It also contained an interview with a member who also urged members to support the rule changes. On 14 April 2011 the Union sent an email to all members effectively reproducing the General Secretary's letter that was in the referendum booklet. On 5 May 2011 all members were again emailed and encouraged to vote before the deadline on 18 May. The Union found it necessary to send this email as the voting paper had referred in error to the closing date for the referendum being 6 May. The Union's website also contained material which recommended that members vote "Yes" in the referendum.
20. The results of the referendum were announced to Council on 22 May 2011. There were 1,906 votes in favour of the rule changes with 1,150 votes against, a majority of 62% of those voting on a turnout of about 9%, with 35,809 members having been entitled to vote.

21. Mr Sharma commenced this complaint to me on 7 July 2011, without having previously raised his grievance within the internal complaints procedure of the Union under rule 29.

The Relevant Statutory Provisions

22. The provisions of the 1992 Act which are relevant for the purposes of this application are as follows:-

Section 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) ...
 - (b) ...
 - (c) the balloting of members on any issue other than industrial action
 - (d) – (e) ...

The Relevant Rules

23. The rules of the Union which are relevant for the purposes of this application are as follows:-

3 Objects, Powers and Duties

3.1 Objects

3.1.1 As a non-party political and non-sectarian Union:

3.1.1.2 to promote, protect and further the artistic, economic, social and legal interests of its members in their professional capacity;

3.1.1.7 to promote equality for all including through: (i) collective bargaining, publicity material and campaigning, representation, union organisation and structures, training, organising and recruitment, the provision of all other services and benefits and all other activities; and (ii) the Union's own employment practices;

3.1.1.8 to oppose actively all forms of harassment, prejudice and unfair discrimination whether on the grounds of sex, race, ethnic or national origin, religion, colour, class, caring responsibilities, marital status, sexuality, disability, age or other status or personal characteristic;

3.1.1.9 to promote, protect and further freedom of artistic expression and to assist performers and others working in the performing arts nationally and internationally who are suffering oppression, persecution or hardship in the pursuit of their profession.

3.2 Powers and Duties

3.2.17 to acknowledge the right of individual members to hold and express their personal political and other beliefs both in their private and professional capacities.

4 Qualification and Application for Membership

4.1 Any person who exercises professional skill in the provision of entertainment in accordance with criteria laid down from time to time by the Council shall be eligible for membership.

16 Powers and Duties of the Council

16.3.6 The Council shall at all times act in the best interests of the members in accordance with the Objects of the Union and shall determine anything wherein the Rules are silent but in no case shall it alter or depart from the Rules of the Union

23 Duties of the General Secretary

23.1 The General Secretary shall act as the chief executive officer and spokesperson for the Union and shall, subject to the Rules and the law, at all times act in accordance with the policies approved by the Council.

23.2 The General Secretary shall use his or her best endeavours in accordance with principles and policies laid down by the Council to ensure that:

23.2.1 ...

23.2.2 representation of the Union and its members to the press, broadcasting and other media and in the editorial policy of the official publication of the Union, advances the interests of the Union's members and the policies of the Council.

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 or resolution whenever the Council deems it necessary.

40.2 A referendum shall be decided by a simple majority of the votes actually cast and the result thereof shall be binding in accordance with its terms. A summary of arguments for and against the question, proposal or resolution 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.

46 Alteration of the Rules

46.1 subject to the provisions of this Rule, alterations to the Rules shall be made either at an Annual Representative Conference or Special Representative Conference, or by means of a ballot of the entire membership under Rule 40. The former procedure shall be referred to as "Alteration by Conference" and the latter as "Alteration by Referendum".

46.3 Notwithstanding Rules 46.1 and 46.2, in the case of a proposed alteration of any of the following Rules, the alteration shall only be effective if made [or approved] by Referendum:

Rule 3 Objects, Powers and Duties

Rule 13 The Governing Body

Rule 14 Qualification for Council

Rule 15 Election for Council

Rule 16 Powers and Duties of Council

Rule 17 Officers

Rule 18 Election of Officers

Rule 19 Election of the Vice Presidents and Honorary Treasurer

Rule 22 Election of the General Secretary

Rule 27 Duties of Appeals Committees

- Rule 32 Appointment of Trustees
- Rule 37 Representative Conferences
- Rule 40 Referendum
- Rule 46 Alteration of Rules

Consideration and Conclusions

Mr Sharma's Complaint

24. Mr Sharma's complaint is as follows:

"That on or around May 2011 my trade union (Equity), as represented by the General Secretary (Chief Executive) and the President (the most senior officer of the governing body, the Council), breached its rule 40.2 because in conducting a referendum on proposed alteration to existing rule 3.2.17 (Objects, Powers and Duties) and proposed new rules 4.8.1, 4.8.2 and 4.8.3 (Qualification and Application for Membership) it issued a referendum booklet (including a ballot paper) which did not have statements for and against proposed new rules 4.8.1, 4.8.2 and 4.8.3."

25. Rule 40.2 of the rules of the Union provides as follows:

"40.2 A referendum shall be decided by a simple majority of the votes actually cast and the result thereof shall be binding in accordance with its terms. A summary of arguments for and against the question, proposal or resolution 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."

Summary of submissions

26. Mr Sharma's Skeleton Argument alleges that the rule change referendum booklet was inadequate because it did not contain statements for and against the separate and distinct questions that members were being asked to vote on. He argued that members were being asked firstly to vote on the question whether to amend existing rule 3.2.17 and then, as a separate and distinct question, whether to introduce new rules 4.8.1 to 4.8.3. In his oral submissions, Mr Sharma emphasised the special place that referenda have in the constitution of Equity and how he considered that the referendum booklet in question was legalistic, complex and difficult to understand. He commented that there was nothing wrong in the Council deciding to campaign for a "Yes" vote or in the General Secretary expressing her own views but that the way they did it was wrong. Mr Sharma submitted that as there were two different rules being considered, each should have been the subject of a separate and distinct question, each with its own Statements in Approval and Disapproval.

27. Ms Tuck, for the Union, submitted that I should refuse to accept Mr Sharma's complaint as he had not used the Union's complaints procedure in rule 29 before commencing his present claim. Counsel argued that I should exercise my discretion under section 108B(1) of the 1992 Act not to accept this complaint on the basis that Mr Sharma had not taken all reasonable steps to resolve his claim by the use of any internal complaints procedure of the Union. She commented that the Union should have been given the opportunity of dealing with Mr Sharma's complaints internally before he resorted to a complaint to the Certification Officer.

28. On the substance of Mr Sharma's complaint, Ms Tuck submitted that it was entirely reasonable for the General Secretary to exercise her discretion regarding "the form" of the referendum by deciding to deal with the amendments to both rule 3 and rule 4 in a single referendum question. She argued that the changes in rule 4 were consequential on the rule 3 change and that it would be undesirable if a member expelled for a breach of rule 3 would be able to rejoin the Union under rule 4. Ms Tuck further submitted that, in any event, the arguments for and against the proposed additions to rule 4 were addressed in the Statements in Approval and in Disapproval.

Conclusion

29. I reject Miss Tuck's application that this complaint should be dismissed by the exercise of my discretion under section 108B(1) of the 1992 Act. Mr Sharma addressed the issue of section 108B(1) in his original application form to me. He stated:

"I have not made an internal complaint to the Union on this specific point because it seems far fetched to expect the governing body of my Union to rule against itself. Past experience of other members seems to bear this out. However, if the Certification Officer wishes me to go through the internal complaints procedure of my Union, I would be happy to comply with his insistence. Since I am informed that this is not a statutory requirement and I do not wish the Union to drag this matter out and cause inordinate delay, and as I am not a scandalous or vexatious complainant whose complaint is misconceived or highly unlikely to succeed, it is my hope that the Certification Officer will choose to exercise his discretion in this matter."

My office sought further information on this matter and Mr Sharma responded by an email of 30 July 2011 in which he stated:

"Since my complaint is against both of them [the General Secretary and the President] as representatives of the Council, it seems ludicrous to ask these Officers to investigate a complaint against themselves, and unduly optimistic to expect the Council to uphold any such complaint – especially when the Council is dominated by the members of one political faction."

I considered the explanations given by Mr Sharma at the time they were made and decided not to exercise my discretion to refuse to accept this complaint. Accordingly, I caused the complaint to be put to the Union, which it was by a letter dated 5 August. The Union raised this issue in its response to the complaint, dated 10 August, and Mr Sharma again explained why he had not used the Union's complaints procedure in his email of 19 September. I reconsidered whether I should exercise my discretion in the Union's favour but decided not to do so, as I accepted the explanations offered by Mr Sharma. Section 108B(1) of the 1992 Act is an important provision which prevents the unnecessary expenditure of time and money by the parties (and the Certification Office) in cases which have a reasonable prospect of being dealt with internally, particularly where a fresh mind is caused to consider the contested issue. In each case, I must balance the alleged failure of the complainant to have taken reasonable steps to use the internal complaints procedure against the explanation offered having regard to all the circumstances of the case. However, in cases where the complaint is against one of the highest constitutional bodies of the Union in respect of a decision that has

been taken with legal advice, there is weight in the argument that to require the internal procedure to be exhausted before accepting a complaint to me would be to build in delay with little reasonable prospect of the matter being resolved internally. Undue delay is not in the interests of either the claimant or the union nor is it in the interests of justice. Each case will of course be fact specific and must be decided on its particular facts.

30. As to the substance of Mr Sharma's complaint, I note that rule 40.1 provides Council with the power to conduct a referendum when it deems that it is necessary. I find, on the evidence, that Council decided to have a referendum on this issue at its meeting in November 2010 and, having received further legal advice, decided on the question to be put in the referendum at its meeting in December. Accordingly, I find that the question to be asked in the referendum was one for Council to determine and that Council determined that question in accordance with the rules. Contrary to the wishes of Mr Sharma (as expressed at the hearing), it was decided that there would be a single question, namely "*Do you approve of making changes to the Equity rules as set out on page 10 of this document?*".
31. The referendum question having been determined, the relevant part of rule 40.2 provides as follows:
- "A summary of arguments for and against the question, proposal or resolution which is the subject matter of the referendum shall be included in the referendum paper circulated to the membership in such a form as the General Secretary considered appropriate in accordance with the Rules of the Union."

I was not directed to any rule of the Union which related to the form of the "*summary of arguments for and against the question*", as referred to in the above rule.

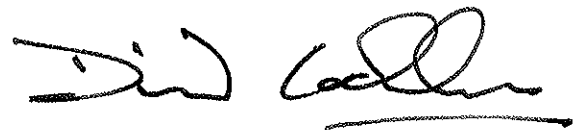
32. As was usual, volunteers were sought to prepare what are known as the Statements in Approval and in Disapproval. Less usually, the Statement in Disapproval was prepared by a former member of Council, not a sitting member of Council. The General Secretary met with the volunteers and the text of the statements was agreed. The General Secretary gave evidence that she assured herself that the statements covered both the changes to rule 3 and rule 4.
33. In both the Statements in Approval and in Disapproval, there are express references to persons seeking to join the Union and therefore to those who would be affected by the proposed additions to rule 4. The Statement of Approval contains the following passages:
- "It is currently possible for people to join the Union who belong to organisations directly opposed to Equity, the TUC and to our equality policy, and we know that this has happened."... "The same reasoning" (as applies to the exclusion from membership pursuant to the proposed amendment of rule 3.2.17 – *my addition*) "would also apply to anyone who applies for Equity membership and safeguards are provided, such as a right of appeal and the need for a full Council decision."

The Statement of Disapproval contains an even more express reference to those joining the Union. It provides:

"MEMBERSHIP APPLICATIONS, Council's JUDGE and JURY opinion rejecting membership applications, is uncharted territory. The LAW reigns

supreme, not this rule change. Extremists may relish the prospect of opportunistically challenging Equity. **REJECTING MEMBERSHIP APPLICATIONS MAY PROVE PERILOUS – PROTECT EQUITY – VOTE DISAPPROVE”.**

34. The relevant obligation within rule 40.2 is that the summary of arguments for and against the question shall be included in the referendum paper. On the evidence before me, I find that a summary of arguments for and against the referendum question was included in the referendum paper. I further find that the question that was put in the referendum was one which Council was entitled to put to the membership and that the Statements in Approval and Disapproval each dealt with the proposed amendments to both rule 3 and rule 4. The amount of space devoted to the different rules within those Statements was a matter for those who prepared them.
35. For the above reasons I refuse to make the declaration sought by Mr Sharma that Equity breached rule 40.2 of its rules on or around May 2011 by holding a referendum on the alteration of its rules in which the referendum booklet which included the ballot paper did not contain statements for and against the new rules that were being proposed.



**David Cockburn
The Certification Officer**